Double Jeopardy—Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime

Barbara A. Mack[*]

I. INTRODUCTION

The Double Jeopardy Clause of the Fifth Amendment provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[1] What does this clause mean? Where did it come from? Was the double jeopardy concept "such an integral part of the common law that many of the first state declarations of

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* Senior Deputy Prosecuting Attorney, Fraud Division, King County Prosecutor's Office. B.A. 1970, Boston University; J.D. 1986, University of Washington School of Law. The opinions expressed herein are solely those of the author.

1. U.S. CONST. amend. V.

rights omitted any mention of it on the theory that it required no further confirmation,"[2] or was it "not so fundamental a privilege" in English law?[3] Legal historians disagree. Was the Double Jeopardy Clause designed to promote the interests of finality;[4] to prevent harassment of defendants;[5] to limit the discretion of prosecutors,[6] of legislatures,[7] or of judges;[8] to save "the public and defendant the cost of redundant litigation;"[9] or to equalize "the adversary capabilities of grossly unequal litigants"?[10] Was it meant to protect against multiple prosecutions only,[11] or against multiple punishments as well?[12] Was it designed to protect against criminal jeopardy only, or also against civil sanctions?[13] The commentators disagree.

What the commentators do agree on is that double jeopardy is a realm of law so confusing, so replete with contradictions, corrections, and exceptions to the rules, that after 120 years no sensible meaning or policy has evolved. In 1965, the "fictions and rationalizations" that complicated double jeopardy law were described as the "characteristic signs of doctrinal senility."[14] The situation since has only worsened, with Supreme Court justices shifting positions even on fundamental aspects of the law.[15] These shifts have opened up entirely new areas of double jeopardy interpretation with respect to parallel civil and criminal proceedings.

This Article will attempt to distill from this confusion a meaningful double jeopardy policy, applicable to parallel civil and criminal proceedings, that takes into account the history of double jeopardy,

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2. ROBERT S. PECK, THE BILL OF RIGHTS AND THE POLITICS OF INTERPRETATION 116 (1992).

3. JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 4 (1969).

4. Peter Westen & Richard Drubel, *Toward A General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84.

5. Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 266-67 (1965).

6. *Id.* at 267.

7. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 368 (1983).

8. *See* Comment, *supra* note 5, at 267.

9. *Id.* at 277.

10. *Id.* at 277-78.

11. *See, e.g.*, United States v. Ball, 163 U.S. 662, 669 (1896).

12. *See, e.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873).

13. *See, e.g.*, One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938).

14. Comment, *supra* note 5, at 264.

15. *See, e.g.*, United States v. Halper, 490 U.S. 435 (1989); Whalen v. United States, 445 U.S. 684, 697-98 (1980) (Blackmun, J., concurring); Lee v. United States, 432 U.S. 23, 36-37 (1977) (Rehnquist, J., concurring).

recent changes in statutory law, and the contemporary chaotic state of parallel civil and criminal proceedings.

Under current law, double jeopardy protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[16]

This Article will show that the multiple punishments prong has little basis in law, other than reliance on dicta that have been repeated a multitude of times. Examining the history and case law leads this author to conclude that double jeopardy was intended to prevent overzealous prosecution, not to curtail the authority of legislatures to determine which punishments fit the crime. This means that double jeopardy applies to multiple prosecutions, but not to multiple punishments. Government overreaching via multiple punishments is more directly and more logically controlled by applying the Eighth Amendment Excessive Fines Clause.

If the courts persist in including double punishment within double jeopardy, then they must define punishment. Forfeiture of proceeds of crimes should never be deemed punishment, nor should penalties or forfeitures that roughly compensate the government for its costs of investigation and prosecution.

Moreover, if the courts continue to include double punishment, they must determine what the "same offense" means in the context of parallel criminal and civil proceedings. This Article contends that to use a more lenient standard in the civil-criminal context than in purely criminal cases would elevate property interests above liberty interests.

Section II of this Article will look first at the historical underpinnings of the Double Jeopardy Clause and its constitutional development. It will then discuss the development of double jeopardy analysis in early criminal cases and in early parallel criminal and civil proceedings. Section III will examine judicial analyses of what constitutes the same offense for double jeopardy purposes, and Section IV will address the definition of punishment in the civil context. Section V will analyze whether the Double Jeopardy Clause inhibits the Legislature's ability to determine what punishments fit the crime, focusing on the Court's deference to legislative intent. Finally, Section VI will discuss the cases since 1989—*United States v. Halper*,[17] *Austin v. United*

16. *Halper*, 490 U.S. at 440.

17. 490 U.S. 435 (1989).

States,[18] and *Department of Revenue of Montana v. Kurth Ranch*[19]—and their ramifications.

II. HISTORICAL DOUBLE JEOPARDY ANALYSIS

A. The Origins and Early History of Double Jeopardy

No early English statutory law mentions double jeopardy.[20] Although the Magna Carta contains the early form of other rights that subsequently appeared in the United States Constitution, it does not mention any former jeopardy rights.[21] Similarly, the English Bill of Rights of 1689 contains many antecedents of our Constitution,[22] but it makes no mention of any kind of double jeopardy protection.[23] Thus the statutory roots of double jeopardy are unclear.

However, in the seventeenth and eighteenth centuries, Lords Coke and Blackstone clarified the concept in their works describing the common law of England,[24] including the pleas in bar of *autrefois acquit* and *autrefois convict*.[25] Under these pleas, if a person was previously acquitted or previously convicted of a crime, the person could not be tried again for the same offense. Historically, these pleas only applied to criminal cases;[26] and the word "jeopardy" only applied to prior verdicts of guilt or acquittal.[27] The pleas in bar of *autrefois acquit* and *autrefois convict* have developed into two of the three prongs of modern double jeopardy analysis.[28] If we look solely at pre-

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18. 113 S. Ct. 2801 (1993).

19. 114 S. Ct. 1937 (1994).

20. SIGLER, *supra* note 3, at 4.

21. *Id.* For example, parts of the Magna Carta are precursors of the United States Constitution's rights of trial by jury, due process, and habeas corpus. PECK, *supra* note 2, at 14 and app. A at 323-28.

22. These antecedents include the right to petition the King without being prosecuted for it; the consent of parliament to raise or keep an army in time of peace; free election of members of parliament; free speech within parliament; parliamentary consent to levy taxes; and the principle that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." PECK, *supra* note 2, at 18 (quoting 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 4 (Bernard Schwartz ed., 1971)); *see also id.* at app. B. The language on excessive fines and cruel and unusual punishment is virtually identical to the language in the Eighth Amendment. *Compare* U.S. CONST. amend. VIII.

23. SIGLER, *supra* note 3, at 23.

24. *Id.* at 17 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 335 (Worcester, Mass., 1790)).

25. *Ex parte* Lange, 85 U.S (18 Wall.) 163, 169 (1873); *see also* Comment, *supra* note 5, at 262 n.1.

26. *See* SIGLER, *supra* note 3, at 18-19.

27. *Id.* at 20.

28. "This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second

constitutional history, it follows that double jeopardy should only apply in the criminal context.

B. The Constitution

In America, the colony of Massachusetts was the first to codify double jeopardy, applying it not only to all kinds of criminal cases, but to civil cases as well.[29] Other colonies adopted Massachusetts' version of the doctrine,[30] but this broad double jeopardy protection was short-lived. After the American Revolution, most of the states did not incorporate double jeopardy, in any form, into their constitutions.[31] New Hampshire was the first state to adopt a Bill of Rights containing a double jeopardy provision: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence."[32] New Hampshire's protection, limited to former acquittals, was narrower than that available in colonial Massachusetts.[33]

The historical development of the Double Jeopardy Clause also supports the thesis that double jeopardy applies only in the criminal context and only to multiple prosecutions, not multiple punishments. James Madison led the effort to add a bill of rights to the Constitution. On June 8, 1789, during the first session of the new Congress of the United States, Madison proposed amendments to the Constitution, including a bill of rights.[34] His original draft of the double jeopardy provision stated that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[35] The House of Representatives adopted this language and sent it to the Senate. The Senate, however, changed the language to read: No person shall "be twice put in jeopardy of life or limb by any

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prosecution for the same offense after conviction; and multiple punishments for the same offense." United States v. Halper, 490 U.S. 435, 440 (1989).

29. SIGLER, *supra* note 3, at 21.

30. *Id.* at 22.

31. *Id.* at 23.

32. *Id.* (quoting N.H. CONST. of 1784, art. I, § XVI, *reprinted in* SOURCES OF OUR LIBERTIES 384 (Richard L. Perry & John C. Cooper eds., 1959)).

33. *Id.*

34. 1 ANNALS OF CONG. 433-36 (Joseph Gales ed., 1834).

35. *Id.* at 434.

public *prosecution*,"[36] then to "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[37]

The new wording of the Double Jeopardy Clause was different from all of the prior statutes, including colonial codes and state constitutions. Its meaning was unclear then, as it is today. Originally, "jeopardy of life" was based on the fact that most criminal penalties were capital, and by the eighteenth century, double jeopardy applied primarily to capital crimes.[38]

C. *Constitutional Interpretation: The Early Cases*

1. *Ex Parte Lange*

After Congress adopted and the states ratified this constitutional right, 120 years of judicial interpretation began. Although it was clear that double jeopardy had previously applied to second prosecutions for the same offense following acquittals or convictions,[39] after *Ex parte Lange*[40] courts began to hold that the Double Jeopardy Clause protects not only against multiple prosecutions, but also against multiple punishments for the same offense.[41]

In *Lange*, the defendant was convicted for stealing United States mail bags. The law authorized a fine or imprisonment, but not both. The judge, however, imposed both a prison sentence and a two hundred dollar fine. Lange went to jail and paid the fine. Shortly thereafter, the first judgment was vacated and a new sentence imposed, this time for prison alone.[42]

After considering these facts, the Court held that vacating the judgment and imposing a different sentence constituted double punishment for the same offense because (1) Lange had paid the fine, which went into the Treasury and beyond the control of the Court,

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36. SIGLER, *supra* note 3, at 31 (emphasis added); *see also* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 154 (Linda G. De Pauw ed., 1972); 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 37 n.14 (Charlene B. Bickford & Helen E. Veit eds., 1986).

37. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 46 (Charlene B. Bickford & Helen E. Veit eds., 1986).

38. *See* SIGLER, *supra* note 3, at 4-5. "Life or limb" may have been an even earlier concept because penalties of maiming and mutilation were common during the period before double jeopardy became limited largely to capital crimes. *Id.*

39. *See Ex parte* Lange, 85 U.S. (18 Wall.) at 169; *see also Halper*, 490 U.S. at 440.

40. 85 U.S. (18 Wall.) 163 (1873).

41. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 & n.11 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989); *Halper*, 490 U.S. at 440.

42. *Ex parte* Lange, 85 U.S. (18 Wall.) at 164.

and (2) Lange had served five days of a one year sentence.[43] Once the defendant "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone."[44]

Two aspects of the *Lange* opinion are notable. First, the opinion was based on the assumption that the court had exceeded the punishment authorized by the Legislature. The original sentence imposed by the lower court in *Lange* was illegal because Congress had not authorized both a fine *and* imprisonment.[45] The issue in *Lange* would never have arisen if Congress had authorized both confinement and a monetary penalty. The *Lange* decision suggests the only unifying thread in double jeopardy analysis from 1874 until today: that the Legislature determines punishment, and the Double Jeopardy Clause does not diminish the Legislature's ability to decide how many punishments are appropriate for the crime.

The second notable aspect of *Lange* is that the Court did not rely on constitutional interpretation to reach its result. In oft-quoted dicta, the *Lange* court said, "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense."[46] To support this broad proposition, the Court cited only cases involving second prosecutions after a conviction or acquittal.[47] As a result, the *Lange* court found no basis outside the common law for its interpretation of the Double Jeopardy Clause.[48] Furthermore, when the Constitution was adopted, the common law limited double jeopardy to pleas in bar of *autrefois acquit*, *autrefois convict*, former pardon, and *autrefois attaint*.[49] Therefore, no common law double jeopardy analysis cited by the Court supported its broad dicta—but then it really needed none, since the Due Process Clause alone supported the Court's decision.[50] Thus, although *Lange* is always cited as the case that establishes the multiple punishments

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43. *Id.* at 175.

44. *Id.* at 176.

45. *See id.* at 165.

46. *Id.* at 168.

47. *See, e.g.*, State v. Cooper, 13 N.J.L. 361, 361-62 (1833); Crenshaw v. State, 8 Tenn. (Mart. & Yer.) 122 (1827); Commonwealth v. Olds, 15 Ky. (5 Litt.) 137, 138-39 (1824).

48. "It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." *Ex parte* Lange, 85 U.S. (18 Wall.) at 170.

49. *See* SIGLER, *supra* note 3, at 18-19. Former pardon and *autrefois attaint* are obsolete English pleas that are irrelevant to American criminal procedure. Comment, *supra* note 5, at 262 n.1.

50. Montana Dep't of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1956 (1994) (Scalia, J., dissenting); *see Ex parte* Lange, 85 U.S. (18 Wall.) at 176, 178.

prong of double jeopardy analysis, that part of the *Lange* opinion is pure dicta, based on unsupported analysis.

The majority and dissenting opinions in *Ex parte Lange* portended the future of the double jeopardy debate. In a vigorous dissent, Justice Clifford said,

> What is meant by the phrase "twice put in jeopardy of life or limb" has been judicially defined, and the definition cannot now be enlarged to help out a predetermined unsound judicial conclusion. It means that a party shall not be tried a second time for the same offense after he has once been acquitted or convicted, unless the judgment has been arrested or a new trial has been granted, on motion of the party; but it does not relate to a mistrial.[51]

Thus, even in 1874, the debate had begun: Was double jeopardy meant to include multiple punishments or only multiple prosecutions?

Twenty-two years after *Lange*, the Court decided *United States v. Ball*[52] and directly contradicted its dicta in *Lange*. The Government charged Millard Fillmore Ball, John C. Ball, and Robert Boutwell with murdering William Box. A jury convicted J.C. Ball and Boutwell, but acquitted M.F. Ball.[53] The Supreme Court reversed the two convictions because the indictments were insufficient. All three defendants were reindicted and convicted, and all three appealed, claiming double jeopardy.[54]

Citing the Double Jeopardy Clause, the Court said: "The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[55] The Court held that M.F. Ball's conviction after acquittal constituted a second jeopardy, but that the other two defendants could not claim double jeopardy since the reversal of their original convictions was due to their own appeal.[56] The *Ball* case is infrequently cited, and where it is, it is cited with *Lange* to support the idea of a three pronged double jeopardy analysis, contradicting Ball's very language.[57]

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51. *Ex parte* Lange, 85 U.S. (18 Wall.) at 201. Note the similarity to Justice Scalia's dissent in *Kurth Ranch*: "'To be put in jeopardy' does not remotely mean 'to be punished,' so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions. . . . [T]he repetition of a dictum does not turn it into a holding . . . ." 114 S. Ct. at 1955-56.

52. 163 U.S. 662 (1896).

53. *Id.* at 663-64.

54. *Id.* at 664-66.

55. *Id.* at 669.

56. *Id.* at 670-72.

57. *See Pearce*, 395 U.S. at 717 & nn.9 & 11.

2. *Coffey*: The Early Civil Cases

In 1886, the Supreme Court addressed double jeopardy in the context of parallel civil and criminal cases. In *Coffey v. United States*,[58] the Government sued *in rem* to forfeit Coffey's property, which consisted of "10 barrels of apple brandy, 1 apple mill, 37 tubs, and 2 copper stills."[59] The seizure of these items was based upon the same fraudulent acts, attempts, and intents for which Coffey had been acquitted in a criminal trial.[60] The Court barred the civil forfeiture.[61] The decision was obviously based on *autrefois acquit*, part of the multiple prosecutions prong of double jeopardy analysis, because the defendant had been acquitted of criminal charges and, therefore, had not previously been punished. But the *Coffey* court noted that the result would be different in a suit against the defendant by an individual: the same offense prong of the double jeopardy analysis would then become an issue because both the parties and the intent required would be different.[62] Although doubt has been cast on *Coffey's* reasoning ever since,[63] the questions raised by *Coffey* are with us today: (1) What constitutes the same offense?; and (2) Is an *in rem* forfeiture a penalty? These two questions will be addressed in the next sections.

III. WHAT CONSTITUTES THE "SAME OFFENSE"?

If a person has been prosecuted or punished, double jeopardy only bars a second prosecution or punishment for the *same offense*.[64] The question then is, what constitutes the same offense?[65] *Blockburger v.*

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58. 116 U.S. 436 (1886).

59. *Id.* at 436-37.

60. *Id.* at 442.

61. *Id.*

62. *See id.* at 443.

63. After years of distinguishing it, *see, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 405-06 (1938), the Court repudiated *Coffey* in United States v. One Assortment of 89 Firearms: "The time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. To the extent that *Coffey v. United States* suggests otherwise, it is hereby disapproved." 465 U.S. 354, 361 (1984).

64. *See* United States v. Halper, 490 U.S. 435, 440 (1989).

65. The issue first arose in the civil-criminal context in Stone v. United States, 167 U.S. 178 (1897). In *Stone*, the Government sued the defendant for conversion of 3,545 cords of wood from unlawfully cut trees and received a judgment of $19,000. *Id.* at 180-81. The defendant had previously been prosecuted and acquitted for unlawfully cutting and removing timber from federal land. *Id.* at 181. The Court distinguished *United States v. Coffey*, saying that its rule "can have no application in a civil case not involving any question of criminal intent or of forfeiture of

United States[66] established the rule for determining what constitutes the same offense. In *Blockburger*, a purely criminal case, the defendant was charged with five counts involving two separate sales of morphine hydrochloride on consecutive days to the same person.[67] Blockburger was convicted on the second, third, and fifth counts.[68] He was sentenced to five years in prison on each count, to run consecutively, and fined $2,000 for each count.[69] The second count charged a sale of ten grains of the drug.[70] The third count charged a sale of eight grains on the day following the first sale.[71] Count five alleged that the sale in count three had been made without a written order of the purchaser.[72] Blockburger contended that the sales in counts two and three were the same offense, and that the sale in count three and the charge in count five were the same offense. Blockburger argued that double jeopardy barred these multiple penalties.[73]

Relying on the ancient case of *Morey v. Commonwealth*,[74] the Court adopted the "same elements" test for determining whether two offenses are the same for purposes of double jeopardy analysis.[75] The *Blockburger* same elements test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[76]

This test is the rule today. Although in 1990 the Court briefly adopted a "same conduct" test for determining whether two offenses are the same,[77] a bitterly divided Court overruled itself just three

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prohibited acts, but turning wholly upon an issue as to the ownership of property." *Id.* at 188. The Court relied on the different burdens of proof required in civil and criminal cases and, specifying the different intents required, the Court said that "an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit." *Id.*

66. 284 U.S. 299 (1932).

67. *Id.* at 301.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.*

74. 108 Mass. 433 (1871).

75. *See Blockburger*, 284 U.S. at 304.

76. *Id.* (citation omitted).

77. *See* Grady v. Corbin, 495 U.S. 508, 510 (1990), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993). The "same conduct" test provided that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.*

years later in *United States v. Dixon*,[78] reinstating the *Blockburger* same elements test.[79] The *Blockburger* same elements test also applies in Washington state.[80]

The question that has been neither directly nor fully answered by the Supreme Court or the Washington courts is whether the *Blockburger* same elements test applies in the context of parallel civil and criminal proceedings. There is only one logical answer: The *Blockburger* test must apply because to apply a less stringent test, such as the same conduct test,[81] would elevate property interests above liberty interests.

For example, under the *Blockburger* same elements test, a defendant could be criminally prosecuted and punished separately for selling cocaine and marijuana when both substances were sold at the same time, because the elements of each crime would contain an element not contained in the other. But if a same conduct test applied, and if the same defendant civilly forfeited the car in which he sold the drugs, he could not then be prosecuted for selling either of the drugs. No interpretation of double jeopardy law or policy leads to such an absurd or unjust result.

In the case of forfeiture of proceeds, the elements of the civil forfeiture and the underlying crime will always be different because mere possession of proceeds is not a crime. Similarly, where conspiracy, money laundering, and racketeering or profiteering crimes are charged, the elements of the underlying crimes will always be different.[82]

The question of what constitutes the same offense in facilitation cases is a closer call, however, and the lower courts have split. Some

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78. 113 S. Ct. 2849 (1993).

79. *Id.* at 2860.

80. State v. Calle, 125 Wash. 2d 769, 777, 888 P.2d 155, 159 (1995); *accord* State v. Gocken, 127 Wash. 2d 95, 896 P.2d 1267 (1995). The Washington Supreme Court has consistently applied federal double jeopardy analysis to Washington's double jeopardy clause, WASH. CONST. art. 1, § 9, because they are "identical in thought, substance, and purpose." State v. Schoel, 54 Wash. 2d 388, 391, 341 P.2d 481, 482 (1959).

81. *See supra* note 77 and accompanying text.

82. *See* United States v. Felix, 112 S. Ct. 1377, 1384 (1992) (prosecution for conspiracy and the underlying offenses does not violate the Double Jeopardy Clause); United States v. Chick, 61 F.3d 682, 687-88 (9th Cir. 1995) (conspiracy requires proof of agreement to commit the offense and proof of participation by the defendant, so criminal conspiracy and civil forfeiture for underlying offense will never constitute same offense) *petition for cert. filed*, 64 U.S.L.W. 3417 (U.S. Nov. 29, 1995) (No. 95-858); United States v. Saccoccia, 18 F.3d 795, 798 (9th Cir. 1994); United States v. El-Difrawi, 898 F. Supp. 3, 10 (D.D.C. 1995) (money laundering and the underlying specified unlawful activity are separate offenses under *Blockburger*), *aff'd*, No. 95-3137, 95-3153, 95-3144, 1995 WL 686255 (D.C. Cir. 1995).

courts have held that forfeitures and crimes can almost never be the same offense because forfeitures always require proof connecting the property to the offense, and crimes always require proof of the identity and intent of the defendant.[83] Other courts, however, have rejected the argument that *in rem* and *in personam* actions are necessarily different offenses.[84] Washington's Supreme Court has so far declined to decide the issue.[85]

The United States Supreme Court, in *Arizona v. Cook*,[86] recently signaled its direction on the same offense issue. *Cook* was a pre-*Dixon* securities fraud case in which the lower court held that the prosecution of securities violations was barred by the prior imposition of a $150,000 administrative sanction.[87] The Supreme Court accepted certiorari, vacated the judgment, and remanded the case for reconsideration in light of *Dixon*.[88] Applying the same elements test to the facts of *Cook*, the prosecution would not be barred.[89] The same elements test must be applied in the civil-criminal context to avoid injustice and "doctrinal senility."[90]

IV. ARE CIVIL FORFEITURES AND PENALTIES "PUNISHMENT"?

Another fundamental question posed by the multiple punishment prong of double jeopardy analysis is this: What does punishment

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83. *See* United States v. Falkowski, 900 F. Supp. 1207, 1214-15 (D. Alaska 1995).

84. United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); Oakes v. United States, 872 F. Supp. 817, 824 (E.D. Wash. 1994).

85. In State v. Clark, the court declined to decide the same offense issue because the issue was briefed only by *amici curiae*. 124 Wash. 2d 90, 101-02, 875 P.2d 613, 618 (1994). In State v. Cole, the Washington Supreme Court held that forfeiture of proceeds is not punishment, 128 Wash. 2d 262, 277, 906 P.2d 925, 934 (1995), but declined to decide whether a facilitation forfeiture constitutes the same offense. Instead, the court remanded a consolidated case for the trial court to determine whether the forfeited property was proceeds or was property that facilitated a crime. *See id.* at 292, 906 P.2d at 942-43. If the trial court finds that the property was forfeited for facilitation, then this case presumably will be before the Washington Supreme Court again on the same offense question. The split in the plurality opinion in *Cole* indicates that a majority of the justices at this time would find that a facilitation forfeiture is the same offense, although the issue was not analyzed.

86. 870 P.2d 413 (1993), *cert. granted and judgment vacated*, 115 S. Ct. 44 (1994).

87. *Id.* at 413-14.

88. In *Dixon*, the Court reaffirmed the *Blockburger* rule for determining whether two distinct statutory provisions constitute the same offense and overruled *Grady v. Corbin*. *See supra* notes 77-79 and accompanying text.

89. Although no result of the remand in *Cook* is recorded, the Arizona courts have since applied *Dixon* in similar cases. *See, e.g.*, Hernandez v. Superior Court, 880 P.2d 735, 737-36, 740-41 (Ariz. Ct. App. 1994) (finding no double jeopardy where defendants were criminally prosecuted after being ordered to pay restitution and administrative penalties for securities fraud).

90. *See supra* text accompanying note 14.

mean? The answer to the question has enormous implications. Is forfeiture of proceeds of crimes punishment? Can a bank robber keep the loot if he is prosecuted criminally? Can an embezzler keep the employer's money? Has a person been punished if he or she forfeits guns, vehicles, or other property used to facilitate a crime? Is revocation of a driver's license an impermissible second punishment after a driver has been convicted of vehicular homicide or drunk driving? Is revocation of a teacher's license an impermissible second punishment after the teacher has been convicted of molesting a child? Is disbarment of an attorney from the practice of law an impermissible second punishment if it follows the attorney's conviction for theft from a client?

Prohibition and related tax laws in the 1920s and 30s spawned a vast increase in double jeopardy cases, multiplying the confusion surrounding both the doctrine and the punishment issue. On the same day in 1931, the Court decided *United States v. La Franca*[91] and *Various Items of Personal Property v. United States*.[92] In *La Franca*, the Government sued the defendant for nonpayment of liquor taxes and penalties, alleging the same unlawful sales of liquor for which he had been convicted and fined under the National Prohibition Act.[93] The statute said that if a violation of the revenue laws was also a violation of the Prohibition Act, a conviction under one was a bar to prosecution under the other.[94] The Court, in an egregious example of bootstrapping, relied on cases that either contained no authority for their own opinions, were cited out of context, or were irrelevant. The Court concluded that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action."[95]

In support of this far-reaching edict, the Court relied primarily on *United States v. Chouteau*,[96] an 1880 case in which the Government had charged Chouteau, a distiller, with two counts of violating the revenue laws for failure to pay taxes.[97] Because Chouteau paid the Government one thousand dollars in settlement, the Government

91. 282 U.S. 568 (1931).
92. 282 U.S. 577 (1931).
93. 282 U.S. at 570.
94. *Id.* at 571.
95. *Id.* at 575.
96. 102 U.S. 603 (1880).
97. *Id.* at 606.

dismissed the indictment.[98] The Government had also brought suit upon the $25,000 bond of the distiller.[99] The bond was conditioned upon compliance with the distillery laws and payment of all penalties and fines imposed for violations of the laws.[100] Both the criminal and civil suits were based upon the same acts.[101] Citing absolutely no authority, the Court said that "we are of the opinion that the compromise with the government pleaded is a complete defence against a recovery of the penalty claimed."[102] The Court stated, without analysis, that the civil action was a penalty, despite the lack of a prior conviction or acquittal, and the Court even dismissed, with similar lack of analysis, the case against the surety, who had been neither prosecuted nor punished.[103]

Relying upon this language from *Chouteau*, the *La Franca* court did not analyze the purpose of the civil penalty for unlawful sales of liquor, but simply declared unequivocally that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding."[104] The Court held this, despite citing a prior opinion written by Justice Holmes that clearly set a precedent for analyzing the purposes of a civil penalty under double jeopardy law.[105] Although the *La Franca* court never mentioned "double jeopardy," the Court conducted a double jeopardy analysis, concluding that its result was necessary to avoid "doubts" about the constitutionality of the civil penalty statute.[106]

The contrast between *La Franca* and *Various Items of Personal Property* illustrates the early confusion surrounding the double jeopardy "punishment" issue in the civil forfeiture-criminal prosecution context. In *Various Items of Personal Property*, the Government filed an *in rem* action under the revenue statutes to forfeit a distillery, warehouse, and

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98. *Id.* at 607.
99. *Id.* at 603.
100. *Id.* at 603-04.
101. *Id.* at 610.
102. *Id.* at 609.
103. *Id.* at 610-11.
104. *La Franca*, 282 U.S. at 575.
105. Murphy v. United States, 272 U.S. 630 (1926). In *Murphy*, Thomas and Vincent Murphy were tried and acquitted of maintaining a nuisance in violation of the National Prohibition Act. *Id.* at 630. Thereafter, the Government sued under the same law to abate the nuisance. Justice Holmes said that the former acquittal would be a bar only if the abatement were punishment, and he concluded that although the abatement worked a financial detriment, the "mere fact that it is imposed in consequence of a crime is not conclusive." *Id.* at 631-32. He analyzed the purpose of the penalty and determined that it was to prevent such nuisances, not to punish. *Id.* at 632. Therefore, the former acquittal was no bar to the civil penalty.
106. 282 U.S. at 576.

denaturing plant because the corporation conducted its distilling business with intent to defraud the government of the tax on distilled spirits.[107] The corporation and others had previously been convicted for conspiring to violate the statute based on the same transactions.[108] Disregarding "the rule in *Coffey's Case*,"[109] the Court said that where a statute creates an *in rem* right to forfeit property used in committing an offense, the property is "primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*."[110] In contrast, in a criminal case, the wrongdoer is considered the offender and is convicted and punished.[111] Thus, the Court held that the Double Jeopardy Clause did not apply in *Various Items of Personal Property* because "the forfeiture was no part of the punishment for the criminal offense."[112]

The primary distinction the Court drew between *La Franca* and *Various Items of Personal Property* was that one case was an *in rem* procedure and the other an *in personam* tax penalty. The Court should have analyzed whether, in fact, either person was punished twice for the same offense.

Perhaps recognizing the potential problems with its inconsistent analyses in *La Franca* and *Various Items of Personal Property*, the Court returned to the analysis suggested by Justice Holmes in *Murphy v. United States*,[113] which inquires whether a civil sanction is remedial or punitive.[114] For example, in *Helvering v. Mitchell*,[115] a taxpayer who had been acquitted of income tax evasion was administratively assessed a fifty percent tax penalty.[116] Mitchell claimed the

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107. 282 U.S. at 578.

108. *Id.* at 579.

109. So-called in Stone v. United States, 167 U.S. 178, 188 (1897); *see supra* text accompanying notes 58-63.

110. *Various Items of Personal Property*, 282 U.S. at 580 (quoting The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827)). The Court relied on Dobbin's Distillery v. United States, a case where the distillery sought to be forfeited was leased, and the lessee's intent was not known to the owner. 96 U.S. 395, 395-97 (1878). In *Dobbins*, the Court said that "[n]othing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery." *Id.* at 401.

111. *Various Items of Personal Property*, 282 U.S. at 581.

112. *Id.*

113. 272 U.S. 630 (1926); *see supra* note 105 and accompanying text.

114. *See Murphy*, 272 U.S. at 632.

115. 303 U.S. 391 (1938).

116. *Id.* at 395.

$364,354.92 assessment was punishment and therefore barred by the Double Jeopardy Clause.[117] Justice Brandeis framed the issue as follows:

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether § 293(b) imposes a criminal sanction. That question is one of statutory construction.[118]

Harking back to *Murphy*, the *Mitchell* court said that revocation of privileges voluntarily granted was remedial, or free of "the punitive criminal element," and that forfeiture of goods and sanctions requiring payment of fixed or variable sums had long been upheld as non-criminal.[119] *Mitchell* defined "remedial," in part, as reimbursement to the government for the costs of investigation and for the loss resulting from the fraud.[120] To support its conclusion that "in the civil enforcement of a remedial sanction there can be no double jeopardy,"[121] the Court relied on Congress' intent to provide a distinctly civil procedure for the collection of the additional assessment.[122]

The cases following *Mitchell* expanded upon this line of reasoning. In *United States ex rel Marcus v. Hess*,[123] electrical contractors were convicted of defrauding the government through collusive bidding on Public Works Administration projects.[124] In a *qui tam* action authorized by the False Claims Act,[125] a third party "informer" sued the contractors civilly on behalf of the government.[126] The Act provided for a $2,000-per-offense civil penalty in addition to double damages, with half the amount recovered in a *qui tam* action to be paid to the government and half to the person instituting the suit.[127] The lower

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117. *Id.* at 398.

118. *Id.* at 399.

119. *Id.* at 399-400. If revocation of privileges granted is remedial, then double jeopardy should not bar, for example, revocation of a driver's license, disbarment from the practice of law, or revocation of a teacher's license after criminal punishment for the same offense on which the revocation or disbarment is based.

120. *Id.* at 401.

121. *Id.* at 404.

122. *Id.* at 402.

123. 317 U.S. 537 (1943).

124. *Id.* at 539-40.

125. Codified at 31 U.S.C.A. §§ 231-234 at the time of *Hess*. The *qui tam*, or informer, provision is now codified at 31 U.S.C.A. § 3730(d) (West 1995).

126. *See Hess*, 317 U.S. at 539-40.

127. *Id.* at 540.

court entered a judgment against the defendants for $203,000 in double damages and $112,000 as an aggregate civil penalty for fifty-six violations of the Act.[128]

The Court found that the civil penalty was remedial because Congress' purpose was restitution to the government for fraud.[129] Congress chose double damages plus a specific sum to assure that "the government would be made completely whole."[130] Moreover, citing "common law tradition," the majority said that Congress could have provided for treble damages, as it had in the antitrust laws.[131]

In a thoughtful and fascinating concurring opinion that portended future debate, Justice Frankfurter would have rejected the double jeopardy plea on different grounds.[132] He believed that the majority's distinction between punitive and remedial sanctions contained "dialectical subtleties" that are "too subtle" when the issue is "safeguarding the humane interests" that the double jeopardy clause was designed to protect.[133] Noting that punitive goals may be pursued in civil proceedings and remedial goals in criminal actions, Justice Frankfurter deemed "speculative" a court's judgment whether forfeiture and double damages constitute an extra penalty or an indemnity for loss.[134] If that were the issue, he said, the respondents should be allowed to prove that the penalty and damages were punitive because they exceeded any reasonable calculation of loss to the government.[135] Rather, Justice Frankfurter said that double jeopardy does not prevent Congress from allowing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings.[136] Such actions were common at the time the Fifth Amendment was written, and "[i]t would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for

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128. *Id.*
129. *Id.* at 551.
130. *Id.* at 552.
131. *Id.* at 550.
132. *Id.* at 553.
133. *Id.* at 554.
134. *Id.*
135. *Id.* This insight of Justice Frankfurter presaged exactly what the Court did in United States v. Halper, 490 U.S. 435, 452 (1989), where, having adopted the punitive/remedial distinction of the majority in *Hess*, the Court remanded the case to the lower court to determine whether the assessment fairly compensated the government for its loss. *See* discussion *infra* section VI.A.
136. *Hess*, 317 U.S. at 555.

ratification."[137] Instead, Justice Frankfurter relied on the Eighth Amendment to protect against oppression from cumulative punishments.[138]

Thirteen years later, in *Rex Trailer Co. v. United States*,[139] the Court relied on the majority's reasoning in *Mitchell* in deciding that double jeopardy did not bar a civil sanction of $10,000 following a criminal conviction and fine of $25,000.[140] The case involved the Surplus Property Act of 1944, which was designed to facilitate the disposal of surplus war materials.[141] These materials were in great demand because of wartime shortages. Congress also intended the Act to help returning veterans by giving them preference in purchasing surplus war goods.[142] Rex Trailer Company had obtained five motor vehicles by fraudulently using the names of five people with veterans' preferences.[143]

In rejecting the company's double jeopardy claim, the Court analogized this case to a case any citizen might file: "The Government has the right to make contracts and hold and dispose of property, and, for the protection of its property rights, it may resort to the same remedies as a private person."[144] The Court concluded that liquidated damages are a "well-known" remedy[145] that is especially useful "when damages are uncertain in nature or amount or are unmeasurable."[146] Where reasonable, such remedies are not penalties.[147]

As Justice Frankfurter suggested in *Hess*, inquiring whether a sanction is remedial or punitive is not an entirely satisfactory approach

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137. *Id.* at 556. For example, the Act of Aug. 4, 1790, ch. 35 § 60, 1 Stat. 174 provided that if goods, entered for exportation with intent to draw back the duties, were landed in the United States, the goods and the vessels that contained them were forfeitable to the government, and all persons involved were subject to criminal prosecution. The Act of May 10, 1800, ch. 51 § 1-4, 2 Stat. 70-71 provided that any person with an interest in a ship used to transport slaves would forfeit twice the value of his interest in the ship and double the value of any slave that, at any time, may have been transported in the vessel; and any person serving on such a vessel could be criminally convicted. The Act of Mar. 2, 1807, ch. 22 §§ 1-10, 2 Stat. 426-30 provided for forfeiture of any vessel fitted out for the slave trade or used to transport slaves, and the Act provided for the criminal punishment of those involved in the slave trade of up to ten years in prison and a $10,000 fine.

138. *Hess*, 317 U.S. at 556.

139. 350 U.S. 148 (1956).

140. *Id.* at 150-51.

141. *Id.* at 150.

142. *Id.*

143. *Id.*

144. *Id.* at 151.

145. *Id.*

146. *Id.* at 153 (quoting Priebe & Sons v. United States, 332 U.S. 407, 411-12 (1947)).

147. *Id.* at 151.

to the question of what constitutes punishment. It invites subjective, result-oriented interpretations of the purposes of a particular sanction.

V. WHO DETERMINES WHAT PUNISHMENTS FIT THE CRIME

To find an approach better than the remedial-punitive distinction, courts must consider one of the early questions posed in this Article: Was double jeopardy intended to limit the discretion of prosecutors, of judges, of the legislature, or of all of them? Early English common law is no guide here because (1) no such distinctions existed—everyone represented the crown, and (2) American crimimal procedure diverged from Britain's after the American Revolution.[148] Yet, in order to determine whether double jeopardy includes multiple punishments, we need to know who has the authority to establish what punishments shall be imposed and how extensive that authority is.

Perhaps realizing the implications and complexity of potential answers to the punishment question, in the 1980s the Court redirected its double jeopardy analysis to the fundamental query first implicitly recognized in *Ex parte Lange*: Does the Double Jeopardy Clause diminish the Legislature's authority to determine what and how many punishments fit the crime?[149] If the answer is no, then, implicitly, double jeopardy only protects against multiple prosecutions, not multiple punishments. The case law supports that answer.

Until 1989, the case law held clearly and almost without exception that double jeopardy did not restrict the power of the Legislature to determine what punishments to impose and even to impose cumulative punishments if it so chose. The job of the courts was to determine what the Legislature intended.

In criminal cases, this meant that double jeopardy did not bar a more severe sentence upon reconviction after a successful appeal of the first conviction by the defendant, as long as the defendant received credit for time served under the first conviction.[150] It meant, in *Albernaz v. United States*,[151] where the defendants were convicted of conspiracy to distribute marijuana and conspiracy to import marijuana, that double jeopardy did not bar consecutive sentences because "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch

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148. *See generally* SIGLER, *supra* note 3, at 4-21, 36.

149. *See supra* text accompanying notes 39-51.

150. *See* North Carolina v. Pearce, 395 U.S. 711, 719-21 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

151. 450 U.S. 333 (1981).

intended to be imposed . . . [and] Congress intended . . . to impose multiple punishments."[152]

Even where Justices were divided on the outcome, they agreed that legislative intent was the fulcrum around which the double jeopardy decision ought to turn. In *Whalen v. United States*,[153] the defendant was given consecutive sentences on charges of rape and felony murder based on the same offense.[154] The majority opinion, written by Justice Stewart, held that because Congress had not intended to impose multiple punishments for those offenses, double jeopardy barred consecutive sentences.[155] Justice White, concurring, said that the case could have been decided strictly by statutory construction, not constitutional interpretation.[156] Justice Blackmun, also concurring, said that "[t]he *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more."[157] Justice Blackmun went on to say that dicta in other cases indicating otherwise had led to "confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments," and such dicta should be squarely repudiated.[158] Justice Rehnquist, dissenting, also noted the confusion in the field, and said that "our opinions, including ones authored by me, are replete with *mea culpa*'s occasioned by shifts in assumptions and emphasis."[159] Justice Rehnquist concluded that double jeopardy was not implicated in *Whalen* and that the Court should have deferred to the lower court's analysis of whether consecutive sentences were intended.[160] *Whalen* is particularly notable because all of the opinions agreed that legislative intent was the determining factor.

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152. *Id.* at 344.
153. 445 U.S. 684 (1980).
154. *Id.* at 685.
155. *Id.* at 689-90.
156. *Id.* at 695-96.
157. *Id.* at 697.
158. *Id.* at 698. This is an interesting comment from the author of the *Halper* opinion, which just nine years later was to create such turmoil in the area of double jeopardy analysis. *See* discussion *infra* section VI.A.
159. *Whalen*, 445 U.S. at 699.
160. *See id.* at 705, 714.

In *Missouri v. Hunter*,[161] the Court similarly deferred to legislative intent. There, the Missouri Supreme Court had considered the *Whalen* and *Albernaz* opinions and ruled that cumulative sentences for armed criminal action and robbery convictions constituted multiple punishments for the same offense and, hence, violated the Double Jeopardy Clause.[162] Previously, the Missouri Supreme Court had issued a direct challenge to the United States Supreme Court:

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments of the same offense arising out of a single transaction.[163]

In response to the Missouri court's challenge, the Supreme Court said, unequivocally, that "[w]here, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end."[164] The Court held that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[165]

The Court has also deferred to legislative intent in the realm of parallel civil and criminal proceedings. In 1972, the Court considered *One Lot of Emerald Cut Stones v. United States*,[166] the case of a jewelry dealer who brought emeralds and a ring into the country without declaring them.[167] After the defendant was tried and acquitted of smuggling, the Government sued to forfeit the jewels.[168] The Court found that the Double Jeopardy Clause did not bar the forfeiture because "it involves neither two criminal trials nor two criminal punishments."[169] Noting that the civil and criminal sanctions were in different parts of the statute, the Court found that "Congress could

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161. 459 U.S. 359 (1983).

162. *See id.* at 364. The Court determined that the convictions were for the same offense under Blockburger v. United States, 284 U.S. 299 (1932).

163. *Hunter*, 459 U.S. at 365 (quoting State v. Haggard, 619 S.W.2d 44, 51 (Mo. 1981), *cert. granted and judgment vacated*, 459 U.S. 1192 (1983)).

164. *Id.* at 368-69.

165. *Id.* at 366.

166. 409 U.S. 232 (1972).

167. *Id.* at 232.

168. *Id.* at 233.

169. *Id.* at 235.

and did order both civil and criminal sanctions, clearly distinguishing them. There is no reason for frustrating that design."[170] The Court analyzed the purposes of the sanction and determined that they were remedial, providing both a reasonable form of liquidated damages for violation of the law and reimbursement for investigation and enforcement expenses.[171]

In *United States v. Ward*,[172] the Court similarly deferred to legislative intent in determining whether a civil statute was punitive. Oil had escaped from a facility leased and operated by L.O. Ward, doing business as L.O. Ward Oil & Gas Operations.[173] Ward notified the Environmental Protection Agency, as required under the Federal Water Pollution Control Act (FWPCA).[174] The FWPCA prohibited such discharges into navigable waters, imposed a duty to inform the government of any discharge, and imposed criminal liability for failure to inform. But use immunity was provided so that notification of a spill could not be used against the notifying person in a criminal case.[175] The law provided for a civil penalty for each discharge violation, and the money was to be paid to a revolving fund used to finance cleanups of oil spills.[176] Ward claimed that the reporting requirements of the FWPCA violated his Fifth Amendment privilege against self-incrimination.[177]

Although *Ward* was not a double jeopardy case, the Court relied on double jeopardy cases to determine whether the penalty under the FWPCA was civil or criminal.[178] The Court concluded that Congress had intended to impose a civil penalty without regard to the "procedural protections and restrictions available in criminal prosecutions,"[179] and that the statutory scheme was not so punitive in purpose or effect as to negate Congress' intention.[180]

A few years after *Ward*, the Court considered *United States v. One Assortment of 89 Firearms*,[181] the case of Patrick Mulcahey, a gun

170. *Id.* at 236-37.
171. *Id.* at 237.
172. 448 U.S. 242 (1980).
173. *Id.* at 246.
174. *Id.* at 244, 246.
175. *Id.* at 244.
176. *Id.* at 245-46.
177. *Id.* at 247.
178. *Id.* at 248-49.
179. *Id.* at 249.
180. *Id.* at 249-51.
181. 465 U.S. 354 (1984).

dealer who was prosecuted for dealing in firearms without a license.[182] After claiming entrapment, Mulcahey was acquitted.[183] The Government then sued *in rem* to forfeit the seized firearms, and the court of appeals held that the forfeiture was barred by double jeopardy.[184] The Supreme Court reversed the court of appeals, noting that the civil forfeiture provision covered broader conduct than the criminal statute.[185] Furthermore, relying on *Mitchell* and *Ward*,[186] the Court said that the forfeiture sanction was not intended as punishment because Congress' purpose was to discourage unregulated commerce in firearms and keep "potentially dangerous weapons out of the hands of unlicensed dealers."[187] The Court stated that "'[o]nly the clearest proof' that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction."[188]

In *Ward*, *One Lot of Emerald Cut Stones*, and *One Assortment of 89 Firearms*, the Court looked at the statutes and legislative intent to determine whether the sanction was punitive and whether Congress intended to impose cumulative punishments. In all three cases, the Court showed great deference to legislatures and the purposes behind their laws.

VI. Recent Developments in Double Jeopardy Analysis

A. Halper

In 1989, Justice Blackmun wrote the majority opinion in *United States v. Halper*,[189] the opinion that fundamentally changed double jeopardy law in the civil-criminal context. *Halper* was the first case to diminish the deference previously given to legislative intent.[190] Irwin Halper managed a medical laboratory and submitted sixty-five false claims for Medicare reimbursement. Those sixty-five false claims resulted in a total loss to the Government of $585. The Government indicted and convicted Halper of filing the false claims, and he was

182. *Id.* at 355-56.
183. *Id.* at 356.
184. *Id.* at 356-57.
185. *Id.* at 363 (noting that 18 U.S.C. § 924(d) subjects to forfeiture any firearm "used *or intended to be used in*, any violation" of the statute).
186. *See id.*
187. *Id.* at 364.
188. *Id.* at 365 (quoting United States v. Ward, 448 U.S. 242, 249 (1980)).
189. 490 U.S. 435 (1989).
190. *See id.* at 447.

sentenced to two years in prison and fined $5,000.[191] In a classic case of government-run-amok, the Government then sued Halper civilly under the False Claims Act, seeking $2,000 per false claim, double damages, and costs of the civil action.[192] The amount of the per claim penalty, $130,000, was 220 times the Government's actual loss.[193]

The Court framed the question before it as whether the statutory penalty constituted a second punishment for purposes of double jeopardy analysis.[194] Framing the question in this way, however, ignored the teachings of *Albernaz*, *Hunter*, and Justice Blackmun's own pronouncement in *Whalen*, that double jeopardy does not restrict the Legislature's ability to impose two punishments for the same offense.[195]

The Court stated that it was rejecting its previous statutory construction approach because that approach is "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."[196] 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."[197] Discussing *Mitchell*, *Hess*, and *Rex Trailer* at length, the *Halper* court concluded that the "relevant teaching of these cases is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis."[198]

The Court acknowledged that the Legislature may authorize cumulative punishment in a single proceeding under two statutes for the same course of conduct.[199] Near the end of the opinion, the

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191. *Id.* at 437.

192. *Id.* at 438.

193. *Id.* at 439.

194. *Id.* at 441.

195. *See supra* notes 157-158 and accompanying text.

196. *Halper*, 490 U.S. at 447 (quoting *Ex rel.* Marcus v. Hess, 317 U.S. 537, 554 (1943)). While Justice Blackmun cites Justice Frankfurter's concurring opinion in *Hess*, he does not adopt that reasoning. *Id.*

197. *Id.* at 448-49.

198. *Id.* at 446.

199. *Id.* at 451 n.10. This contravenes Justice Frankfurter's conclusion in *Unites States ex rel. Marcus v. Hess* that the Legislature can authorize cumulative punishments in separate

Court reiterated its only proscription—that "the Government 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 Government whole."[200] The Court remanded the case to the district court so the Government could present an accounting of its actual costs.[201]

Although the Court was justifiably outraged at the nature of the remedy the Government was seeking and the fact that the Government was seeking a second sanction because it was dissatisfied with the first,[202] the Court's analysis in *Halper* has disturbing ramifications. The Court has now stated that double jeopardy is not implicated if the Legislature intended to impose cumulative punishments for the same offense in the criminal arena, where the sanctions are clearly penal and liberty interests are at stake.[203] But a civil sanction that follows a criminal conviction (where both are intended by the Legislature) is barred to the extent the civil sanction is not remedial.[204] The Court never explained why it will defer to legislative intent in criminal cases like *Hunter* and *Whalen* where a person's liberty is at stake, but not where money or property is at issue. Rather, the Court said that double jeopardy protection is "intrinsically personal" and that a double jeopardy violation "can be identified only by assessing the character of the actual sanction imposed on the individual by the machinery of the

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proceedings. *See supra* text accompanying notes 123-138. The Court relied on a quotation from *Missouri v. Hunter*: "Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." 459 U.S. 359, 368-69 (1983). But the *Halper* court broadened considerably the import of the quotation by taking a phrase from a criminal case that necessarily involved only one proceeding and applying it in the civil-criminal context. *See id.* at 368. Since *Hunter* was a criminal case, two proceedings would have meant two prosecutions, and multiple prosecutions are barred by double jeopardy. Some courts have used the "single proceeding" line from *Halper*, combined with *Halper's* footnote 10, to find no double jeopardy where a civil proceeding and criminal case were conducted contemporaneously, were based on the same information from the same investigator, and were heard by the same judge. These courts found that the proceedings, although in different courts, were, in effect, a single coordinated prosecution. *See* United States v. 18755 N. Bay Rd., 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). *But see* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994), *amended on denial of reh'g*, 56 F.3d 41 (9th Cir. 1995), *and cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346).

200. *Halper*, 490 U.S. at 451.

201. *Id.* at 452.

202. *See id.* at 451 n.10.

203. *See* Albernaz v. United States, 450 U.S. 333, 343-44 (1981); Whalen v. United States, 445 U.S. 684, 689-690 (1980); State v. Calle, 125 Wash. 2d 769, 776, 888 P.2d 155, 158 (1995).

204. *Halper*, 490 U.S. at 448-49.

state."[205] This interpretation of double jeopardy, which permits a person to be punished twice criminally, but not be subject to separate civil and criminal punishments, unmistakably elevates property interests above liberty interests and interferes with the Legislature's prerogative to determine punishment.

The *Halper* court did not see its opinion as far reaching, and it took pains to limit its decision as "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."[206] This language, however, practically defines an excessive fines inquiry based on proportionality. Although the Court cited Justice Frankfurter's concurring opinion in *Hess*, the Court failed to use his common-sense approach to double jeopardy. Had the Court used that approach, it would have viewed *Halper* as an Eighth Amendment excessive fines case, an easier and more direct way to curb the Government's overreaching.[207]

B. Halper's *Aftermath*

An obvious question, following *Halper*, is how a case, seemingly so narrowly confined, could engender such chaos in the field of double jeopardy. The answer requires an understanding of the legislative changes that began in the 1970s affecting parallel criminal actions and civil forfeitures, and an analysis of the cases following *Halper*.

1. Legislation That Created New Tools to Fight Crimes

Forfeitures, long a part of American law, had their genesis in English law. In England, the value of an object that directly or indirectly caused the death of another was forfeited to the crown.[208] Similarly, convicted felons were required to forfeit their personal

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205. *Id.* at 447.

206. *Id.* at 449.

207. *Compare* Dep't of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1955 (1994) (O'Connor, J., dissenting) ("Today's decision is entirely unnecessary to preserve individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching."). In fact, at the same time it was considering *Halper*, the Court was considering an excessive fines case for the first time. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). In that case, the Court held that punitive damages in litigation between private parties does not violate the Excessive Fines Clause because the Eighth Amendment was intended to prevent excessive fines imposed by the government, not by private parties. *Id.* at 259-60; *see also* Austin v. United States, 113 S. Ct. 2801 (1993) (applying the Excessive Fines Clause to an *in rem* forfeiture by the Government).

208. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974). This kind of forfeiture was called a deodand. *Id.*

property to the crown, and their lands escheated to their lords.[209] Traitors also forfeited all of their property to the crown.[210] In addition, statutes provided for forfeiture, mostly *in rem*, of objects used to violate customs and revenue laws.[211]

Although American forfeitures were based on this English tradition, only statutory forfeitures survived in America:[212] "[A]lmost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law," and forfeitures were also authorized for ships involved in piracy and slave trading.[213] Forfeitures were also authorized and used under the revenue and liquor control laws.[214] Beginning in the 1970s, government became increasingly concerned about organized crime and crimes motivated by greed, including drug trafficking. As a result, a plethora of laws was passed authorizing new ways to combat these crimes, including forfeiture of proceeds of the crimes and of property used to facilitate the crimes.

Passage of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act[215] and the Continuing Criminal Enterprise section of the Controlled Substances Act[216] began this trend. Both of these laws included new criminal forfeiture provisions. Other new laws provided for civil forfeitures, including the Currency and Foreign Transactions Reporting Act[217] and the Psychotropic Substances Act of 1978.[218]

In the 1980s, Congress continued this trend, amending the drug laws to authorize forfeiture of real property used to facilitate drug crimes,[219] and enacting comprehensive money laundering laws that were also intended to curb drug trafficking.[220] These laws all greatly expanded the government's ability to compel forfeiture of proceeds of crimes and property used to facilitate crimes.

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209. *Id.* at 682.

210. *Id.*

211. *Id.*

212. *See id.* at 682-83; *see also supra* note 137.

213. *Calero-Toledo*, 416 U.S. at 682-83; *see supra* note 137.

214. *See supra* notes 91-112 and accompanying text.

215. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1995).

216. 21 U.S.C.A. § 848 (West 1981 & Supp. 1995).

217. The Currency and Foreign Transactions Reporting Act, which pertains to search and forfeiture of monetary instruments, was enacted in 1970. Tit. II, Pub. L. No. 91-508, 84 Stat. 1114 (codified at 31 U.S.C.A. § 5317 (West 1983 & Supp. 1995)).

218. Pub. L. 95-633, 92 Stat. 3768 (codified as amended, in part, at 21 U.S.C.A. § 881(a)(6) (West 1981)).

219. 21 U.S.C.A. § 881(a)(7) (West 1981).

220. 18 U.S.C.A. § 1956 (West Supp. 1995).

This trend occurred in the states as well. In Washington, the legislature enacted, and then amended, a drug forfeiture law modeled after, but not identical to, the federal law.[221] The law was amended several times during the 1980s, and it eventually included forfeiture of real property that was either purchased with proceeds of drug crimes or used to facilitate drug crimes.[222] The legislature also passed the Criminal Profiteering Act, Washington State's version of RICO, which provides for civil forfeitures.[223] Washington law now also provides for forfeiture of proceeds of money laundering,[224] instrumentalities used to commit felonies or property acquired with the proceeds of many felonies,[225] property used to facilitate the crimes of gambling[226] and sexual exploitation of a minor,[227] and firearms possessed or used in violation of various laws.[228]

In passing these laws, the state and federal legislatures were attempting to remove the enormous profit incentive that attracts drug dealers and other criminals to their trade. Before these laws were implemented, major drug dealers who got caught would serve their time, get out of prison, and retire on their ill-gotten gains or use them to finance their return to the drug distribution network. "Doing their time" was a cost of doing business. Few significant drug traffickers are addicts. They are motivated not by their own habits, but by greed. The forfeiture laws were designed to target those at the top of the drug distribution ladder—those who live off the profits illegally derived from the addictions and misfortunes of others. Where is the justice in a society that sentences a nineteen-year-old street-corner crack dealer to prison for twenty-one to twenty-seven months for a first offense,[229] but will not forfeit the property of the wealthy supplier who makes it possible for the street-corner dealer to deal and to be addicted? Forfeiture laws were, and remain, a valuable tool for fighting organized crime, major drug activity, and other crimes motivated by greed.

Any tool, however, can be abused. *Halper* was not a forfeiture case, but a case brought under the False Claims Act,[230] an act which

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221. *See* WASH. REV. CODE § 69.50.505 (1994).
222. *See id.* § (a)(8).
223. WASH. REV. CODE § 9A.82.100 (1994).
224. WASH. REV. CODE § 9A.83.030 (1994).
225. WASH. REV. CODE § 10.105.010 (1994).
226. WASH. REV. CODE § 9.46.231 (1994).
227. WASH. REV. CODE § 9.68A.120 (1994).
228. WASH. REV. CODE § 9.41.098 (1994).
229. *See* WASH. REV. CODE §§ 69.50.401, 9.94A.320, 9.94A.310 (1994).
230. 31 U.S.C.A. §§ 3729-3731 (West 1983 & Supp. 1995).

has been used well and appropriately for years. Many of the recent double jeopardy decisions, like *Halper*, have been classic examples of bad facts making bad law. The bad facts involved, as in *Halper*, government overreaching.

2. *Austin*

Austin v. United States[231] was the first major Supreme Court case following *Halper* that affected double jeopardy law, and it was not a double jeopardy case at all, but an excessive fines case. Like *Halper*, its facts were egregious. Richard Lyle Austin met an undercover agent at his auto body shop, agreed to sell him two ounces of cocaine, and went to his mobile home to retrieve the cocaine.[232] The next day, state authorities executed a search warrant at the home and body shop, discovering a small amount of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700.[233] Austin pled guilty in South Dakota to one count of possession with intent to distribute cocaine and was sentenced to seven years in prison. The federal government also sued for forfeiture of Austin's home and body shop.[234] Under the dual sovereignty doctrine, double jeopardy was not applicable.[235] Thus, Austin claimed that the forfeiture was an excessive fine under the Eighth Amendment.[236]

Justice Blackmun wrote the Court's opinion. Predictably, he relied on *Halper* for much of his analysis as to what constitutes punishment.[237] First, he undertook a historical analysis to determine whether forfeiture was understood, in part, as punishment at the time the Eighth Amendment was ratified, concluding that it was.[238] Based on its historical analysis, the Court held that forfeitures under the drug forfeiture statute[239] were intended to be punitive rather than remedial.[240] The Government had argued that forfeiting property used to

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231. 113 S. Ct. 2801 (1993).

232. *Id.* at 2803.

233. *Id.*

234. *Id.*

235. Under the dual sovereignty doctrine, double jeopardy does not apply if separate sovereigns prosecute or punish. United States v. Wheeler, 435 U.S. 313, 316-17 (1978); Bartkus v. Illinois, 359 U.S. 121, 136-38 (1959).

236. *Austin*, 113 S. Ct. at 2308.

237. *See id.* at 2805-06.

238. *Id.* at 2806. For this analysis he relied primarily on Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), a case involving due process, not double jeopardy or excessive fines.

239. 21 U.S.C.A. § 881(a)(4), (7) (West 1981 & Supp. 1995).

240. *Austin*, 113 S. Ct. at 2812.

facilitate a crime removed instrumentalities of the drug trade, and was therefore remedial.[241] The Court rejected the Government's argument based on a quotation from *One 1958 Plymouth Sedan v. Pennsylvania*:[242] "There is nothing even remotely criminal in possessing an automobile."[243] The Court used this quotation out of context, however.[244] Astonishingly, the Court's use of this quotation implies that forfeiture of property that facilitates a crime, or is an instrumentality of a crime, cannot be remedial unless the property is contraband.

The Court also rejected the Government's argument by relying on dicta in *Halper* that stated, "A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[245] The dicta in *Halper* can only have been meant to support *Halper's* conclusion that punishment was involved and, thus, the multiple punishments prong of double jeopardy analysis applied in that case. If the *Halper* court had meant that all civil punishment is barred by double jeopardy, it would not have remanded the case to the trial court to determine what part of the penalty was remedial.

Based on this dicta, the *Austin* court held that facilitation forfeitures under the federal drug forfeiture statute are punitive.[246] This reliance upon dicta from *Halper* is misplaced because that dicta implicitly contradicts the holding in *Halper*, which says that double jeopardy bars a civil sanction following a criminal conviction only to the extent the civil sanction is not remedial.[247] As in *Halper*, the *Austin* court did not find the forfeiture or the statute unconstitutional. But, having determined that the Excessive Fines Clause applies to civil drug forfeitures, the Court remanded the case so that the lower courts could develop a test for determining when a forfeiture is excessive.[248]

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241. *Id.* at 2811.

242. 380 U.S. 693 (1965).

243. *Austin*, 113 S. Ct. at 2811 (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).

244. In *One 1958 Plymouth Sedan*, the Court held that the exclusionary rule applied in a civil forfeiture proceeding where evidence had been seized from a car without a warrant. 380 U.S. at 696, 702. The Government could not forfeit the car since the only evidence supporting forfeiture was illegally seized. *See id.* at 698. The Court said that if the car had been contraband, the Government would not necessarily have to return it, but since there is nothing illegal about owning the car, without further evidence of its forfeitability, the Government must return it. *Id.* at 699. The issue in *One 1958 Plymouth Sedan* is far removed from the issue of whether facilitation forfeitures may be remedial. *See id.* at 698-70.

245. *Austin*, 113 S. Ct. at 2812 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).

246. *Id.*

247. *Halper*, 490 U.S. at 448-49.

248. *Austin*, 113 S. Ct. at 2812.

This discussion in *Austin* of the *Halper* dicta only created more confusion about double jeopardy and has led to troublesome and sometimes tortured analyses. Many lower courts have applied *Austin's* "solely remedial" language in the double jeopardy context.[249] Others continue to apply *Halper* to determine what part of a sanction is remedial and what part punitive.[250] The Ninth Circuit has accepted the facile argument that because *Austin* holds that drug-related civil forfeitures are punishment for purposes of excessive fines analysis, regardless of the value of the property or the government's damages, all *in rem* drug forfeitures are also punishment for purposes of double jeopardy analysis.[251]

This analysis is flawed, however. If all *in rem* drug forfeitures are punishment for double jeopardy purposes, then all drug forfeitures following criminal convictions would be barred, regardless of legislative intent, remedial character, or the "intrinsically personal" nature of double jeopardy protection. This argument assumes that the double jeopardy and excessive fines provisions protect the same interests, when clearly they do not.

For example, in the context of parallel civil and criminal actions, double jeopardy analysis (at least under current law) asks whether a person has been punished twice for the same offense. Under *Halper*, to determine if a second sanction is punishment, the court must consider whether any portion of the civil sanction was remedial.[252] Under the Excessive Fines Clause, the threshold question, according to *Austin*, is whether punishment has been imposed at all, regardless of the number of sanctions.[253] Then the court must weigh the proportionality of the punishment to the offense.[254] These two analyses are fundamentally different. Therefore, application of an excessive fines analysis in the double jeopardy context is inappropriate, and *Austin* should not apply to determine the existence of double jeopardy in parallel civil and criminal proceedings.

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249. *See, e.g.*, United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); Unites States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994), *amended on denial of reh'g*, 56 F.3d 41 (9th Cir. 1995), *and cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346).

250. *See, e.g.*, United States v. Ogbuehi, 897 F. Supp. 887, 891-92 (E.D. Pa. 1995); SEC v. O'Hegan, 901 F. Supp. 1461, 1469-70 (D. Minn. 1995).

251. *See, e.g.*, *$405,089.23 U.S. Currency*, 33 F.3d at 1221.

252. *See Halper*, 490 U.S. at 448.

253. *Austin*, 113 S. Ct. at 2812.

254. *Id.*

3. *Kurth Ranch*

In 1994, double jeopardy arose in yet another context in the case of *Department of Revenue of Montana v. Kurth Ranch*.[255] Montana's Dangerous Drug Tax Act,[256] which took effect in 1987, imposed a tax on the possession and storage of dangerous drugs.[257] This tax was to be collected only after state or federal fines or forfeitures were satisfied, and the tax was computed at ten percent of the market value of the drugs or a specified amount per drug.[258] The obligation to pay the tax arose at the time of arrest, and tax forms were to be filed at the time the taxpayer was arrested.[259] The Kurth family, who engaged in grain and livestock farming, had expanded their operation to include marijuana cultivation. Montana authorities seized an enormous quantity of marijuana (including 2,155 plants and more than eight pounds of dry marijuana) and a substantial quantity of hash oil.[260] All of the defendants pled guilty to various crimes.[261]

Montana's Department of Revenue then tried to collect almost $900,000 in taxes and penalties under the new law.[262] The Kurths filed for bankruptcy and then challenged the constitutionality of the Montana tax.[263] The bankruptcy court held that the tax subjected the Kurths to double jeopardy.[264] In the bankruptcy court proceeding, Montana had "failed to introduce one scintilla of evidence as to [the] cost of the . . . government programs or costs of law enforcement incurred to combat illegal drug activity."[265]

The question addressed by the Court in *Kurth Ranch* was "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense."[266] While the Court declined to apply a *Halper*

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255. 114 S. Ct. 1937 (1994).
256. MONT. CODE ANN. §§ 15-25-101 to -123 (1995) (repealed 1987).
257. *Kurth Ranch*, 114 S. Ct. at 1941.
258. *Id.*
259. *Id.* at 1941-42.
260. *Id.* at 1942 & n.7.
261. *See id.* at 1942.
262. *Id.*
263. *Id.* at 1942-43.
264. *Id.*
265. *Id.* at 1943 (quoting Kurth Ranch v. Dep't of Revenue of Montana (*In re* Kurth Ranch), 145 B.R. 61, 74 (Bankr. D. Mont. 1990), *aff'd*, 114 S. Ct. 1937 (1994).
266. *Id.* at 1941.

analysis to determine whether the tax was punitive or remedial,[267] the Court did cite *Halper* for the proposition that double jeopardy protection is intrinsically personal.[268] The Court also cited the holding from *Halper*,[269] not the dicta that caused such confusion after *Austin*. In fact, *Kurth Ranch* contravened *Halper's* controversial dicta by stating that "while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive."[270] This language is inconsistent with the dicta from *Halper* that all forfeitures, penalties, or taxes are punitive unless they are solely remedial.[271]

Kurth Ranch was a five-to-four opinion with three separate dissents. These dissents indicate that some members of the Court are beginning to re-examine double jeopardy analysis in light of its historical roots and the turmoil occurring in the law. In his dissenting opinion, Chief Justice Rehnquist said that *Kurth Ranch* clearly was not the "rare case" contemplated by *Halper* and implied that *Halper* may have been wrongly decided.[272] In her dissent, Justice O'Connor noted that the consequences of the majority's ruling were "astounding" and said that the decision was "entirely unnecessary to preserve individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching."[273] Applying *Halper*, Justice O'Connor said that the defendant must first show that the amount of the sanction was not rationally related to the Government's non-punitive objectives, and then the burden shifts to the Government to justify the sanction in the particular case.[274] That was not done here.

In his dissent, Justice Scalia returned to the origins of double jeopardy law in this country, stating that double jeopardy applies to

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267. The Court said that the *Halper* test is inappropriate because taxes serve a different purpose than civil penalties: "they are usually motivated by revenue-raising rather than punitive purposes," *id.* at 1946, and "determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.'" *Id.* at 1948 (citations omitted). In effect, the tax here of $100 per ounce of marijuana is very like the civil penalty of $2,000 per false claim in *Halper*.

268. *Id.* at 1946.

269. *Id.* at 1945.

270. *Id.* at 1947.

271. *See Halper*, 490 U.S. at 448.

272. *Kurth Ranch*, 114 S. Ct. at 1949. Chief Justice Rehnquist said that because the Court did not undertake a *Halper* analysis to determine whether the sanction was remedial or punitive, it was unnecessary to determine whether *Halper* was correctly decided. *Id.*

273. *Id.* at 1955.

274. *Id.* at 1954.

multiple prosecutions only, not to multiple punishments.[275] To support this proposition, he cited Justice Frankfurter's concurring opinion in *United States ex rel Marcus v. Hess*,[276] as well as other cases.[277] Justice Scalia noted "that, until *Halper*, the Court [had] never invalidated a *legislatively authorized* successive punishment."[278]

The combined effect of the *Halper*, *Austin*, and *Kurth Ranch* opinions has been an utterly divided lower court system. Courts have found creative new ways of interpreting double jeopardy, based on the Supreme Court's opinions, in order to reach particular results. The problem, of course, is that egregious facts occur on both sides and, because the Supreme Court's decisions have been so convoluted and inconsistent, courts have ample precedent to support whatever results they want.

The primary disagreement in *Halper's* aftermath revolves around the question of punishment. The Fifth, Sixth, and Eighth Circuits have held that forfeiture of proceeds of crimes is never punishment because it involves only forfeiture of property that the claimant did not lawfully own or earn and because the claimant has no reasonable expectation that the law will permit his continued possession of such proceeds.[279] These circuits suggest that such forfeitures are always proportional to the crime, and thus always remedial, because forfeiture of proceeds compensates government and society for the costs of detection, investigation, and prosecution of crimes, as well as the costs of "combating the allure of illegal drugs" and caring for its victims.[280] In contrast, the Ninth Circuit has held that any civil forfeiture is punishment.[281]

Most jurisdictions have found that a person whose property is forfeited by default has not been punished if he did not claim the property.[282] Some courts have held that parallel civil and criminal

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275. *Id.* at 1955.

276. 317 U.S. 537, 555-56 (1943).

277. For example, see William v. Bradley (*In re* Bradley), 318 U.S. 50, 53 (1943) (Stone, C.J., dissenting).

278. *Kurth Ranch*, 114 S. Ct. at 1956.

279. *See* United States v. Salinas, 65 F.3d 551, 554 (6th Cir. 1995); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994); United States v. Tilley, 18 F.3d 295, 300 (5th Cir.), *cert. denied*, 115 S. Ct. 573 (1994); *see also* SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994).

280. *See Tilley*, 18 F.3d at 299.

281. *See $405,089.23 U.S. Currency*, 33 F.3d. at 1221.

282. The theories for this vary. Some courts say that a person must become a party to an action for jeopardy to attach: "You can't have double jeopardy without a former jeopardy." United States v. Torres, 28 F.3d 1463, 1465 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994); *accord* United States v. Arreola-Ramos, 60 F.3d 188, 192 (5th Cir. 1995) ("[I]t is axiomatic that there

proceedings are a "single coordinated prosecution" and therefore, under *Halper*, a single proceeding where cumulative punishments are allowed.[283] Others have said that parallel civil and criminal proceedings can never be a single proceeding for purposes of double jeopardy analysis.[284] Following *Halper*, the question of what constitutes punishment for double jeopardy purposes remains one of two main issues in the area of parallel civil forfeiture and criminal proceedings.[285]

VII. CONCLUSION

The historical roots of double jeopardy are not nearly so clear as some cases and commentators suggest. We do not, in fact, know whether the Framers of the Constitution intended to include double punishment in double jeopardy. Because, as Justice Frankfurter said in *Hess*, it was then common to allow comprehensive penalties prescribed in advance to be enforced in separate proceedings, it is likely that double jeopardy was not meant to apply to double punishment. Certainly early Supreme Court decisions disagreed on the purpose of the Double Jeopardy Clause.[286] Perhaps because of uncertainty about the original meaning of the Double Jeopardy Clause, the Supreme Court has been inconsistent, confusing, and result-oriented in its double jeopardy opinions.

The time has come for the Court to resolve the conflicts among the circuits and formulate a double jeopardy policy that protects against multiple prosecutions and excessive punishments, and still permits legislatures to establish policies that further their law enforcement goals. The legal framework exists.

Double jeopardy's history, derived from the ancient pleas in bar of *autrefois convict* and *autrefois acquit*, shows that double jeopardy was meant to be a check on prosecutors and multiple prosecutions, not on legislative authority. The Double Jeopardy Clause should, therefore,

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can be no punishment if the property forfeited did not belong to the person claiming jeopardy."); United States v. Amiel, 995 F.2d 367, 371-72 (2d Cir. 1993). Others have found that a person who fails to claim the property has abandoned it and, therefore, has not been punished by its forfeiture. *See* United States v. Cretacci, 62 F.3d 307, 310 (9th Cir. 1995), *petition for cert. filed*, (U.S. Feb. 13, 1996) (No. 95-7955).

283. *See 18755 N. Bay Rd.*, 13 F.3d at 1499; *Millan*, 2 F.3d at 19-20.

284. *See $405,089.23 U.S. Currency*, 33 F.3d at 1217.

285. The other main issue is what constitutes the same offense. *See supra* section III.

286. *Compare Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) *with* Ball v. United States, 163 U.S. 662 (1896). *See* discussion *supra* section II.C.1.

be interpreted to apply to multiple prosecutions, not multiple punishments.

There is nothing inherently unconstitutional about civil penalties or forfeitures. Legislative goals to remove the profit from drug trafficking, money laundering, and other crimes motivated by greed further society's goals and are just. They are meant to deprive major drug dealers and other criminals of their ill-gotten gains—their incentive to deal drugs.

Clearly legislatures can impose multiple criminal punishments for the same offense.[287] It would be manifestly unjust to permit multiple criminal punishments for the same offense, but to prohibit a criminal and a civil sanction for the same offense. If a legislature decides that a civil financial sanction in addition to a criminal penalty will be more effective in deterring criminals from the drug trade than excessive sentences or multiple criminal penalties, no law or constitutional provision prohibits it from doing so.

The Supreme Court is legitimately concerned about government overreaching. But it need not engage in tortured analysis that opens the door for lower courts to infer that double jeopardy bars all civil sanctions following criminal prosecutions or criminal prosecutions following civil sanctions. The Excessive Fines Clause prohibits excessive fines imposed by the government. Period. Whether there has been one proceeding or more. The Excessive Fines Clause requires that a punitive civil sanction be proportional to the crime, whether or not there has been a criminal sanction.

The Court should explicitly limit double jeopardy analysis in the context of civil and criminal proceedings as follows: The Court should defer to Congress to determine what punishments fit the crime. Moreover, the same elements test of *Dixon* and *Blockburger* should apply so that if either offense contains an element not contained in the other, they are not the same offense for double jeopardy purposes. This would mean that most civil allegations and criminal charges would not be the same offense.

The Court should develop proportionality guidelines under the Excessive Fines Clause that would curb any inclination for government overreaching in the context of civil sanctions. If the Court adopts this approach, criminal defendant property owners will be protected from both multiple prosecutions and excessive financial punishments, and legislative prerogatives will be protected.

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287. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); Whalen v. United States, 445 U.S. 684, 688 (1980); State v. Calle, 125 Wash. 2d 769, 776, 888 P.2d 155, 158 (1995); *see supra* section V.