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CRIME AND PUNISHMENT AND PUNISHMENT: CIVIL FORFEITURE, DOUBLE JEOPARDY AND THE WAR ON DRUGS

David Osgood

Abstract: Over the past several years, the Supreme Court taken a hard look at statutes that impose "quasi-criminal" sanctions such as "civil" punishment for criminal behavior. In several high profile cases, the Court has extended double jeopardy protection to defendants subjected to civil sanctions. By looking at the punitive intent behind "civil" sanctions, the Court has embroiled itself in the highly-charged debate surrounding civil drug forfeitures. This Comment examines the tension between the Court's emergent philosophy on double jeopardy and so-called "civil" sanctions, and its application in the Ninth Circuit case, United States v. $405,089.23, which the Court heard on April 17. This Comment concludes by arguing that $405,089.23 is the logical outgrowth of the Supreme Court's own decisions, and that despite the unsympathetic facts of the case, the underlying constitutional values compel its affirmation.

From the early days of the republic, the Federal Government has been able to confiscate vehicles, ships, and houses believed to be used in the commission of crimes, regardless of the owner's guilt or innocence. In the 1970s, Congress extended these "civil forfeiture" statutes to target the assets of suspected criminals as part of the "war on drugs," and in 1984, Congress gave enforcement agencies the power to use seized assets exclusively for law enforcement purposes. Since then, civil forfeiture laws have become one of the Federal Government's most powerful weapons against drug dealers, organized crime, money launderers, and others. By the late 1980s, forfeiture laws were being treated increasingly as revenue sources for law enforcement; for many, this has become cause for concern.

2. See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 1.01, at 1–4 (1995). Congress enacted civil forfeiture provisions under the RICO statute, which "reflected a new awareness of the importance of economic sanctions." Id.
3. Id. at 1–7 ("[T]he most significant change wrought by the 1984 Act was the earmarking of forfeited assets exclusively for law enforcement purposes.... The allotting of forfeited assets for law enforcement purposes provided a tremendous incentive to seek forfeiture simply to raise revenue for law enforcement agencies.").
4. See 4 No. 17 Dep't of Justice Alert 2 (Oct. 3, 1994) ("By all accounts, civil forfeiture is a major part of criminal enforcement. A few critics complain that it is the dominant force in law enforcement today.").
5. Smith, supra note 2, at 1–16. Smith quotes Attorney General Richard Thornburgh on the occasion of the transfer of $229 million from the Justice Department's Asset Forfeiture Fund to the Bureau of
Civil forfeiture offers authorities many substantive and procedural advantages over criminal forfeitures. By using civil forfeiture, authorities benefit from a lesser burden of proof. Once the government shows the existence of probable cause to believe that property is being used to facilitate an illegal act, the defendant must prove by a “preponderance of the evidence” that either the property is not subject to forfeiture or that a valid defense exists. Under criminal forfeiture statutes, the authorities must first prove the defendant’s guilt beyond a reasonable doubt. Additionally, under civil forfeiture statutes, authorities operate under the legal fiction that they are punishing “guilty” property instead of a person, and so avoid many of the constitutional protections customarily available to a defendant in a criminal prosecution.

One of those constitutional protections is the Fifth Amendment’s bar against “double jeopardy.” Historically, the Constitution’s Double Jeopardy Clause was held to apply only to “criminal punishments.” For example, a criminal acquittal would not bar a subsequent action to enforce sanctions by way of forfeiture of goods or enforce other civil

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Prisons. Thornburgh said, "It's satisfying to think that it's now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation." For a spirited discussion of civil forfeiture in the United States, see Henry J. Hyde, Forfeiting Our Property Rights: Is Your Property Safe from Seizure? (1995).

6. See Andrew Schneider & Mary Pat Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs, Pittsburgh Press, Aug. 11-16, 1991 (reprint). According to this series of articles, 80% of people who lost property to the federal government via civil forfeiture were never charged with the underlying offense: "The owners' only crime in many of these cases: They 'looked' like drug dealers. They were black, Hispanic, or flashily dressed." Id. at 3.

7. See Steven Kessler, Civil and Criminal Forfeiture, §3.01[2][h] (1995); United States v. Real Property Located at Incline Village, 47 F.3d 1511, 1519 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996):

The government bears the initial burden of showing probable cause that the property seized is the proceeds of a federal narcotics violation or was used to commit or facilitate such a violation. Although the government must show "more than mere suspicion," establishing probable cause is not a heavy burden, requiring only that the government "demonstrate by some credible evidence the probability that the [property] was in fact drug-related.

Id. (citations omitted).


9. United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1068 (9th Cir. 1994) (“We are particularly wary of civil forfeiture statutes, for they impose ‘quasi-criminal’ penalties without affording property owners all of the procedural protections afforded criminal defendants. The relative ease of obtaining forfeitures may tempt the government to seek criminal law enforcement objectives through these nominally ‘civil’ proceedings.”) (citations omitted).

10. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .” U.S. Const. amend. V.
penalties. However, recent Supreme Court opinions have shown a willingness to look at the intent underlying a sanction labeled “civil.” Where the Court has found that a civil sanction serves punitive goals, it has held that the Double Jeopardy Clause may apply. Unfortunately, the Court’s decisions have also set forth contradictory standards for what constitutes “punishment.” Consequently, the circuit courts have been left to formulate their own tests with no clear guidance.

Within this framework, the Ninth Circuit has re-examined the applicability of double jeopardy to civil sanctions, particularly with regard to drug forfeiture and money laundering laws. While some circuits have adopted a “proportionality” analysis that compares the amount of a forfeiture to the magnitude of an offense, the Ninth Circuit has rejected this in favor of a broader categorical approach that looks at the structure, legislative history, and deterrent or punitive intent behind the statute imposing the sanction. Where a civil forfeiture statute is designed, even in part, to deter or punish, double jeopardy will bar the forfeiture once a criminal plea has been accepted or a jury impaneled. Conversely, where a judgment of forfeiture is entered first, double jeopardy will bar a subsequent criminal proceeding.

The Ninth Circuit’s approach has ignited considerable controversy. In United States v. $405,089.23 U.S. Currency, the court held that a civil forfeiture of drug proceeds pursuant to 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) was barred by an earlier criminal conviction. Because of the nature of the property involved, and driven perhaps by the extreme facts of the particular case, $405,089.23 has split the circuits, and given the Supreme Court yet another double jeopardy conflict for review.

16. United States v. Faber, 57 F.3d 873, 874 (9th Cir. 1995).
19. 33 F.3d 1210.
20. Claimants were accused of conducting a large-scale methamphetamine manufacturing operation, and laundering the money through a series of front corporations to make it look like they were successfully engaged in gold mining activities. Seized property included “$405,089.23 in a Security Pacific Bank account; $8,929.93 in three Bank of America accounts; $123,000 in cash and 138 silver
Part I of this Comment takes a cursory look at the historical nature of the double jeopardy protection; part II examines the three Supreme Court cases that have revolutionized the modern doctrine. Part III analyzes how the circuit courts have synthesized the Supreme Court's holdings, with particular focus on the Ninth Circuit's approach in $405,089.23. Part IV probes the emergent split amongst the circuits and assesses the reasoning presented by each. Finally, this Comment concludes by arguing that the methodology established by the Ninth Circuit is the only logical approach to the standard developed by the Court; if anything, it has not gone far enough.

I. DOUBLE JEOPARDY – A PRIMER

The Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution is said to consist of three separate protections. It protects against a second prosecution for the same offense after acquittal, against prosecution for the same offense after conviction, and against multiple punishments for the same offense.\(^2\) Traditionally, double jeopardy was seen solely as a criminal protection,\(^2\) and the test for whether a civil sanction was essentially criminal in nature was high.\(^2\) At least where the "multiple prosecution" components were involved, great deference was given to whether Congress's characterization of a "penalizing mechanism" was civil or criminal.\(^2\) To negate Congress's intention to create a "civil" penalty, one had to prove that the sanction: (1) involved an affirmative disability or restraint; (2) historically had been regarded as punishment; (3) came into play only on a finding of scienter; (4) promoted the traditional aims of punishment, retribution and deterrence; (5) applied to behavior that was already a crime; (6) had no rational alternate purpose; or, (7) was excessive in relation to that

bars seized at Maryhill Bail Bonds; one Bell 47 G-2 helicopter; one shrimp boat; a Piper 6 Cherokee airplane; and eleven automobiles and one boat purchased at an auction." \textit{Id. at} 1214.

21. See Smith v. United States, 76 F.3d 879 (7th Cir. 1996); United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160 (3d Cir. 1995); United States v. Clementi, 70 F.3d 997 (8th Cir. 1995); United States v. Salinas, 65 F.3d 551, 553 (6th Cir. 1995); United States v. Tilley, 18 F.3d 295, 297 (5th Cir.), \textit{cert. denied}, 115 S. Ct. 574 (1994).


This showing became known as the "Kennedy-Ward test," and was exceptionally difficult to meet, especially because the government could always argue that forfeiture primarily served a remedial purpose. On the other hand, once a defendant showed under the Kennedy-Ward test that the sanction was severe enough to render a proceeding essentially "criminal," he was entitled to the full panoply of constitutional protections due defendants in criminal proceedings.

II. THE SUPREME COURT TAKES A CLOSER LOOK AT "CIVIL" SANCTIONS

A. United States v. Halper

In 1989, the U.S. Supreme Court began to re-examine the nature of so-called "civil sanctions." In United States v. Halper, a former medical service manager was tried and convicted of filing inflated Medicare claims. For submitting sixty-five claims, each for nine dollars over the actual claim amount, Halper initially netted $585, plus two years in prison and a $5000 fine. After his conviction, the government brought an action under the False Claims Act. Based on the facts established in the criminal conviction, the district court held that the defendant was subject to a civil penalty of $2000 for each claim, an additional amount equal to twice the amount of damages the government sustained, plus the costs of the civil action. Because the defendant violated the act sixty-five times, he was theoretically subject to a $130,000 penalty. But the district court concluded that a civil remedy that large would constitute a second punishment under double jeopardy analysis, as the amount of the penalty bore no rational relation to either the actual damages suffered or the expenses incurred by the Government in prosecuting the case. However, because the district court viewed the purpose of the penalty provisions of the statute as ensuring the Government was fully

27. See 3 No. 11 Dep’t of Justice Alert 2 (Sept. 6–20, 1993) (advising that government attorneys should argue that forfeitures serve remedial purposes such as disrupting criminal enterprises).
29. Id. at 437.
31. Halper, 490 U.S. at 438 (citing 31 U.S.C. § 3729 (1982 ed., Supp. II) (amended in 1986 to increase the civil penalty to not less than $5000 and not more than $10,000 plus three times amount of damages the government sustains)).
32. Id.
compensated for any damages it incurred, and imposition of the full penalty as discretionary, the court awarded damages of $16,000 as the approximate amount required to make the Government "whole."\(^{34}\)

The Government appealed, and on direct review the Supreme Court found for the defendant. In doing so, it relied on the third double jeopardy protection—the proscription against multiple punishments—to skirt a long line of precedents holding that a civil fine was insufficient to establish a criminal proceeding for double jeopardy purposes.\(^{35}\) At least in the multiple punishments context, Congress's intent to impose a civil penalty was no longer dispositive:

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. . . . This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.\(^{36}\)

The Court rejected the labels "civil" and "criminal" as irrelevant. It found that the concept of punishment exists in both civil and criminal law:

> [F]or the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. . . . Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.\(^{37}\)

The Court then attempted to define when a civil sanction became "punishment." It first concluded that because retribution and deterrence were not legitimate non-punitive government objectives, "a civil sanction

\(^{34}\) Id. at 534.

\(^{35}\) *Halper*, 490 U.S. at 440–42. See also Rex Trailer Co. v. United States, 350 U.S. 148 (1956); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); Helvering v. Mitchell, 303 U.S. 391 (1938). The Court also distinguished these cases as involving "roughly remedial" penalties, i.e., penalties proportional to the harm done the government. *Halper*, 490 U.S. at 446.

\(^{36}\) *Halper*, 490 U.S. at 447 (citations omitted).

\(^{37}\) Id. at 447–48.
that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." But then moderating its position, the Court held 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.

B. Austin v. United States

The Supreme Court revisited the civil punishment issue in *Austin v. United States*. In *Austin*, the petitioner was indicted on four counts of violating South Dakota’s drug laws. He ultimately pleaded guilty to one count for a relatively minor drug sale, and was sentenced to seven years’ imprisonment. The United States then filed an in rem action seeking forfeiture of Austin’s mobile home and business under 21 U.S.C. § 881(a)(4), (7). The Eighth Circuit Court of Appeals upheld the forfeiture on the principle that if the guilt or innocence of the property’s owner is constitutionally irrelevant in an in rem proceeding, "the constitution hardly requires proportionality review of forfeitures."

*Austin* deals primarily with the question of whether the Eighth Amendment’s Excessive Fines Clause applies to in rem civil forfeiture

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38. *Id.* at 448 (emphasis added) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)).
39. *Id.* at 449, 451.
40. 113 S. Ct. 2801 (1993).
41. *Id.* at 2803.
42. *Id.* 21 U.S.C. § 881(a)(4), (7) (1994) provide for the forfeiture of:
   (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution]
   
   (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year’s imprisonment . . . ."
43. United States v. 508 Depot Street, 964 F.2d 814, 817 (8th Cir. 1992).
44. *Id.* (citing United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)).
45. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
proceedings. The Supreme Court held it does, observing that while some provisions of the Bill of Rights expressly limit themselves to criminal cases by their language, the Eighth Amendment does not. The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense. The Court relied on Halper for the notion that punishment, as commonly understood, cuts across the division between civil and criminal law. Thus, the issue faced in Austin (at least in an excessive fines context), was not "whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment."

Though the Court recognized that forfeitures may be partly remedial, it adopted the Halper punishment analysis, that is, where "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, [it] is punishment."

Looking at the history of statutory forfeiture in the United States, and specifically at the language, provisions, and legislative history of 21 U.S.C. § 881(a)(4), (7), the Court found nothing "to contradict the historical understanding of forfeiture as punishment." Because both statutes provided an "innocent owner" defense, Congress chose to tie forfeiture directly to the commission of drug offenses, and "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of

46. Austin, 113 S. Ct. at 2804–05.
47. Id. at 2805 (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 266–67, 275 (1989)).
48. Id. at 2805 (citing United States v. Halper, 490 U.S. 435, 447–48 (1989)).
49. Id. at 2806. The Court further went on to distinguish the Kennedy and Ward cases as only applying when a civil penalty rose to such a level that the safeguards that attend a criminal prosecution should be required. "In addressing the . . . question whether punishment is being imposed, the Court has not employed the tests articulated in Mendoza-Martinez and Ward." Id. at 2806 n.6.
50. Id. at 2806 (quoting Halper, 490 U.S. at 448.)
51. Id. at 2810.
52. See 21 U.S.C. § 881(a)(4)(C) (1994) ("[N]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."). See also 21 U.S.C. § 881(a)(7) ("[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.").
punishment and deterrence," the Court found that the statutes imposed "punishment" for application of the Excessive Fines Clause.\textsuperscript{55}

The \textit{Austin} Court recognized that the "categorical" approach it adopted was at odds with the case-by-case, fact-specific approach advocated in \textit{Halper}. It distinguished \textit{Halper} by noting that \textit{Halper} involved fixed-penalty provisions, which ordinarily "do no more than make the Government whole."\textsuperscript{56} Such an approach was inappropriate for forfeitures where the value of the conveyances and real property forfeitable could "vary so dramatically that any relationship between the Government’s actual costs and the amount of the sanction is merely coincidental."\textsuperscript{57}

\section*{C. Department of Revenue v. Kurth Ranch}

In the next major double jeopardy controversy, \textit{Department of Revenue v. Kurth Ranch},\textsuperscript{58} the Supreme Court applied the "categorical approach" formulated in \textit{Austin}. It held that a tax on the possession of illegal drugs assessed after the State imposed a criminal penalty for the same conduct violated the constitutional prohibition of "successive punishments" for the same offense.\textsuperscript{59} As in \textit{Austin}, the Court examined the history and structure of the civil sanction and concluded that because it could be "fairly characterized as punishment," it was subject to the Double Jeopardy Clause.\textsuperscript{60}

In \textit{Kurth Ranch}, the defendants operated a marijuana growing operation out of the family farm in central Montana.\textsuperscript{61} Approximately two weeks after the Montana Drug Tax Act\textsuperscript{62} went into effect, the State raided the farm and shut down the operation. In the Supreme Court’s opinion, this gave rise to four separate and distinct legal proceedings: (1) criminal charges filed in the Montana District Court; (2) civil

\textsuperscript{54} \textit{Austin}, 113 S. Ct. at 2812 n.14 (citing United States v. Halper, 490 U.S. 449 (1989)).

\textsuperscript{55} \textit{See also} Alexander v. United States, 113 S. Ct. 2766 (1993) (decided on the same day as \textit{Austin}, remanding criminal forfeiture to district court for application of Excessive Fines Clause).

\textsuperscript{56} \textit{Austin}, 113 S. Ct. at 2812 n.14.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} 114 S. Ct. 1937 (1994).

\textsuperscript{59} \textit{Id.} at 1940.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.} at 1942.


\textsuperscript{63} \textit{Kurth Ranch}, 114 S. Ct. at 1942.
forfeiture of cash and equipment;\textsuperscript{64} (3) assessment of the Montana “drug tax”;\textsuperscript{65} and (4) a Chapter 11 bankruptcy petition.\textsuperscript{66}

The Kurths challenged the constitutionality of the drug tax during the bankruptcy proceedings, and the bankruptcy court concluded that the assessment was invalid under the Federal Constitution as a violation of double jeopardy.\textsuperscript{67} The bankruptcy court, though ostensibly relying on \textit{Halper}, applied an \textit{Austin}-like analysis and examined both the historical understanding of drug tax laws as penal, and the retributive and deterrent nature of the Montana drug tax statute before it. The district court affirmed the bankruptcy court, and concluded that the Montana Dangerous Drug Act “simply punishes the Kurths a second time for the same criminal conduct.”\textsuperscript{68} The appeals court also affirmed, although it was not willing to hold the tax unconstitutional per se.\textsuperscript{69} The appeals court recognized that the central inquiry under \textit{Halper} is whether the sanction imposed is related to the damages the government suffered.\textsuperscript{70} Because the State refused to offer evidence as to its “damages,” the court found the tax unconstitutional as applied to the Kurths.\textsuperscript{71}

The U.S. Supreme Court affirmed, resting its decision both on \textit{Halper}’s “multiple punishments” theory and on the “successive proceeding” arm of the Double Jeopardy Clause.\textsuperscript{72} Analyzing the structure of the tax statute, the Court noted several unusual features. The “so-called” tax was conditioned on the commission of a crime, showing “penal and prohibatory intent” as opposed to a simple intent to gather revenue.\textsuperscript{73} The tax was exacted only after the taxpayer had been arrested for the “taxable activity”: “Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.”\textsuperscript{74} The same sovereign that criminalized the activity

\begin{itemize}
\item \textsuperscript{64} The respondents settled the forfeiture action prior to this case. \textit{Id.}
\item \textsuperscript{65} The Montana Department of Revenue assessed a total of $894,940.99 in taxes on marijuana plants, harvested marijuana, hash tar, and hash oil, and interest and penalties. \textit{Id.} at 1942–43 & n.10.
\item \textsuperscript{66} 11 U.S.C. § 362(a) (1994).
\item \textsuperscript{67} \textit{Kurth Ranch}, 114 S. Ct. at 1943.
\item \textsuperscript{68} \textit{Id.} (quoting \textit{In re Kurth Ranch}, 1991 WL 365065 at *4 (Bankr. D. Mont. Apr. 23, 1991)).
\item \textsuperscript{69} \textit{Id.} at 1943–44.
\item \textsuperscript{70} \textit{In re Kurth Ranch}, 986 F.2d 1308, 1310–12 (9th Cir. 1993).
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Kurth Ranch}, 114 S. Ct. at 1947 n.21 (“[T]he statute [does not] require us to comment on the permissibility of ‘multiple punishments’ imposed in the same proceeding, since it involves separate sanctions imposed in successive proceedings.”) (citations omitted).
\item \textsuperscript{73} \textit{Id.} at 1947.
\item \textsuperscript{74} \textit{Id.}
\end{itemize}
imposed the tax,75 and although the tax was nominally "a tax on the possession and storage of dangerous drugs" it was levied against goods that were neither owned nor possessed by the taxpayer at the time it was imposed.76 In short, the Court concluded that "this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis."77

Once it ruled that Montana's tax statute was fairly characterized as punishment,78 the Court rejected application of Halper's proportionality doctrine. While in Halper the Court recognized that a civil penalty may be imposed as a remedy for actual costs to the state attributable to the defendant's conduct, Halper's method of determining whether the sanction was remedial or punitive simply did not work in the case of a tax statute.79 Because the formula that Montana used to compute the tax assessment would be the same regardless of the amount of the State's damages, if any, "[s]ubjecting Montana's drug tax to Halper's test for civil penalties is therefore inappropriate."80 Or to put it another way the amount of the tax imposed could "vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental."81

The Court's conclusion also suggested that Montana's tax should be barred as a "successive prosecution":

This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead, it is a second punishment within the contemplation of a constitutional protection that has "deep roots in our history and jurisprudence," and therefore must be imposed during the first prosecution or not at all. The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time "for the same offense."82

75. Id. at 1947 n.22.
76. Id. at 1948 (quoting Mont. Code Ann. § 15–25–111 (1987)).
77. Id.
78. Id.
79. Id. (citing id. at 1950 (Rehnquist, C.J., dissenting)).
80. Id.
Kurth Ranch was a 5-4 decision. Chief Justice Rehnquist felt that the tax should be treated not as punishment, but as a "genuine tax," something akin to a "sin tax" for double jeopardy purposes. Justice O'Connor felt that the Halper proportionality doctrine should apply. Justice Scalia, joined by Justice Thomas, would have gone further by overruling Halper as erroneously decided and scrapping the multiple punishment component of double jeopardy entirely. In Justice Scalia's opinion, the multiple punishments protection does not exist, and all cases citing it merely repeat dictum. Where the legislature authorizes successive punishments, a defendant's recourse should be to due process, to keep the punishment within legislatively established bounds, and to the Cruel and Unusual Punishments and Excessive Fines Clauses, to limit what those bounds may legitimately be.

Commenting that the holding in Halper produced "results too strange for judges to endure, and regularly demands judgments of the most problematic sort," Justice Scalia predicted that future cases "will demand much more of us: disallowing criminal punishment because a civil sanction has already been imposed." Based on the perceived "social costs" of enforcing what he considered a "fictional" multiple punishments right, he would overrule Halper and hold that the Double Jeopardy Clause only prohibits successive prosecutions, not multiple punishments.

Nor did Justice Scalia accept that what was being decided in Kurth Ranch was really a "successive prosecutions" case. If the majority opinion implied that any proceeding which evokes the multiple-punishments component of the Double Jeopardy Clause is a criminal prosecution, that assumption would ignore the standards set by the court in both Kennedy v. Mendoza-Martinez and United States v. Ward. As the test of when a civil prosecution arises to the level of criminal prosecution for double jeopardy purposes, "Halper's focus on whether the sanction serves the goals of 'retribution and deterrence' is just one

83. Id. at 1952 (Rehnquist, C.J., dissenting).
84. Id. (O'Connor, J., dissenting).
85. Id. at 1955–56 (Scalia, J., dissenting).
88. Id. (emphasis in original).
89. Id. at 1958–59.
91. 448 U.S. 242 (1980).
factor in the *Kennedy-Ward* test . . . and one factor alone is not dispositive." Justice Scalia would apply *Kennedy-Ward* to the Montana tax proceeding and hold that it did not constitute a criminal prosecution warranting double jeopardy protection.

**III. FOLLOWING THE NOTION WHERE IT LEADS**

Taken together, *Halper*, *Austin*, and *Kurth Ranch* revolutionize how the Supreme Court will treat ostensibly civil sanctions. By focusing on the actual intended effect of a sanction, the Court has adopted a much more realistic approach than mere acquiescence to the "civil" label attached by Congress. By revivifying the long-dormant multiple punishments component of the Double Jeopardy Clause, the Court managed to artfully avoid the pitfalls it set for itself in over sixty years of double jeopardy jurisprudence. While they do not overrule prior precedents, these cases represent a pragmatic response to the overuse, and sometimes abuse of civil sanctions as a supplement to criminal punishment. To the extent that these abuses are the result of the Court's prior unwillingness to attach constitutional protections to "quasi-criminal" proceedings, thereby making so-called "civil" remedies more appealing to Congress and law enforcement, this shift is long overdue.


93. Id. at 1960.

94. According to Justice Scalia, only two cases prior to *Halper* relied on the multiple punishments arm of the Double Jeopardy Clause, and then, only in part. *Id.* at 1956–57 (citing *Ex Parte Lange*, 85 U.S. 163 (1873); *In re Bradley*, 318 U.S. 50 (1943)).


96. See, e.g., *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). The Court stated:

The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

"We must significantly increase production to reach our budget target."

"... Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990."

*Id.* at 502 n.2 (quoting Executive Office for United States Attorneys, U.S. Dep't of Justice, 38 United States Attorney's Bull. 180 (1990)).
However, even though Justice Scalia might ultimately be wrong, he does raise a valid issue—by avoiding the successive proceedings issue entirely, *Halper* has raised fundamental questions about the function of the multiple punishments component of the Double Jeopardy Clause. Given the current focus on the ultimate goal of a statutory sanction, i.e., whether or not the sanction was designed, even in part, for retribution or deterrence, the nature of the proceeding it is imposed in becomes irrelevant. Thus, application of a multiple punishment test essentially renders the successive proceedings component redundant. This is especially so considering the fact that multiple punishments are permissible when imposed within the confines of a single proceeding.97 Only when multiple punishments are imposed in separate, successive proceedings may the multiple punishments component of double jeopardy operate. And when it does, it not only bars the second unconstitutional punishment, but may also bar the proceeding that would ultimately impose it.98

But that does not mean that the multiple punishments component of the Double Jeopardy Clause is inconsistent with the separate proceedings components. If there were no multiple punishment prohibition under double jeopardy, why would successive proceedings be barred? If multiple punishments are allowed, it would not make sense to prohibit the proceedings that would impose them. Conversely, it would be a strain to imagine that the framers of the Double Jeopardy Clause intended to prohibit the government from bringing separate proceedings that bore no adverse consequences for the defendant whatsoever.99 It is only the threat

98. See, e.g., *Witte v. United States*, 115 S. Ct. 2199, 2204–05 (1995) (holding that where a defendant is not yet twice convicted, multiple punishment claim is ripe for appellate review); *United States v. Chick*, 61 F.3d 682, 686 (9th Cir. 1995) (holding that a defendant should not be forced to endure personal strain, public embarrassment, and expense of criminal trial where there is colorable claim that Double Jeopardy Clause will be violated), cert. denied, 1996 WL 730101 (U.S. Apr. 15, 1996).

  Why is it that, having once been tried and found guilty, [a criminal defendant] can never be tried again for that offence? Manifestly, it is r.ot the danger or jeopardy of bcing a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is nct its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
of a successive punishment brought in a separate proceeding that would force a defendant to go through the "harassment" of a successive trial, or "marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." Viewing the separate proceedings components as simply barring the process by which punishment is meted out, the Double Jeopardy Clause can be seen as really offering two protections: it protects against the threat of punishment after acquittal and against the threat of successive punishments. By necessary implication, it must also protect against the successive punishment itself.

Unfortunately, this has not always been the case. The current direction the Supreme Court is moving conflicts with its prior holdings in One Lot Emerald Cut Stones v. United States and United States v. One Assortment of 89 Firearms. In both cases, defendants were tried and acquitted in criminal proceedings, then later subjected to separate civil forfeiture proceedings based on the "remedial" purposes of removing the res from circulation. Both cases relied on Helvering v. Mitchell for the proposition that the Double Jeopardy Clause only prohibits "punishing twice, or attempting a second time to punish criminally, for the same offense."

Both cases deferred to the civil labels given their respective forfeitures by Congress - because the second proceedings or punishments were not "criminal," they were allowed. Both cases perceived their respective forfeitures as broadly remedial, "in spite of their comparative severity."

This new emphasis on successive punishment has developed incrementally over several cases, however, the Court seems satisfied with its result. In lieu of the traditional double jeopardy formulation found in

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The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it.

101. See Witte, 115 S. Ct. at 2204 (holding that Double Jeopardy Clause serves function of preventing both successive punishment and successive prosecution).
104. In the case of Firearms, eighty-nine firearms were found in the possession of an unlicensed dealer. 465 U.S. at 355–56; and in Emeralds, precious stones and jewelry were allegedly smuggled into the United States, 409 U.S. at 232–33.
105. 303 U.S. 391, 399 (1938).
106. Id.; Firearms, 465 U.S. at 360; Emeralds, 409 U.S. at 235–36.
North Carolina v. Pearce, the Court now offers a different explication of the Double Jeopardy Clause—now the clause serves the function of preventing both successive prosecution and successive punishment. Given the Court’s increasing reluctance to rely on civil labels given to quasi-criminal sanctions, cases such as Helvering, Rex Trailer, Emeralds, and Firearms have become anachronistic and contrary to current Court doctrine. Insofar as they are inconsistent with Halper, Austin, and Kurth Ranch, they should be overruled.

As has been shown, after Halper, the factors that drove the Court in Helvering, Emeralds, and Firearms no longer motivate it today. Congress’s intent in labeling a proceeding is irrelevant in the multiple or successive punishments context. It is the intent to impose a second punishment, either civil or criminal, that is dispositive in bringing down the double jeopardy bar. After Austin, it is insufficient for a sanction to serve a “roughly remedial” purpose; any non-remedial punitive intent renders a sanction punishment. That Austin’s categorical test has displaced Halper’s proportionality analysis where statutory forfeiture allows an amount of recovery that is merely fortuitous, or coincidental to the Government’s costs, is shown in Kurth Ranch.

Many courts were quick to pick up on the implications of the Halper, Austin, and Kurth Ranch line of cases. In United States v. Torres, the defendant sought reversal of his criminal conviction on double jeopardy grounds. The Seventh Circuit observed that as the result of a drug “sting” operation, the Government brought separate criminal and administrative proceedings, and issued a warning:

With the benefit of Austin and Kurth Ranch, both of which were decided after this prosecution began, the prosecutor doubtless can see the hazards of such an approach. The United States would do well to seek imprisonment, fines, and forfeiture in one proceeding. When choosing between civil and criminal forfeitures, the prosecutor will have to recall

113. 28 F.3d 1463, 1464 (7th Cir.), cert denied, 115 S. Ct. 669 (1994).
that after *Halper, Austin*, and *Kurth Ranch* the nomenclature "civil" does not carry much weight.\(^{114}\)

However, Torres also received notice inviting him to make a claim in the forfeiture proceeding, but did not do so. Because he failed to claim the money seized in the drug transaction, in the court's opinion, he did not become a party to the forfeiture. Because there was no opposition to the forfeiture, there was no trial, and jeopardy did not attach. Torres was not at risk in the forfeiture proceeding, and ""[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.""\(^{115}\)

Likewise, in *United States v. Tilley*,\(^{116}\) (a pre-*Kurth Ranch* case), the Fifth Circuit denied the defendant's double jeopardy challenge to his conviction based on a stipulated forfeiture of approximately $650,000 worth of cash, certificates of deposit, automobiles, and other personal property. The court recognized that:

The pending criminal trial in this case, if it results in a conviction, would, of course, subject the defendants to punishment. Thus, if the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a ""punishment,"" the Double Jeopardy Clause will bar the pending criminal trial.\(^{117}\)

The court refused to consider the *Austin* analysis in determining whether the civil forfeiture constituted a ""punishment"" for double jeopardy purposes. It narrowly read *Austin* as only involving forfeitures of conveyances and real estate, and not the forfeiture of drug proceeds.\(^{118}\) Instead, the court applied a *Halper*-like proportionality analysis to determine that the amount of the sanction was not ""overwhelmingly disproportionate"" to ""the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combating the allure of illegal drugs, caring for the victims of the criminal trade . . . etc.""\(^{119}\) Estimating the costs of the illicit drug trade to the government and society at $60 billion to $120 billion per year, the court found a

\(^{114}\) *Id.* at 1464–65.

\(^{115}\) *Id.* at 1465 (quoting *Serfass v. United States*, 420 U.S. 377, 389 (1975)).

\(^{116}\) 18 F.3d 295 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

\(^{117}\) *Id.* at 297–98.

\(^{118}\) *Id.* at 300.

\(^{119}\) *Id.* at 299.
$650,000 sanction "not 'overwhelmingly disproportionate' on a national level" and roughly remedial for the Halper test. Beyond its "proportionality" analysis, the Tilley court held that the forfeiture of the proceeds from illegal drug sales nevertheless was not punishment because it did not involve the extraction of lawfully derived property from the forfeiting party.

When, however, the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. . . . The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.

Comparing the forfeiture of proceeds from drug sales to the seizure of proceeds from the robbery of a federal bank, the court found that such a forfeiture "merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme."

Finally, in United States v. $405,089.23 U.S. Currency, the Ninth Circuit Court of Appeals held that the Double Jeopardy Clause barred the civil forfeiture of property seized following a claimant’s criminal convictions on various counts of conspiracy and money laundering. Relying heavily on Jeffers v. United States, Austin, and Halper, the court asked two questions: (1) whether the civil forfeiture action and the claimant’s criminal prosecution constituted separate "proceedings," and (2) whether civil forfeiture under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constituted "punishment." Answering the first question

120. Id. Cf. United States v. 6380 Little Canyon Rd., 59 F.3d 974, 96 (9th Cir. 1995) (disproportionately large forfeitures cannot be reasonably justified as civil fines by placing full responsibility for the "war on drugs" on the shoulders of every individual defendant); United States v. 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir.), cert. denied, 506 U.S. 815 (1992) (same).
121. Tilley, 18 F.3d at 300.
122. United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), modified on denial of motion for rehearing en banc, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996).
123. Id. at 1214. Claimants were accused of conducting a large-scale methamphetamine manufacturing operation, and laundering the money through a series of front corporations to make it look like they were successfully engaged in gold mining activities. Id.
125. Both statutes provide for the forfeiture of drug "proceeds." 21 U.S.C. § 881(a)(6) states: All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this
affirmatively, the court held that the forfeiture violated both of the Double Jeopardy Clause's proscriptions against successive prosecutions and multiple punishments.\textsuperscript{126} The court rejected the government's argument that parallel criminal and civil cases did not constitute "separate proceedings" for double jeopardy purposes. It observed that the civil forfeiture had been awarded the government over a year after the criminal convictions, by a different district judge, because of the property's connection with the same offenses that resulted in the defendant's criminal punishment.\textsuperscript{127}

The court then proceeded to the second part of its test—whether the civil forfeiture statute in question constituted "multiple punishment." Turning its attention to \textit{United States v. One Assortment of 89 Firearms},\textsuperscript{128} the court stated that "[a] decade ago, the law was clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes."\textsuperscript{129} However, \textit{Firearms} relies on the \textit{United States v. Ward}\textsuperscript{130} test, "which focused heavily on the label Congress had attached to a particular sanction. If Congress indicated a preference that the proceeding be denominated 'civil' rather than 'criminal,' the Court

\textsuperscript{126} 18 U.S.C. § 981(a)(1)(A) provides for the forfeiture of "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation . . . of this title, or any property traceable to such property."

\textsuperscript{127} Id. at 1215. The court stated:

Whatever other abuses the Clause prohibits, at its most fundamental level it protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts."

\textit{Id.} (quoting Abbatte v. United States, 359 U.S. 187, 198–99 (1959) (Brennan, J., concurring)).


\textsuperscript{129} 448 U.S. 242, 248 (1980).
would defer to that preference except in extraordinary circumstances."\textsuperscript{131} In the Ninth Circuit's opinion, the Supreme Court abandoned the \textit{Ward} approach in favor of the test it formulated in \textit{Halper}:\textsuperscript{132} "[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 . . . ."\textsuperscript{133} This approach was buttressed, in the $405,089.23 court's view, in \textit{Austin v. United States},\textsuperscript{134} which again generally holds that civil forfeitures constitute a form of punishment.

Although \textit{Austin} was an Eighth Amendment Excessive Fines Clause case, to determine whether the clause applied, the Court first needed to determine whether the forfeiture statutes constituted punishment. By using the \textit{Halper} double jeopardy analysis, the \textit{Austin} Court established that if a forfeiture constitutes punishment under the \textit{Halper} criteria, it constitutes punishment for the purposes of both the Excessive Fines and Double Jeopardy Clauses.\textsuperscript{135}

Additionally, the Ninth Circuit rejected the Government's argument that because the forfeiture involved only narcotics proceeds, the forfeiture was entirely remedial.\textsuperscript{136} The panel interpreted the legal standard set by \textit{Austin} as requiring an examination of the scope of the statute, rather than the characteristics of the property the government is trying to forfeit.\textsuperscript{137} Even if the forfeiture statutes involved were only concerned with the forfeiture of illegal proceeds, the court found that the

\begin{itemize}
\item \textsuperscript{131} $405,089.23, 33 F.3d at 1218.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} United States v. Halper, 490 U.S. 435, 448 (1989) (distinguishing successive proceedings cases from multiple punishments cases).
\item \textsuperscript{134} 113 S. Ct. 2801, 2806, 2812 (1993) (holding that sanction need only serve in part to punish to be subject to the limitations of Excessive Fines Clause).
\item \textsuperscript{135} At least in the Ninth Circuit's opinion. $405,089.23, 33 F.3d at 1219. See also Smith, \textit{supra} note 2, \textsection 12.10[2], at 12-131 ("The Supreme Court's decision in \textit{Austin v. United States} makes it clear that \textit{Halper}'s double jeopardy protections do apply to the vast majority of civil forfeiture cases.").
\item \textsuperscript{136} $405,089.23, 33 F.3d at 1220. \textit{Cf.} United States v. Tilley, 18 F.3d 295, 299-300 (5th Cir.), \textit{cert. denied}, 115 S. Ct. 574 (1994) (adopting \textit{Halper} proportionality analysis, and holding that forfeiture of proceeds not so excessive as to render relationship between amount of proceeds and general governmental and societal costs irrational, \textit{Austin} inapplicable to proceeds forfeitures).
\item \textsuperscript{137} $405,089.23, 33 F.3d at 1220. \textit{Cf.} \textit{Halper}, 490 U.S. at 448 ("[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed, and the purposes that the penalty may fairly be said to serve.").
\end{itemize}
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legal standard established by Austin still led to the conclusion that the proceeds forfeiture statutes did not serve solely remedial purposes.

IV. THE CIRCUITS LINE UP

A. Limiting the Scope of the Double Jeopardy Challenge

To say that confusion ensued following $405,089.23 would rank as gross understatement. Several circuits have followed $405,089.23's reasoning to hold that facilitation forfeitures of real property or conveyances under 21 U.S.C. § 881(a)(4)(C) and (a)(7) would be barred by double jeopardy; many of the same circuits have relied on Tilley to hold that proceeds forfeitures under 21 U.S.C. § 881(a)(6) do not constitute double jeopardy punishment. Still others, including the Ninth Circuit, have cited Torres's rationale to deny double jeopardy protection where the defendant has failed to claim the res, some going so far as to deny the defense even where the defendant's ownership of the property could be established by other means.

However, given the Supreme Court's recent emphasis on the multiple, or successive punishment prohibition, reliance on Tilley is questionable at best; Torres, a "successive prosecutions" case, is inconsistent and must be overruled. Though there is an instinctive appeal to the argument raised in Tilley that forfeiture of drug proceeds is not a punishment worthy of double jeopardy protection, there remains at its core a flawed set of assumptions that make the argument untenable. It remains a fundamental tenet in our jurisprudence that a criminal defendant is innocent until

138. I.e., looking at the historical understanding of forfeiture as punishment, the punitive purpose inferred from the focus of the statutes on the owner's culpability, and the congressional intent to "deter" and "punish." Austin v. United States, 113 S. Ct. 2801, 2812 (1993).

139. $405,089.23, 33 F.3d at 1220–21. See also Austin, 113 S. Ct. at 2811–12 (1993).


141. United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160, 1169 (3d Cir. 1995); United States v. Clementi, 70 F.3d 997, 999 (8th Cir. 1995); United States v. Salinas, 65 F.3d 551, 554 (6th Cir. 1995); Baird, 63 F.3d at 1217.

142. $184,505.01, 72 F.3d at 1167; United States v. Washington, 69 F.3d 401, 403 (9th Cir. 1995); Baird, 63 F.3d at 1218–19; United States v. Areola-Ramos, 60 F.3d 188, 192 (5th Cir. 1995).

proven guilty. The government has the burden of proving this guilt beyond a reasonable doubt, and a criminal defendant is entitled to certain rights and protections. By using civil forfeiture to seize property, including drug proceeds, the government is allowed to shift that burden. Once the government shows "probable cause" to believe that money (property, etc.) was linked to illegal activity, the defendant must prove by a preponderance of the evidence that it was not. As previously stated, this "burden shifting" is allowed under the fiction that the government is in fact punishing guilty property, regardless of the innocence or guilt of the criminal defendant. However, in tilley, the court assumed the defendant's guilt before any adjudication was ever made.

In the tilley court's opinion, the government is free to seize property "not derived from lawful activities," because the forfeiting party loses nothing to which he was entitled. While this argument blithely assumes that no drug purchaser earned his money lawfully, (as contrasted with the seller), it also stacks the deck against a defendant who has to prove by a preponderance of the evidence that his property was legally derived. For the sake of argument, assuming that an alleged purchaser could easily prove that he earned his drug money legally, regardless of his alleged criminal spending habits, would he enjoy double jeopardy protection from the forfeiture when his counterpart, the alleged drug dealer, would not? Even a verdict of not guilty does not save a defendant—an acquittal may not be proof enough to warrant return of the forfeited property.

145. Such rights include protections against self-incrimination, right to court-appointed counsel, and trial by jury, to name but a few.
146. This can be a very light burden. It has been estimated that up to 97% of all U.S. currency is tainted with cocaine residue, sufficient to alert a trained dog to its presence. See United States v. $639,558 in U.S.-Currency, 955 F.2d 712, 714 n.2 (D.C. App. 1992).
148. Id. at 300. See supra text accompanying note 122.
149. 21 U.S.C. § 881(a)(6) by its language, contemplates forfeiture of moneys, negotiable instruments, securities, things of value "furnished or intended to be furnished by any person in exchange for a controlled substance." This presumably applies to either side of a drug transaction.
Moreover, because the Supreme Court has undermined the validity of facilitation forfeitures on double jeopardy grounds, the government may recast such claims as proceeds or “instrumentality” forfeiture claims. Because only a dim criminal would segregate house or car payments into those made with legally earned income versus those made with illicit drug money (and only a dimmer criminal would admit it), the government may be able to use proceeds forfeitures to seize property purchased in large part with legitimate income.

Although it is not unreasonable to assume that drug proceeds are inherently proportional to the damages caused by the illegal activity, thereby making their forfeiture “remedial,” that doesn’t end the inquiry. Under *Austin*, a forfeiture can be perfectly proportional to the harm caused and still be punishment, so long as it also serves deterrent and retributive purposes. Given this caveat, there is no reason not to perform the statutory analysis given proceeds forfeitures in $405,089.23.

Again, looking at the factors enunciated in *Austin*, there is no reason to overcome the “strong presumption” that the forfeiture provision does not serve a solely remedial purpose.

Finally, if civil forfeiture cases truly fall within the Double Jeopardy Clause’s multiple punishments/successive punishments proscription, then *United States v. Torres* deserves to be revisited. In *Torres*, the defendant was caught attempting to purchase three kilograms of cocaine from undercover agents with $60,000 in cash. Federal agents arrested the defendant and seized the cash. Torres, though notified, failed to make a claim in the civil forfeiture proceeding and forfeited the property. Torres later pled guilty to the criminal charges and was sentenced to over

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151. See *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 490–91 (2d Cir. 1995) (government sought to forfeit auto shop as “instrumentality” of criminal activities, without regard to legitimate business on same premises).


155. $405,089.23, 33 F.3d at 1220–21. See also *Wood v. United States*, 863 F.2d 417, 421 (5th Cir. 1989) (holding that forfeiture of drug proceeds under 21 U.S.C. § 881(a)(6) “cannot be seriously considered anything other than an economic penalty for drug trafficking”). Though five years earlier, *Wood* was decided by the same panel that decided *Tilley*.

156. 28 F.3d 1463 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994).

157. *Id.* at 1464.

158. *Id.* at 1465.
six years in prison.\textsuperscript{159} He then attacked his conviction on appeal, arguing that double jeopardy barred it by virtue of the prior forfeiture.\textsuperscript{160}

Essentially, the court decided against Torres on a “successive prosecution” theory. Because Torres did not file a claim to the currency, he was not a party to the first proceeding. Under the Seventh Circuit’s theory of double jeopardy, jeopardy does not attach without a proceeding, that is, without the risk of a determination of guilt.\textsuperscript{161} This was buttressed, in the court’s view, by the nature of the seized property. Without the defendant’s participation in the civil forfeiture, the court had no way of knowing whether he had any property interest in the currency. Had he no interest in the currency, he could not be penalized by its forfeiture.\textsuperscript{162}

This illustrates one of the problems with being subjected to a civil forfeiture prior to a criminal proceeding. Civil forfeiture may make available to law enforcement a wide range of discovery procedures otherwise unavailable in the criminal context.\textsuperscript{163} As in a civil suit, the law enforcement authorities may take depositions and compel the production of documents. Refusal to answer questions on Fifth Amendment self-incrimination grounds may lead to “adverse factual determinations.”\textsuperscript{164} Answering questions posed in the civil proceeding may provide grist for the criminal trial.\textsuperscript{165} In short, the Torres court’s approach requires defendant to either forfeit his property without the government having to make any showing of illegality or run a much greater risk of self-incrimination than he would in a criminal trial alone.\textsuperscript{166}

Further, the holding in Torres undermines the Supreme Court’s “successive punishments” prohibition. If jeopardy can only attach to a criminal defendant in proceeding, it makes no difference whether multiple, successive punishments were imposed or not.\textsuperscript{167} Under the

\textsuperscript{159} Id. at 1464.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 1465 (citing Serfass v. United States, 420 U.S. 377, 391–92 (1975)).
\textsuperscript{162} Id. at 1465–66.
\textsuperscript{163} Kessler, supra note 7, § 2.03, at 2–6.
\textsuperscript{164} Id. at 2–7.
\textsuperscript{165} But see United States v. Cretacci, 62 F.3d 307, 311 (9th Cir. 1995) (holding that defendant does not incriminate himself by claiming that he owns property subject to forfeiture).
\textsuperscript{166} In addition to the Double Jeopardy Clause, the Fifth Amendment also provides that a person shall not “be compelled in any criminal case to be a witness against himself.” U.S Const. amend. V.
\textsuperscript{167} Serfass v. United States, 420 U.S. 377 (1975), upon which Torres relies, was a “successive prosecutions” case of the purest sort. In Serfass, the defendant/petitioner was indicted to failing to report for and submit to induction into the armed forces. The district court granted
Torres court’s reasoning, a defendant may be punished repeatedly, so long as those punishments are not brought in a “proceeding,” an outcome which must certainly raise due process concerns. Alternatively the court may be saying that unless a sanction is imposed after a judicial proceeding, it is not punishment. Either interpretation creates a distasteful result.

Instead, the focus should be on whether the $60,000 forfeiture was intended to punish the defendant’s behavior. If it was, it should not matter whether the defendant was party to the proceeding or not. (Arguably, if the defendant had submitted a claim, it would be considered punishment.) The government’s intent behind the forfeiture does not change merely because a defendant fails to file a claim in a forfeiture proceeding.

Again, the traditional reasoning in these situations states that the guilt of the owner is not relevant—it is the guilt of the forfeited property that is germane: “'[F]orfeiture is not tied to or dependent upon the wrongdoing of the owner of the monetary instruments.’”168 Consequently, the argument is that the first punishment is directed at the property itself and the second punishment at the individual.

However, the Supreme Court has intimated that reliance on that statutory in rem forfeitures and especially the “guilty property” fiction would no longer suffice.169 In reality, the guilty property fiction rests on the premise “that the owner who allows his property to become involved in an offense has been negligent.”170 Explaining the technical distinctions between in rem and in personam proceedings as primarily developed to expand a court’s jurisdiction over a property’s absentee owner, the court cautioned that reliance on such technicalities “would be misplaced.”171

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168. United States v. United States Currency in the Amount of $145,139.00, 18 F.3d 73, 74 (2d Cir.) (quoting United States v. $6,700, 615 F.2d 1, 3 (1st Cir. 1980)), cert. denied, 115 S. Ct. 72 (1994).


170. Id.

171. Id. at 2809 n.9. This view has been undercut, somewhat, by the Supreme Court’s recent holding in Bennis v. Michigan, 116 S. Ct. 994 (1996) (rejecting innocent owner defense by relying, in large part, on historical pedigree of guilty property fiction).
Though the Court may not be ready to abandon the guilty property fiction entirely, it must still be recognized that a forfeiture is ultimately a determination of a defendant's culpability. Even though in *Torres* the court could not prove, absent defendant's filing a claim, that the currency belonged to the defendant, *Torres* has been repeatedly applied to cases where the property being forfeited could easily be traced to the claimant via automobile titles, deeds of trust, bank accounts, or bills of sale. Under such circumstances, it is difficult to envision how a forfeiture does not act as a determination of a defendant's culpability or how the defendant avoids a second "sting of punishment."

Perhaps recognizing the problems inherent in *Torres*'s approach, one court has advanced a different rationale for denying double jeopardy protection in this situation—namely, where a defendant fails to file a claim in a civil forfeiture proceeding, he abandons his property, relinquishing "all right, title, claim, and possession." Still, abandonment requires an element of intent—one must abandon one's property with no intention of reclaiming it or resuming its ownership, possession, or enjoyment in the future. Where, as in the case discussed, a jailed defendant is required to post a cost bond totaling thousands of dollars together with a claim of ownership to contest the claim in court, a failure to file a claim of ownership may not show so much an intent to relinquish his property interest as an inability to pay the requisite bond.

But what is really going on in cases such as *Torres* and *Cretacci* is that the circuits are scrambling to find ways to deny retroactivity to the double jeopardy principles laid out in *Halper*, *Austin*, and *Kurth Ranch*. By emphasizing the historical understanding of forfeiture as punishment and the basis for the "successive punishments" doctrine in established case law, the Supreme Court has made it possible to argue that hundreds of civil forfeiture/criminal prosecution cases were unconstitutionally

175. *Cretacci*, 62 F.3d at 310–11, (citing *Black's Law Dictionary* 2–3 (5th ed. 1579)).
decided. Where the application of the Double Jeopardy Clause may result in a convicted criminal going free, the circuits seem extremely reluctant to give it a liberal construction.

V. CONCLUSION

Over the past several years the punitive nature of "civil forfeiture" has led to severe criticism of it in the press, and has reminded the Supreme Court of its early admonition: "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." Even Congress has recognized its harsh, punitive effect. Since 1993, Congress has been working on civil forfeiture reform legislation that would remedy the most egregious aspects of the current law.

In light of the emerging consensus against quasi-criminal sanctions, and civil forfeitures in particular, the Supreme Court's rulings in Halper, Austin, and Kurth Ranch, and their application in $405,089.23, should not be viewed as terribly shocking. Instead, these rulings should be understood as a common sense development in the law. By looking behind the sanction to its actual intended effect, the Court may finally bring some reason to double jeopardy interpretation, and insure that law enforcement will no longer be able to deny a defendant's rights based on historical fiction. Although the holdings in Halper, Austin, and Kurth Ranch may produce "judgments of the most problematic sort," the solution is not to deny a defendant basic constitutional protections guaranteed by the Bill of Rights. As the Supreme Court has previously stated, "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

178. See, e.g., Schneider & Flaherty, supra note 6.
180. Among other things, proposed legislation would shift the burden of proof to the government to show by "clear and convincing evidence" that the unlawful act on which the forfeiture was based actually occurred; appoint legal counsel for indigent defendants in civil forfeiture proceedings; clarify innocent owner defenses; extend the time period for contesting forfeiture; and allow recovery for damages caused by negligent handling or storage of property detained by law enforcement officers. See Hyde, supra note 5, at 80–84.