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INTRODUCTION

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

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


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

\(^5\) See infra note 14 and accompanying text.


\(^7\) Although some state courts have found that the protection against double jeopardy insulates criminally prosecuted defendants from civil prosecutions in separate proceedings, see Matt Schwartz, Court Ruling Likely to Alter War on Drugs; Says Forfeiture of Assets can be Double Jeopardy, THE HOUSTON POST, July 23, 1994, at A1 (some Texas courts so hold); Russell
U.S. Currency, the United States Court of Appeals for the Ninth Circuit became the first federal court of appeals to hold that the Double Jeopardy Clause bars parallel civil and criminal suits arising from the same offense.

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

I. BACKGROUND: DOUBLE JEOPARDY JURISPRUDENCE GENERALLY

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

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

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

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


14 U.S. CONST. amend. V.
legal tradition." Although the First Congress debated the scope of the protection against multiple trials and punishments, "[t]he need for the principle's general protection was undisputed." Over the years, a general understanding of the protection developed.

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

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

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16 Id. at 201.
17 See, e.g., id. at 187 ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . .").
20 Jahncke, supra note 19, at 134-35; Dallet, supra note 19, at 242.
21 Foremost among the exceptions is that a court may impose multiple punishments in a single proceeding. Ohio v. Johnson, 467 U.S. 493, 500 (1984); Missouri v. Hunter, 459 U.S. 359, 366 (1983); Albemarle v. United States, 450 U.S. 333, 343-44 (1981); Whalen v. United States, 445 U.S. 684, 693 (1980). This suggests that the two protections, although distinct, work in tandem. See, e.g., Hunter at 368-69 ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial.").

Despite the codependency of the two protections, circuit court guidance for an eventual Supreme Court resolution has generally dealt with either separate proceedings or multiple punishments, but not both. See generally, e.g., S.E.C. v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994) (resolving only the multiple punishment issue); United States v. Torres, 28 F.3d 1463 (7th Cir. 1994) (expressing an opinion about separate proceedings, but resolving the case on other grounds), cert. denied, 115 S. Ct. 669 (1994); United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) (resolving only the multiple punishment issue), cert. denied, 115 S. Ct. 574 (1994);
Clause bar to successive prosecutions, the Court has long allowed retrials following successful appeals from convictions infected by trial error. The law allows the second trial, conceiving it as a continuation of jeopardy that "rest[s] on an amalgam of interests—e.g., fairness to society, lack of finality, and limited waiver, among others." As the Court explained the continuing jeopardy rationale in United States v. Burks, retrial is permitted following reversals for trial error because "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." Moreover, the Court noted in Richardson v. United States, "[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." This language "suggests that an event which terminates [original] jeopardy is a condition precedent to a defendant's assertion of a double jeopardy claim." Thus, the nonoccurrence of an event terminating original jeopardy leaves a defendant

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23 Green, 355 U.S. at 329 n.4.


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


27 Id. at 325.

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

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

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

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29 See Wang, supra note 28, at 1390.
30 See, e.g., Richardson, supra note 26, at 325 (“[J]eopardy does not terminate when the jury is discharged [merely] because it is unable to agree.”); Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984) (holding that a defendant who elects to partake in two-tier trial does not terminate original jeopardy after conviction in the first trial).
35 Id. at § 1321(b)(5).
36 Id. at § 1321(b)(6)(A).
37 Ward, 448 U.S. at 247.
38 See U.S. CONST. amend. V (“No person shall be... compelled in any criminal case to be a witness against himself...”).
40 U.S. CONST. amend. V.
41 Ward, 448 U.S. at 250-51.
labeling a statute's enforcement purpose as either civil or criminal, for both double jeopardy and self-incrimination analysis.\(^4^2\)

*United States v. One Assortment of 89 Firearms*\(^4^3\) permitted the Supreme Court to hold the *Ward* presumption applicable to the Double Jeopardy Clause. The Court did so by unanimously holding that a claimant's prior criminal trial did not bar the government's subsequent, related civil forfeiture action because Congress intended it to be "a remedial civil sanction."\(^4^4\) The Court, merely holding what it had already suggested in *Ward*,\(^4^5\) delivered a unanimous opinion.\(^4^6\)

Five years later, the Supreme Court changed the applicable test in another unanimous decision.\(^4^7\) In *United States v. Halper*, the Court held that labels attached by Congress to particular statutory sanctions were no longer presumptive determinants of whether those sanctions constitute punishment, thereby triggering the constitutional protection against double jeopardy.\(^4^8\) Unfortunately, the test that *Halper* promulgated includes confusing and contradictory language\(^4^9\) which has indirectly led to the erroneous law of the Ninth Circuit.\(^5^0\)

II. THE NINTH CIRCUIT:  
*UNITED STATES v. $405,089.23 U.S. CURRENCY*\(^5^1\)

A. THE FACTS OF THE CASE

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

\(^4^2\) See id. at 248-251 (cautioning the judiciary to carefully review a statute's construction when determining its sanction's nature or purpose—civil thus remedial, or criminal thus punitive—because of the general procedural implications in affixing the appropriate evidentiary burdens under the Sixth Amendment).


\(^4^4\) Id. at 363.

\(^4^5\) See *Ward*, 448 U.S. at 248.

\(^4^6\) See *One Assortment of 89 Firearms*, 465 U.S. at 355.


\(^4^8\) Id. at 447.

\(^4^9\) See infra Part III(B).

\(^5^0\) See infra Part II.

\(^5^1\) United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), aff'd as modified en banc, 56 F.3d 41 (9th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).
from illegal drug transactions.\textsuperscript{52} Five days later, the United States government filed a civil proceeding seeking to forfeit property worth several hundred thousand dollars.\textsuperscript{53} The property included the balances in four bank accounts, over $100,000 in cash, 138 silver bars, bonds, a helicopter, an airplane, two boats, and eleven automobiles.\textsuperscript{54} The government claimed two grounds warranted the forfeiture: the goods' status as illegal proceeds of the drug trade under 21 U.S.C. § 881(a)(6),\textsuperscript{55} and the goods' status as property used in illegal money laundering under 18 U.S.C. § 981(a)(1)(A).\textsuperscript{56} The parties agreed to suspend the civil forfeiture action until after the criminal case was resolved.\textsuperscript{57}

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

\begin{itemize}
\item[(6)] All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all money's negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.
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\textsuperscript{52} See \textit{id.} at 1214.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} 21 U.S.C. § 881(a) (1988) states:

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

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

\textsuperscript{56} 21 U.S.C. § 981(a)(1) (1988) states:

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

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

\textsuperscript{57} $405,089.23, 33 F.3d at 1214.
\textsuperscript{58} \textit{But see} United States v. Arlt, 42 F.3d 516 (9th Cir. 1994) (reversing Charles Arlt's conviction for trial error).
\textsuperscript{59} $405,089.23, 33 F.3d at 1214.
\textsuperscript{60} \textit{Id.} at 1214-15.
punishment. The Ninth Circuit agreed to hear the case on appeal, and on September 6, 1994, rendered judgment in favor of the petitioners in United States v. $405,089.23 U.S. Currency.

B. THE NINTH CIRCUIT'S RATIONALE

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

1. The Scope of the Proceeding

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

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61 See id. at 1215.
62 Id.
63 Id. at 1216.
64 Id.
65 Id.
66 Id.
67 See supra notes 18-20 and accompanying text.
68 $405,089.23, 33 F.3d at 1216.
forfeitures arising from the same offense constitute a single, coordinated prosecution for double jeopardy analysis, Judge Reinhardt stated that such a position "contradicts controlling Supreme Court precedent as well as common sense." Appealing first to common sense, Judge Reinhardt indicated that the government obtains an unfair and possibly unlawful advantage if it can persuade the district court to follow the customary practice of holding the civil forfeiture action "in abeyance pending the outcome of the criminal prosecution." If the government succeeds in obtaining a conviction, it can use that result to prevail in the civil trial with a summary judgment. If the government obtains an acquittal, it can still seek the forfeiture by urging that the civil action's more lenient rules and evidentiary burdens should apply.

Next, Judge Reinhardt revived a seventeen year old Supreme Court case, *Jeffers v. United States*, to assert that the protection against double jeopardy prohibits separate, albeit concurrent, proceedings that potentially result in separate punishments of imprisonment and financial sanctions. In *Jeffers*, the government sought to prosecute the defendant for two related criminal offenses: conspiring to distribute controlled substances and participating in a continuing criminal enterprise to violate drug laws. Jeffers opposed joining the offenses for trial and thus forced the government to prosecute the actions consecutively. He then moved to dismiss the second count on double jeopardy grounds after the district court convicted him on the first. The Supreme Court, in a divided judgment, narrowly affirmed the Seventh Circuit's rejection of Jeffers' double jeopardy argument. A four Justice plurality held that "although a defendant is normally entitled to have [multi-
ple] charges . . . resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately.”

In dissent, four Justices noted, “The Court’s disposition is especially troubling because eight Justices agree that petitioner’s constitutional right was violated and only four are persuaded that he waived his double jeopardy objection.” Following the four dissenters’ line of reasoning, the panel in $405,089.23 concluded that “the decisions of eight of the nine Justices in Jeffers rested on the common sense proposition that two parallel criminal cases, which unquestionably were brought as a part of a ‘single, coordinated prosecution,’ constituted ‘separate proceedings’ for double jeopardy purposes.”

2. The Test for Punishment

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

80 Id. at 152 (emphasis added).
81 Id. at 160 n.7 (Stevens, J., dissenting in part, and concurring in the judgment in part).
82 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218 (9th Cir. 1994), aff’d as modified en banc, 56 F.3d 41 (9th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).
83 Id.
84 Id.
85 Id. (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984)); see also United States v. Ward, 448 U.S. 242, 248 (1980) (promulgating the Ward test, which deferred the status of a sanction as either punitive or remedial to the congressional label—criminal or civil—attached to the sanction).
87 Id.
sanctions which exceed purely remedial purposes now constitute punishment for double jeopardy analysis.

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

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

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88 E.g., id. at 439 (“In the [d]istrict [c]ourt’s view, the authorized recovery of more than $130,000 bore no ‘rational relation’ to the sum of the [g]overnment’s $585 actual loss plus its costs in investigating and prosecuting Halper’s false claims.”) (citation omitted).
89 *$405,089.23*, 33 F.3d at 1218-19 (citing *Halper*, 490 U.S. at 448 (1989)).
91 See U.S. CONST. amend. VIII (“Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.”) (emphasis added).
92 *Austin*, 113 S. Ct. at 2806.
93 *$405,089.23*, 33 F.3d at 1219.
94 United States v. Tilley, 18 F.3d 295 (5th Cir. 1994), cert. denied, 115 S. Ct. 574 (1994); *Compare Tilley*, 18 F.3d at 299 ("[T]he relationship between the amount of the proceeds and the resulting governmental and societal costs [of illegal drug sales] would not exhibit the excessive quality found in *Halper* . . .") with id. at 300 ("[W]hen . . . the property taken by the government [is] not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him."). See the discussion *infra* at Part III(B).
95 *$405,089.23*, 33 F.3d at 1220-21.
96 *Austin*, 113 S. Ct. at 2812 n.14.
97 *$405,089.23*, 33 F.3d at 1220.
and punish guilty conduct." Third, the panel concluded, "[W]here Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law." Thus, these three Austin principles led Judge Reinhardt to conclude that 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) "operate at least in part to punish and deter." Additionally, the panel rejected the notion that the statutes relied upon by the government were solely remedial because they forfeited property only arising from illegal drug proceeds. On the contrary, "[r]ather than rendering only the profits of drug dealers subject to forfeiture, [21 U.S.C. § 881(a)(6)] applies to nearly any money that is involved in a narcotics transaction in some fashion." Similarly, 18 U.S.C. § 981(a)(1)(A) "applies to any property which is 'involved in' an illegal money laundering transaction." Thus, finding that "the forfeiture statutes at issue here do not serve solely a remedial purpose," the Ninth Circuit barred the government's civil action as a violation of the Double Jeopardy Clause.

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

98 Id. at 1221.
99 Id.
100 Id.
101 Id.
102 Id.; see also id. ("[T]he statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.").
103 Id.
104 Id. at 1222.
III. DISCUSSION

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

106 See United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 496 (9th Cir. 1994) (Rymer, J., concurring) (“I concur . . . only because I am constrained to follow United States v. $405,089.23 in [sic] U.S. Currency . . . . The result I feel obliged to reach . . . may have other consequences for parallel civil and criminal proceedings which I find it difficult to believe that either the Congress or the Court had in mind.”) (citations omitted).
109 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994), aff’d as modified en banc. 56 F.3d 41 (9th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).
112 $405,089.23, 33 F.3d at 1218-22.
113 See infra Part III(B).
114 See infra Part III(B).
A. SCOPE: SEPARATE TRIALS, OR A SINGLE COORDINATED PROCEEDING?

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

1. Overlooking Constitutionally Required Procedure

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

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

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115 $405,089.23, 33 F.3d at 1215.
116 Id. at 1216 (emphasis added).
117 Id. at 1218.
119 See Millan, 2 F.3d at 20.
120 Id. at 17 (including among the defendant-appellants Alfred V. Bottone, Sr. (a.k.a. Fat Al), Anthony Bottone, Alfred Bottone (a.k.a. Alfie), and Eric Millan).
121 Id. at 20.
actions at hand by determining when, how, and why the civil and criminal actions were initiated. . . . [Here the two actions arose] as part of an effort to put an end to an extensive narcotics conspiracy. We therefore must conclude that the civil forfeiture suit and the criminal prosecution at issue here constituted a single prosecution against the [defendants].

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

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

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122 Id. (emphasis added).
123 United States v. One Single Family Residence, 13 F.3d 1493, 1494, 1499 (11th Cir. 1994).
124 See, e.g., FED. R. CIV. P. 1 (noting governance over all federal civil suits); FED. R. CRIM. P. 2 (noting governance over all federal criminal actions).
125 See AM. JUR. 2D Criminal Law § 649 (1981) (footnote omitted): [D]ue process requires that there be a regular course of judicial proceedings and that a criminal trial proceed according to the established procedure or rules of practice applicable to all such cases. . . . [Due process] guarantee[s] procedural standards adequate and appropriate . . . to protect at all times persons charged with or suspected of crime . . . .
126 One Single Family Residence, 13 F.3d at 1499 (emphasis added); see AM. JUR. 2D Criminal Law § 632 (1981) (“The defendant in a criminal prosecution is entitled to assert a number of constitutional and statutory guaranties [unavailable to a defendant in a civil suit].”); see, e.g., United States v. Regan, 232 U.S. 37, 47-48 (noting that persuasion beyond a reasonable doubt is an evidentiary standard required only in criminal cases), cited in United States v. Ward, 448 U.S. 242, 248 (1980).
127 One Single Family Residence, 13 F.3d at 1499.
128 See United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993) (“[W]e are cognizant that one of the Halper Court's concerns was that the government might act abusively by seeking a second punishment when it is dissatisfied with the punishment levied in the first action. That problem is obviously not present in the instant case, because the civil and criminal actions were contemporaneous and not consecutive.”) (citation omitted) cert. denied, 114 S. Ct. 922 (1994).
constitute the same proceeding only if they were brought in the same indictment and tried at the same time." Yet the Ninth Circuit did not suggest how one could accomplish this and adhere to both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. *Halper*, discussed below, suggested criminal and civil actions could be joined in the same proceeding, but offered no guidance on the method by which to join them. This silence by the judiciary is no accident. Many problems hinder implementing a plan that would allow a person to combine criminal and civil actions in a true, single proceeding—not the least of which is negotiating the application of significantly different burdens of proof. One commentator has clearly explained these problems:

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

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

130 See infra Part III(B)1.


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

2. The Problematic Resurrection of Jeffers v. United States

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

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

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133 Jahncke, supra note 19, at 141 n.230.
134 Id.
135 Id.
136 See supra notes 118-29 and accompanying text.
138 Id.
139 See id. at 139 (plurality) (stating the issue as the "extent of the protection against multiple prosecutions afforded by the Double Jeopardy Clause of the Fifth Amendment, under circumstances in which the defendant opposes the Government's efforts to try charges under 21 U.S.C. §§ 846 and 848 in one proceeding.").
140 Id. at 152.
141 Id. at 158 (Stevens, J. dissenting in part, and concurring in the judgment in part).
142 Id. at 158-160.
of those trials on double jeopardy grounds. In reality, even if the Justices of the plurality and the dissent are counted together for an agreed-upon notion, the *Jeffers* court held only that multiple criminal proceedings against a defendant should be joined if the crimes charged arise out of the same offense, and the defendant chooses not to wage separate trials. The *Jeffers* decision suggests nothing about procedural requirements where the government charges the accused with both criminal and civil violations arising from the same offense. Moreover, double jeopardy analysis was not extended to civil sanctions until *Halper*, decided twelve years after *Jeffers*. As a result, the *Jeffers* rationale cannot logically be extended to concurrent civil and criminal proceedings.

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

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

145 See supra notes 33-48 and accompanying text.

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

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

Neither Congress nor the Supreme Court could have intended for courts to make such a determination. When a court concludes that it must void one of two parallel proceedings because of double jeopardy, it has no guidance to rely upon to make its choice. Arbitrary and
simultaneously files criminal and civil actions against a defendant for the alleged commission of a single offense, original jeopardy does not terminate until both actions have concluded free from trial error.

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

The Ninth Circuit’s determination that the civil forfeitures authorized by 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitute punishment relies on the development of a test in two Supreme Court cases: United States v. Halper148 and Austin v. United States.149 Because both cases represent marked departures from precedent,150 one should cautiously accept the viability of each application of their holdings to different fact patterns.151 Thus, a thoughtful analysis of $405,089.23 requires a detailed understanding of the facts, language, and scope of the holding in both Halper and Austin.


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

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150 See Lauren O. Clapp, Note, United States v. Halper: Remedial Justice and Double Jeopardy, 68 N.C. L. REV. 979, 980 (1990) (noting the Court’s failure in cases before Halper even to consider that, under some circumstances, civil penalties could serve punitive ends); see also Dallet, supra note 19, at 238 n.16 (noting that Austin was only the second time that the Court had considered an application of the Excessive Fines Clause, and on the first occasion had rejected it).
151 See Halper, 490 U.S. at 451 ("[T]he only proscription established by our ruling is that the 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."); see also Austin, 113 S. Ct. 2801 at 2812 (declining to establish a test to determine excessive forfeitures—despite its clear holding of most forfeitures as punishments—because “[p]rudence dictates that . . . the lower courts . . . consider that question in the first instance").
Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent,
company provided on sixty-five separate occasions between 1982 and 1983. After convicting Halper on all counts, the district court sentenced him to imprisonment for two years and fined him $5000. Following this judgment, the government brought a civil claim against Halper under the False Claims Act. The facts established at Halper’s conviction persuaded the district court to grant the government’s motion for summary judgment. Because Halper violated the act on sixty-five separate occasions, the court recognized that the statute required fines for Halper exceeding $130,000. The court declined to impose the fines, cursorily reasoning that “this civil remedy, designed to make the government whole, would constitute a second punishment for double jeopardy analysis.”

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

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

153 Halper, 490 U.S. at 437.
154 Id.
155 Id. at 438. The False Claims Act, 31 U.S.C. §§ 3729-3731 (1982 & Supp. II 1985) states: A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action if the person ... (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

156 Halper, 490 U.S. at 438.
157 Id.
159 Id.
161 Id. at 448-49 (emphasis added).
Thus, Halper's "liability of $130,000 for false claims amounting to $585, constitutes a second 'punishment' for the purpose of double jeopardy analysis."162

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

162 Id. at 441; see also id. at 452.
163 Id. at 451.
164 Id. at 449 (emphasis added).
165 See id. at 451 n.10 ("[T]he multiple-punishment inquiry in the context of a single proceeding focuses on whether the legislature actually authorized the cumulative punishment."); see also id. at 449-50 ("Where... the civil penalty... bears no rational relation to the goal of compensating the [g]overnment for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting... to determine if the penalty sought in fact constitutes a second punishment.") (emphasis added).
166 Id. at 448-49 (emphasis added).
167 Id. at 448 (emphasis added).
2. Austin v. United States: The Court Equivocates on Halper’s Test

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

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

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

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

Second, the majority stated that “the question is whether forfeiture serves in part to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion.” This statement seemingly invalidates all civil forfeitures for double jeopardy purposes because “forfeiture [always] serves, at least in part, to punish the owner” as a result of its “punitive and deterrent purposes,” and “imposition of an economic penalty.”

Thus, the Court stated two different standards. The first standard creates a relatively high threshold where a given forfeiture is an abuse of the government’s power to punish. The second standard creates a relatively low threshold where a given forfeiture merely has the effect of punishing.

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

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

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

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179 Id. at 2804 (second emphasis added).
180 Id. at 2810 n.12.
181 Id. at 2810; see also id. at 2813 n.* (Scalia, J., concurring in part and concurring in the judgment) (“[T]he statutory forfeiture must always be at least ‘partly punitive,’ or else it is not a fine.”).
182 Id. at 2810 (quoting Calero-Toledo v. Pearsom Yacht Leasing Co., 416 U.S. 663, 686, 687 (1974)) (citations omitted).
183 Id. at 2812 n.14 (emphasis added).
184 See Jahmcke, supra note 19 (suggesting that the Excessive Fines Clause, rather than the Double Jeopardy Clause, should apply to and potentially bar civil punishments, because the Excessive Fines Clause is unburdened by the confused mass of case law distorting double jeopardy jurisprudence).
excessive fines analysis differs significantly from the double jeopardy analysis of Halper. 185

3. The Ninth Circuit’s Cumulative Error

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

Recall the holding of Halper:

[U]nder the Double Jeopardy Clause a defendant who al-ready has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution. 189

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185 See infra notes 191-203 and accompanying text. But see Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937, 1953 (1994) (O’Connor, J., dissenting) (“To hold . . . that [a civil sanction] is not exempt from scrutiny under the Double Jeopardy Clause says nothing about whether imposition of the tax is unconstitutional.”) (emphasis added).
186 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218-22 (9th Cir. 1994), aff’d as modified en banc, 56 F.3d 41 (9th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).
187 Id. at 1219.
189 See supra note 185 and accompanying text.
190 United States v. Halper, 490 U.S. 435, 448-449 (1989) (emphasis added); see also id. at 449 (“What we announce now is a rule for the rare case . . . . The rule is one of reason: Where . . . the civil penalty . . . bears no rational relation to the goal of compensating the government for its loss, but rather appears to qualify as ‘punishment’ in the plain meaning of the word, then the defendant is entitled to [a determination of whether the second penalty is in fact a second punishment].”) (emphasis added).
The Court's holding in *Halper* implies a threshold beyond which a civil sanction becomes wholly punitive and does not rationally serve to compensate the government, even in part. Reaching this brink is a condition precedent to the inclusion of a civil sanction in double jeopardy analysis. Although *Halper* recognizes that determining when a fine crosses this threshold is "difficult if not impossible," the opinion emphasizes "the process of affixing a sanction that compensates the government for all its costs inevitably involves an element of rough justice"—including "the ordinary case fixed-penalty-plus-double-damages provisions." Essentially, the *Halper* protection "is a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." As such, it does not apply in *Austin*, regardless of its citation there.

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

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

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191 *See id.* at 449 ("[The] rare case . . . [is] where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.").
192 *Cf. supra* note 28 and accompanying text.
193 *Halper*, 490 U.S. at 449.
194 *Id.*
195 *Id.*
196 *Id.*
198 *Id.* at 2812 n.14 (remanding the case to determine whether the forfeiture of Austin's mobile home constituted an excessive punishment, in violation of the Excessive Fines Clause).
199 *Id.*
200 *Id.* at 2812-13 (Scalia, J., concurring in part and concurring in the judgment) (noting that all fines are payments to the government as punishment).
jeopardy will apply to civil proceedings into a commonplace occurrence, and may have . . . consequences for parallel civil and criminal proceedings which I find it difficult to believe that either the Congress or the Court had in mind." 201 Considering the Halper Court's statement that "[n]othing in today's ruling precludes the government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive," 202 it is difficult to argue otherwise.

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

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

201 United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 496 (9th Cir. 1994) (Rymer, J., concurring).
203 The statutory provisions applicable in Austin.
204 United States v. Tilley, 18 F.3d 295 (5th Cir. 1994), cert. denied, 115 S. Ct. 574 (1994).
205 Tilley, 18 F.3d at 296.
206 Id.
drugs, caring for the victims of the criminal trade when preventive efforts prove unsuccessful, lost productivity, etc.\textsuperscript{207}

Second, the forfeiture of illegally derived proceeds "does not punish the defendant because it exacts no price in liberty or lawfully derived property from him."\textsuperscript{208}

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

\begin{itemize}
\item \textsuperscript{207} \textit{Id.} at 299 (citations omitted); see also \textit{id.} ("Various sources estimate that illegal drug sales produce approximately $80 to $100 billion per year while exacting $60 to $120 billion per year in costs to the government and society. Clearly, the above overlapping estimates of proceeds and resulting costs are not 'overwhelmingly disproportionate' on a national level . . . .") (citations and footnote omitted); \textit{accord} S.E.C. v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994).
\item \textsuperscript{208} \textit{Tilley}, 18 F.3d at 300 (emphasis added); see also \textit{id.} ("[T]he forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property.").
\item \textsuperscript{209} United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1220 (9th Cir. 1994), \textit{aff'd as modified en banc}, 56 F.3d 41 (9th Cir. 1995), \textit{petition for cert. filed}, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).
\item \textsuperscript{210} \textit{See supra} notes 179-86 and accompanying text.
\item \textsuperscript{211} $405,089.23, 33 F.3d at 1220.
\item \textsuperscript{212} United States v. \textit{Halper}, 490 U.S. 435, 451 n.10 (1989) (emphasis added).
\end{itemize}
when combined as "a single, coordinated prosecution," they constitute the same jeopardy.

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

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

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214 United States v. One Single Family Residence, 13 F.3d 1493, 1499 (11th Cir. 1994).
216 *Id.* at 1941-42; *cf.* infra text accompanying note 227.
217 *Kurth Ranch,* 114 S. Ct. at 1948.
218 *Id.* at 1946.
219 *Id.* at 1945 (quoting United States v. Halper, 490 U.S. 435, 448-49 (1989)). The Court also considered that the tax was "conditioned on the commission of a crime" as a factor in its determination. *Id.* at 1947.
220 *Kurth Ranch,* 114 S. Ct. at 1948. The Court never explained how it reached this opinion. Whether the tax proceeding followed or paralleled the criminal prosecution is subject to differing opinions. *See* United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994) ("In *Kurth Ranch* itself the tax proceeding was begun at the same time as the criminal prosecution; the Supreme Court did not think the fact that the two were pending contemporaneously mattered."). *But see In re Kurth Ranch,* 145 B.R. 61, 63-66 (Bankr. D. Mont. 1990) (noting that between the start of the criminal prosecution on October 18, 1987 and the initial tax assessment on December 8, 1987, the new tax regulations were unavailable to calculate the assessment until November 13, 1987), *aff'd,* No. CV-90-084-GF, 1991 WL 365065 (D. Mont. Apr. 23, 1991), *aff'd,* 986 F.2d 1308 (9th Cir. 1993), *aff'd,* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994). However, it seems more likely that the Bankruptcy Court for the District of Montana familiarized itself with the facts in *Kurth Ranch* to a greater degree than the Seventh Circuit.
opinion should have guided the Ninth Circuit toward a different conclusion than the one arrived at in $405,089.23.

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

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

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221 Kurth Ranch, 114 S. Ct. at 1947 n.21 (emphasis added); see supra note 220.
222 See supra text accompanying notes 118-29.
223 Kurth Ranch, 114 S. Ct. at 1948 (quoting id. at 1950 (Rehnquist, C.J., dissenting)); see also id. at 1947 (“Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed despite their adverse effect on the taxed activity.”).
224 Id.
225 Id. at 1948.
226 Id.
228 See Kurth Ranch, 114 S. Ct. at 1952-55 (O’Connor, J., dissenting).
229 Id. at 1953; cf. supra notes 184-86 and accompanying text.
that a “drug tax is always punitive” by finding that step “entirely unnecessary to preserve individual liberty.”

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

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

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

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

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

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230 Id. at 1955 (emphasis added).
231 See id. at 1949-52 (Rehnquist, C.J., dissenting).
232 Id. at 1949.
233 Id. (“[T]he Court then goes astray and the end result of its decision is a hodgepodge of criteria . . . .”)
234 Id. at 1956 (Scalia J., dissenting).
235 Id. at 1958.
236 Id. at 1956.
237 Jahncke, supra note 19, at 134-35.
not much matter whether that rule was a free-standing constitutional prohibition implicit in the Double Jeopardy Clause or . . . merely an aspect of the Due Process Clause requirement of legislative authorization."\(^{238}\) Justice Scalia continued, writing:

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

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

\(^{238}\) *Kurth Ranch*, 114 S. Ct. at 1957 (Scalia, J., dissenting).
\(^{239}\) *Id.* at 1958 (quoting United States v. *Halper*, 490 U.S. 435, 452 (1989)); see also United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 496 (9th Cir. 1994) (Rymer, J., concurring) ("The result I feel obligated to reach [because of our holding in *$405,089.23*] effectively transforms the 'rare case' where *Halper* contemplates that double jeopardy will apply to civil proceedings . . . into a commonplace occurrence, and may have other consequences for parallel civil and criminal proceedings which I find it difficult to believe that either the Congress or the Court had in mind.") (citation omitted).
\(^{240}\) See *Abramowitz*, *supra* note 1, at 3 (considering whether the Court will revisit *Halper* to limit or overrule the decision).
\(^{241}\) See Department of Rev. of Mont. v. *Kurth Ranch*, 114 S. Ct. 1937, 1958 (Scalia, J., dissenting) ("*Halper* was in error . . .").
\(^{242}\) Justice Breyer replaced Justice Blackmun beginning in the 1994-95 Term. See generally, *e.g.*, *Martel v. Fridovich*, 14 F.3d 1 (1st Cir. 1993) (offering little guidance regarding Justice Breyer's disposition of the *Halper* test while sitting as the First Circuit's Chief Judge).
Kurth Ranch Court has retreated from a liberal application of the Halper test, the Ninth Circuit has erroneously extended it.

CONCLUSION

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

Adam R. Fox

243 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1217 (9th Cir. 1994), aff'd as modified en banc, 56 F.3d 41 (9th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346).
244 See United States v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994); United States v. Millan, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).
245 See, e.g., United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489 (9th Cir. 1994) (following $405,089.23); United States v. Real Property Located at Incline Village, 47 F.3d 1511 (9th Cir. 1995) (same).