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Second Thoughts on Second Punishments: Redefining the Multiple Punishments Prohibition

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NOTES

Second Thoughts on Second Punishments: Redefining the Multiple Punishments Prohibition

I. INTRODUCTION

The Fifth Amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."[1] To the layperson "twice put in jeopardy" means twice tried. The Supreme Court has firmly established, however, that the Double Jeopardy Clause targets *two* kinds of multiplicity: multiple prosecutions and multiple punishments.[2] The right against multiple punishments is less commonly understood than the right against multiple prosecutions. What does it mean to be punished twice for the same offense? What is the evil that the right guards against?

The Court appears to have defined the prohibition in two ways. For years, it explained the right as a guarantee that defendants will suffer no greater punishment than that authorized by the legislature.[3] The idea underlying this approach is that legislatures define the scope of punishments,[4] and thus, punishment in excess of this legislative authorization is unconstitutionally "multiple." Until recently, the Court seemed to have taken the position that legislative deference is the only function of the right against multiple punishments. In 1989, however, the Court held in *United States v. Halper*[5] that legislatively authorized civil sanctions cannot be imposed in a separate proceeding after the defendant has been prosecuted and punished.[6] The *Halper* Court thus seemed to define multiple punishments in terms of proceedings rather than legislative maximums.

These two approaches to the multiple punishments prohibition coexist uneasily. While the legislative deference model recognizes the legislature's power to prescribe punishments, the separate proceedings model effectively undermines that power by prohibiting punishments within legislatively authorized maximums if they happen to be imposed in separate proceedings.[7] Thus, some

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1. U.S. Const., Amend. V. The clause is read broadly to apply to all criminal offenses, not only to capital crimes or crimes involving corporal punishment. Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* 1058-59 (West, 2d ed. 1992).

2. In 1873, the Supreme Court declared: "[W]e 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." *Ex Parte Lange*, 85 U.S. (18 Wallace) 163, 173 (1873).

3. See Part III.A.

4. *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) (stating that the legislature has the power to "prescribe crimes and determine punishments").

5. 490 U.S. 435 (1989).

6. Id. at 448-49.

7. See, for example, Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. Pa. L. Rev. 101, 126 (1995) (criticizing the *Halper* Court for establishing limits on multiple punishments "that the legislature cannot circumvent"); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with*

commentators have argued that the two models of multiple punishments doctrine are fundamentally inconsistent.[8] The Court's focus on separate proceedings in *Halper* has also caused problems by blurring the distinction between multiple punishments and multiple prosecutions cases.[9] Thus lower courts applying *Halper* awkwardly import multiple prosecutions doctrine, creating even more confusion.[10]

Some point to these problems as evidence that the Double Jeopardy Clause should not be read to protect against multiple punishments at all.[11] The most vocal of these critics, Justice Scalia, has described the multiple punishments prohibition as "one of those areas" where the Court's jurisprudence "is not only wrong but unworkable as well."[12]

This Note suggests that a double jeopardy prohibition on multiple punishments is neither wrong nor unworkable. Rather, the main problem with multiple punishments jurisprudence stems from the Court's failure to identify a single double jeopardy interest underlying its various applications of the right.[13] While the Court sometimes states what the prohibition *does*, it has not articulated what it *means*.[14] The Court could achieve enhanced clarity by tying its multiple punishments jurisprudence to the interest that the Double Jeopardy Clause was originally designed to serve: the interest in preserving the integrity of final judgments.

Under this formulation, courts may impose punishment to the full extent authorized by the legislature in one judgment. Any pun-

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Double Jeopardy, 31 Am. Crim. L. Rev. 1, 55-56 (1993) (arguing that the *Halper* Court undermined Congress's power to impose both civil and criminal sanctions for certain conduct).

8. See, for example, King, 144 U. Pa. L. Rev. at 113-23 (cited in note 7) (discussing the "fundamental inconsistency" between the Court's "majoritarian" and "antimajoritarian" strands of double jeopardy jurisprudence).

9. See Henning, 31 Am. Crim. L. Rev. at 5 (cited in note 7) ("*Halper* has obscured the distinction between multiple penalty cases and successive prosecutions.").

10. See Part III.B.2.

11. See, for example, *United States v. Ogbuehi*, 897 F. Supp. 887, 890 n.3 (E.D. Pa. 1995) (noting that the Double Jeopardy Clause only provides the multiple punishment protection through "judicial generosity"); Brian L. Summers, Note, *Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition*, 56 Ohio St. L. J. 1595, 1607-14 (1995) (arguing that a right against multiple punishments should not he recognized as a component of double jeopardy protection).

12. *Witte v. United States*, 115 S. Ct. 2199, 2209, 132 L. Ed. 2d 351, 368 (1995) (Scalia, J., concurring).

13. To students of double jeopardy doctrine generally, this is a familiar criticism. Professor Westen diagnosed the problem eloquently almost ten years before *Halper*: "[B]ecause [the Court] never collectively focused on the values that inform the prohibition, they have no common idea as to what the prohibition itself means; and not knowing what they mean by it, they disagree on its application." Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1063 (1980).

14. *Halper*, 490 U.S. at 451 n.10.

ishment that exceeds the scope of the first final judgment—by exceeding either legislative limits or the limits set by the sentencing authority[15] in the judgment itself—constitutes a second, or unconstitutionally multiple, punishment.[16] This analysis places the focus of the multiple punishments inquiry where it belongs—on judgments of *punishment*, rather than on proceedings or legislative maximums. If the criminal proceeding is the unit that defines multiplicity in the multiple prosecutions context, it is only logical that the lawful judgment of punishment is the corresponding constitutional unit that defines multiplicity in the multiple punishments context. By tying its various applications of multiple punishments rules to the interest they serve, the Court could dissolve many of the apparent anomalies and inconsistencies that currently plague the Court's jurisprudence. Moreover, a clear identification of the interest behind the multiple punishments prohibition would provide much-needed guidance to the lower courts who must apply the right.

Part II of this Note discusses double jeopardy interests and argues that the multiple punishment prohibition, as originally conceived, is consistent with the Double Jeopardy Clause's primary purpose of preserving the integrity of final judgments. Part III explores the Court's two models of the multiple punishments prohibition and discusses how the modern Court has failed to articulate a coherent double jeopardy interest underlying either model. It demonstrates how this failure has created a multiple punishments jurisprudence that is confusing and apparently inconsistent. Part IV discusses the Court's two models of the multiple punishments prohibition in light of the interest in preserving the integrity of judgments. It concludes that refocusing the prohibition on this interest would clarify the Court's confusing jurisprudence and provide guidance to lower courts.

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15. The function of punishing criminal defendants is essentially a judicial function. See *Mistretta v. United States*, 488 U.S. 361, 408 (1989) (noting that sentencing lies "close to the heart of the judicial function"). In a case reviewing the proportionality of a sentence to the severity of the crime the Court stated: "[A]pplication of [proportionality] factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

16. The final judgment of punishment represents the legitimate determination of punishment under the laws promulgated by the legislature and the sentencing authority of the judiciary. Any punishment exceeding the limits set by either of those two bodies, therefore, undermines the integrity of the judgment.

II. DOUBLE JEOPARDY INTERESTS AND THE MULTIPLE PUNISHMENTS PROHIBITION

The original purpose of the Double Jeopardy Clause was to preserve the integrity of final judgments.[17] A defendant could therefore not raise a double jeopardy claim unless a final judgment—either of acquittal or conviction—had been rendered for the same offense.[18] After a final judgment, however, the defendant was said to have been put in jeopardy.[19] The right against multiple prosecutions protected defendants from "double jeopardy"—being prosecuted a second time for the same offense[20] after either an acquittal or a conviction.[21]

The limited focus on the integrity of final judgments did not last long. The Supreme Court soon recognized a "separate but related interest" of defendants in avoiding the burdens of the prohibited criminal proceedings themselves.[22] This interest protects defendants from the embarrassment, expense, stigma, and anxiety of facing more than one confrontation with society on the question of guilt or innocence.[23] Moreover, it guards against the danger of erroneously convicting innocent defendants that is created by the sheer weight of

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17. *United States v. Scott*, 437 U.S. 82, 92 (1978).

18. *Crist v. Bretz*, 437 U.S. 28, 33 (1978). The rule was based on the common law pleas of autrefois acquit and autrefois convict. See Comment, *Twice in Jeopardy*, 75 Yale L. J. 262, 262 n.1 (1965) ("The two . . . pleas in bar, *autrefois acquit* (former acquittal) and *autrefois convict* (former conviction) prevented reprosecution after a verdict.").

19. *Bretz*, 437 U.S. at 33.

20. The formula for determining when two statutery offenses are similar enough to constitute the "same offense" is commonly known as the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (stating that two statutory provisions describe the same offense unless each requires proof of a fact that the other does not). See *United States v. Dixon*, 509 U.S. 688, 704 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990), which had established a broader "same conduct" test for determining whether two provisions are the same offense in the multiple prosecutions context). The multiple prosecutions prohibition acts as a constitutional rule of compulsory joinder, requiring prosecutors to raise all offenses that are the same under *Blockburger* in a single prosecution. See Comment, 95 Yale L. J. at 277-99 (cited in note 18) (discussing the rationales for the multiple prosecutions prohibition's compulsory joinder rule).

Although some would read the Double Jeopardy Clause's "same offense" requirement quite literally, see, for example, Akhil Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 36 (1995) (arguing that "the Double Jeopardy Clause means what it says—'same' means 'same' "), the Supreme Court has long refuted such a narrow reading. See *Brown v. Ohio*, 432 U.S. 161, 164 (1977) ("It has long been understood that separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the [Double Jeopardy Clause].").

21. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

22. *Scott*, 437 U.S. at 92 ("Although the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment, this Court has also developed a body of law guarding the separate but related interest of a defendant in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made.") (citations omitted).

23. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

these burdens, along with the prosecutor's ability to rehearse her case, in multiple criminal proceedings.[24] Thus the Court identified a *procedural* finality interest implicated by the unique dangers inherent in criminal prosecutions.[25]

Thus, although the interest commonly said to underlie the protection is still the finality of "judgments,"[26] the Court has long held that the multiple prosecutions prohibition takes effect before any final judgment is reached. Jeopardy "attaches" at the outset of the trial when the case is put to the trier of fact. [27] The prosecutor may not institute separate criminal proceedings for the same offense, or unnecessarily[28] declare or induce a mistrial and reprosecute the defendant for the same offense.[29] In addition, multiple prosecutions claims are appealable before the second trial ends in a final judgment because it is the danger inherent in the procedure leading to the second judgment that warrants the protection of the multiple prosecutions prohibition.[30]

The Supreme Court first held that the Double Jeopardy Clause protects defendants from multiple *punishments* in *Ex Parte Lange*.[31] Lange was charged with stealing mailbags, an offense punishable by a maximum sentence of either one year in prison or a $200 fine.[32] The

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24. See *Scott*, 437 U.S. at 91 ("To permit a second trial . . . would present an unacceptably high risk that tbe Government, with its vastly superior resources, might wear down tbe defendant so tbat even tbough innocent he may be found guilty.") (internal quotation marks omitted) (quoting *Green*, 355 U.S. at 188).

25. See *United States v. Jorn*, 400 U.S. 470, 479 (1971) ("The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in . . . criminal proceedings.").

26. See *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (stating that the interest in finality of judgments is "a or the primary" interest behind the Double Jeopardy Clause); Henning, 31 Am. Crim. L. Rev. at 7 (cited in note 7) (stating tbat in the retrial context "the primary [double jeopardy] value is protecting the defendant's interest in the finality of the verdict").

27. *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

28. See Comment, 75 Yale L. J. at 286-87 (cited in note 18) ("[C]ourts have recognized necessity when there is a breakdown of judicial machinery—when the first jury is hung, a juror is disqualified, the trial judge dies, or war closes the courts.") (footnotes omitted).

29. See *Arizona v. Washington*, 434 U.S. 497, 516 (1978) (stating that double jeopardy bars a second prosecution if a mistrial is not supported by "manifest necessity"); *Oregon v. Kennedy*, 456 U.S. 667, 673-76 (1982) (holding that double jeopardy prohibits a second trial after a mistrial if the basis for the mistrial was prosecutorial or judicial conduct intended to prejudice a defendant into moving for a mistrial); *Green*, 355 U.S. at 188 (noting that the rule prevents prosecutors and judges from discontinuing the first trial and retrying the defendant when it appears that the first jury might not convict).

30. *Abney v. United States*, 431 U.S. 651, 660 (1977) ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.").

31. 85 U.S. (18 Wallace) 163 (1873).

32. Id. at 175.

trial judge mistakenly sentenced Lange to one year's imprisonment *and* s $200 fine.[33] Before the judge realized his error, the defendant had already paid the fine and served five days of the prison sentence.[34] The judge then vacated the original sentence, and resentenced the defendant to one year's imprisonment.[35] The Supreme Court reversed Lange's sentence, reasoning that imposing the prison term would punish Lange twice for a single offense.[36] The Court stated that the judge had no power to impose a prison sentence when Lange had fully satisfied one of the maximum alternative penalties prescribed by the legislature.[37] The Double Jeopardy Clause, the Court concluded, "was designed as much to prevent the criminal from being twice punished for the same offence as being twice tried for it."[38]

Lange thus presented the Court with the opportunity to firmly locate the multiple punishments prohibition in the scheme of interests protected by the Double Jeopardy Clause. Yet the *Lange* Court did not articulate any interest behind its new prohibition. The decision clearly does not reflect the procedural finality interest that the Court identified in its later double jeopardy decisions. The defendant was not subjected to the burdens of a second prosecution. Nor did he suffer the embarrassment, expense, stigma, or harassment of a second criminal proceeding. Nor did he risk a second determination of guilt. He was simply resentenced on the original verdict. What, then, was the *Lange* Court seeking to protect the defendant against by identifying this "multiple punishments" prohibition?

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33. Id.
34. Id.
35. Id.
36. Id.
37. Id. In fact, Lange had already endured punishment in excess of the maximum authorized by the legislature since he had not only paid the maximum fine, but also served five days in prison as well.
38. Id at 173.

III. THE TWO MODELS OF MULTIPLE PUNISHMENTS

A. The Traditional Model: Punishments Defined by Legislative Limits

Although *Lange* has been subjected to various readings,[39] the Court has confined its interpretation of the decision to one limited proposition—that double jeopardy in the multiple punishments context prevents courts from imposing punishment in excess of that authorized by the legislature.[40] The underlying rationale for this proposition is that legislatures have the exclusive power to prescribe the scope of punishments.[41]

For example, a legislature can define a specific crime and punish it with two consecutive one-year prison terms, or it can achieve the same effect by simply punishing the crime with a single two-year sentence. Similarly, a legislature can impose both a fine and a prison sentence for a single offense. Until *Halper*, as long as a punishment did not exceed whatever the legislature had clearly authorized,[42] it did not violate the Double Jeopardy Clause.[43] Under this traditional

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39. See, for example, George C. Thomas III, *Multiple Punishments for the Same Offense: The Analysis After* Missouri v. Hunter, 62 Wash. U. L. Q. 79 (1984). Professor Thomas describes three possible multiple punishments violations in *Lange*: First, the original sentence exceeded the maximum allowed by the legislature; second, Lange was resentenced after fully satisfying one of two alternative penalties authorized; third, both sentences subjected Lange to greater punishment than the legislature had authorized. Id. at 89.

40. See, for example, *Jones v. Thomas*, 491 U.S. 376, 383 (1989) (stating that "*Lange* . . . stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature, and not for the broader rule suggested by its dictum" and rejecting the argument that *Lange* requires a prisoner who has satisfied the less severe of two alternative sentences to be released) (citation omitted). See also *DiFrancesco*, 449 U.S. at 139 ("As *Ex Parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex Parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment.").

41. *Johnson*, 467 U.S. at 499 (stating that the legislature has the power to "prescribe crimes and determine punishments").

42. This view of the multiple punishments prohibition entitles defendants only to a *presumption* that the legislature did not intend to cumulate punishments for the same offense. If two statutory provisions describe the same offense under the *Blockburger* test, the Double Jeopardy Clause requires courts to *presume* that sentencing under both statutes would violate the defendant's right against multiple punishments. *Whalen v. United States*, 445 U.S. 684, 692 (1980). The presumption is justified on the ground that legislatures "ordinarily [do] not intend to punish the same offense under two different statutes." Id. at 691-92. Accordingly, this presumption is overcome when the legislature has "clearly authorized" cumulation of punishment. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983). If the legislature has clarified its intention to cumulate punishment, then the defendant cannot complain of "multiple" punishments.

43. Some commentators have presumed that the *Blockburger* test itself incorporates only a rebuttable presumption that two statutes constitute the same offense. Under this interpreta-

approach, the multiple punishments prohibition amounted to little more than a separation of powers rule:[44] punishment only became unconstitutionally "multiple" when courts usurped the power of the legislature by imposing punishment exceeding legislatively authorized limits.[45]

The notion that the multiple punishments prohibition prohibits punishment in excess of legislatively authorized limits is consistent with the original purpose of the Double Jeopardy Clause—preserving the integrity of final judgments. A judgment of punishment, after all, is only final insofar as the court has the power to impose that punishment in the first place. To the extent that a

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tion, even multiple prosecutions for the same offense would be permissible if the legislature had clearly authorized both prosecutions since the *Blockburger* test controls the same offense issue in both the multiple prosecutions and multiple punishments contexts. See, for example, King, 144 U. Pa. L. Rev. at 118 (cited in note 7) (stating that when the Court in *Dixon* held the *Blockburger* test applicable in both the multiple prosecutions and multiple punishments contoxts, it "gave the go-ahead to government attorneys to cumulate prosecutions and punishments . . . as long as the legislature had approved").

This perception overreads the *Dixon* holding. *Dixon* did not hold that legislative intent governs the question of whether the Double Jeopardy Clause allows multiple prosecutions or that a *Blockburger* finding of "same offense" is rebuttable by the legislature. *Dixon* only held that the *Blockburger* test defined the sole constitutional meaning of "same offense" in the multiple prosecutions context. *Dixon*, 509 U.S. at 703-04. In doing so, *Dixon* overruled *Grady*, which adopted a more encompassing definition of same offense than the *Blockburger* test. See *Grady*, 495 U.S. at 521-22 (adopting a "same conduct" test to define same offense). The *Grady* Court regarded the *Blockburger* test as conclusive, rather than rebuttable, yet found it inadequate to protect defendants without an additional test:

> If application of [*Blockburger*] reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred. The State argues that this should be the last step in the inquiry and that the Double Jeopardy Clause permits successive prosecutions whenever the offenses charged satisfy the *Blockburger* test. We disagree.

Id. at 516 (citing *Brown*, 432 U.S. at 166).

Even Justice Scalia, one of *Grady's* harshest critics and author of the *Dixon* opinion, appears to assume that *Blockburger* is a conclusive, not rebuttable, definition of "same offense." See *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1957 n.1, 128 L. Ed. 2d 767 (1994) (Scalia, J., dissenting) ("Thus, in the context of criminal proceedings, legislatively authorized multiple punishments are permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings.").

44. See *Whalen*, 445 U.S. at 689 ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."); Kenneth G. Schuler, *Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine*, 91 Mich. L. Rev. 2220, 2225-26 & n.40 (1993) (stating that the multiple punishments rule serves the important interest in maintaining separation of powers between legislature and judiciary).

45. Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S. Ct. Rev. 81, 108 ("[I]nsofar as a defendant was subjected to punishment in excess of what the legislature intended, he was 'doubly' punished in violation of the Double Jeopardy Clause."); *Johnson*, 467 U.S. at 499 ("Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question of whether punishments are multiple is essentially one of legislative intent.") (citation omitted).

single judgment exceeds the legislature's punitive limits, it undermines its own integrity and finality. The prohibition on unauthorized punishment therefore can be seen as one aspect of the central multiple punishments interest.

The Court, however, treated the ban on unauthorized punishment as an end in itself, rather than a means of vindicating a broader double jeopardy interest. At times the Court even stated that the multiple punishments prohibition serves no other purpose whatsoever.[46] "Legislatures," the Court announced flatly, "not courts, prescribe the scope of punishments."[47] Many commentators have presumed that this function is the core interest underlying the prohibition.[48] This perception is not surprising, however, for the multiple punishments issues rarely arose outside the context of multiple punishments imposed in a single judgment. Generally, defendants subjected to punishment (or the threat of punishment) in two separate judgments could challenge the action under the bar on retrial after conviction.[49] Naturally, observers defined the multiple punishments interest solely in terms of the context in which it generally arose: multiple punishments rendered under a single judgment.

B. The Halper *Model: Punishments in Separate Proceedings*

1. *United States v. Halper* and *Department of Revenue v. Kurth Ranch*

During the 1980s and early 1990s criminal law enforcement strategies changed dramatically. In response to public furor over crime rates, legislatures promulgated—and prosecutors increasingly relied upon—a vast array of civil and adminstrative sanctions to sup-

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46. See *Jones*, 491 U.S. at 381 ("Our cases establish that in the multiple punishments context, [double jeopardy] is limited to ensuring that the total punishment [does] not exceed that authorized by the legislature.") (internal quotation marks omitted); *Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed."); *Whalen*, 445 U.S. at 688-89 (stating that the "dispositive" question is whether the legislature provided for cumulative punishments).

47. *Hunter*, 459 U.S. at 368.

48. See, for example, George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1, 4 (1985).

49. See *Kurth Ranch*, 114 S. Ct. at 1957 (arguing that before *Halper* the multiple punishments prohibition did not much matter because the multiple prosecutions prohibition "would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*").

plement traditional criminal punishments.[50] Many defendants found themselves facing imprisonment, fines, civil forfeiture, and civil taxes for the same criminal conduct.[51] And such consequences could be imposed in any number of criminal, civil, or administrative proceedings.[52]

Against this backdrop, a second model of multiple punishments surfaced in the Supreme Court's double jeopardy jurisprudence. In *United States v. Halper*,[53] the Court held that punishments imposed in "separate proceedings" violated the multiple punishments prohibition even when the legislature had clearly authorized *both* punishments.[54] At trial the court sentenced Halper, who had been convicted of sixty-five counts of violating the criminal false-claims statute, to two years' imprisonment and a $5,000 fine.[55] The Government then brought a civil action against Halper under the False Claims Act.[56] Under the civil statute, Halper's sixty-five violations could have resulted in fines of $130,000.[57] Therefore, in light of the extreme disparity between the amount of the monetary sanction and the government's actual damages,[58] the Court held that civil sanctions could constitute "punishment" for purposes of the Double Jeopardy Clause.[59] The *Halper* Court then held that because Halper had already been punished in the separate criminal proceedings, any further punishment (that is, the civil sanctions) would violate the multiple punishments prohibition.[60]

The Court did not fully articulate the reason for its departure from the traditional legislative deference model. In a footnote the Court stated that in separate proceedings, the Double Jeopardy Clause "protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction

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50. See King, 144 U. Pa. L. Rev. at 103 (cited in note 7) (noting the "remarkahle increase in the last decade in the imposition of overlapping civil, administrative and criminal sanctions for the same misconduct"); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L. J. 1795, 1844-61 (1992) (analyzing the greater role of civil sanctions in modern law enforcement).

51. King, 144 U. Pa. L. Rev. at 103 n.1 (cited in note 7).

52. Id.

53. 490 U.S. 435 (1989).

54. Id. at 448-49.

55. Id. at 437.

56. 31 U.S.C. §§ 3729-31 (1994 ed.).

57. *Halper*, 490 U.S. at 438.

58. The defendant duped the government out of only $585. Id. at 437.

59. The Court remanded the case to allow the government the opportunity to prove that the fines were not so disproportionate to the government's actual costs that they would constitute a second punishment. Id. at 452.

60. Id. at 448-49.

obtained in the first proceeding."[61] The Court insisted that in a single proceeding, the multiple punishments inquiry would still be limited to ensuring that punishment did not exceed legislative limits.[62]

The Court's focus on the proceedings, rather than the punishment itself, suggested a concern for avoiding the dangers and burdens associated with a second criminal prosecution akin to the interest behind the multiple prosecutions prohibition. But the *Halper* Court seemed to reject any reliance on a procedural finality interest. When determining the punitive nature of the civil sanction, it specifically refused to analyze whether Halper's further civil *proceeding* was functionally similar to a criminal prosecution.[63] Instead, the Court looked only to the nature of the punishment itself.[64] In addition, the Court specifically rejected the government's argument that in determining whether a civil sanction is punitive, one should employ a highly deferential statutory analysis standard previously used to determine what safeguards must accompany certain kinds of proceedings.[65] Instead, the Court held that because the multiple punishments prohibition is "intrinsically personal" and serves "humane interests," one must focus exclusively on the nature of the sanction rather than "proceedings as a general matter."[66] The *Halper* Court thus appeared uncertain whether it was truly relying on the multiple punishments prohibition or on a procedural finality interest already protected by the bar on multiple prosecutions.[67]

In *Department of Revenue v. Kurth Ranch*,[68] the Court further obscured the nature of the interest underlying its most recent strand

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61. Id. at 451 n.10.

62. Id. at 450 ("Nor does [our] decision prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding. In a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature.").

63. The Court stated:

> [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.

Id. at 447.

64. Id.

65. Id.

66. Id.

67. See Elizabeth S. Jahncke, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. Rev. 112, 137 n.202 (1991) (stating that the Court's focus on separate proceedings contradicted its multiple punishments characterization of the case).

68. 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

of multiple punishment jurisprudence. After holding that a legislatively authorized[69] civil tax on drug possession constituted punishment,[70] the *Kurth Ranch* Court struck down the tax under the Double Jeopardy Clause.[71] Noting that the tax was sought in a separate proceeding[72] after the defendants had been prosecuted and punished on drug charges,[73] the Court held that the tax had to be imposed "in the first prosecution or not at all."[74] The Court once again invoked the "intrinsically personal" interest underlying the multiple punishment prohibition and stated that the analysis must focus exclusively on the nature of the sanction.[75] Yet this time, the Court concluded that the administrative proceeding in which the Government attempted to assess the tax was "the *functional equivalent* of a successive *criminal prosecution* that placed the [defendants] in jeopardy a second time 'for the same offence.' "[76]

The *Kurth Ranch* Court thus implied, even more strongly than did the *Halper* Court, that the multiple punishments prohibition serves to protect defendants' procedural finality interest in avoiding the burdens of a second criminal prosecution. Because the Court deemed the administrative proceeding the "functional equivalent" of a second criminal prosecution, it implied that any civil or administrative proceeding that imposes punishment entails the same burdens and dangers as a criminal proceeding.[77] Yet the *Kurth Ranch* Court grounded its holding in the multiple punishments prohibition rather than the prohibition against multiple prosecutions which had always protected against such dangers. Having thus blurred the distinction between multiple punishments and multiple prosecutions,

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69. See id. at 1960 (Scalia, J., dissenting) ("[T]he Montana legislature authorized these taxes *in addition to* the criminal penalties for possession of marijuana . . . .").

70. The Court cited several "unusual features" that rendered the tax punitive. It noted that the "so-called tax" was conditioned on the commission of a crime, that it was exacted after the taxpayer had been arrested for the conduct giving rise to the tax, and was levied on goods that the taxpayer neither owned nor possessed when the tax is imposed. Id. at 1947-48.

71. Id.

72. The court sentenced four of the defendants to suspended or deferred sentences. Id. at 1942.

73. The tax was assessed in an administrative proceeding and the defendants challenged it in a subsequent bankruptcy proceeding. Id. at 1943.

74. See Jahncke, 66 N.Y.U. L. Rev. at 137 n.202 (cited in note 67) (stating that the Court's focus on separate proceedings contradicted its multiple punishments characterization of the case).

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

76. Id. at 1948.

77. See id. at 1959 (Scalia, J., dissenting) ("The only conceivable foundation for [the Court's conclusion] is the implicit assumption that any proceeding which imposes 'punishment' within the meaning of the multiple-punishments component of the Double Jeopardy Clause is a criminal prosecution.").

the Court left to the lower courts the task of applying the newfound multiple punishments rule.

2. The *Halper* Model in the Lower Courts

Not surprisingly, the Court's uncertainty in *Halper* and *Kurth Ranch* has caused much confusion among lower courts attempting to apply the separate proceedings model of multiple punishments. Many courts have analyzed cases involving separate proceedings the same way they would a multiple prosecutions claim.[78] Importing multiple prosecutions analysis into multiple punishments cases, however, leads to procedural difficulties. Some of the most troubling problems have occurred when the government seeks punitive civil and criminal sanctions in simultaneous but separate proceedings. In such cases, although one proceeding might begin first, the other proceeding might culminate in a judgment of punishment first. Courts then have to determine which punishment is the constitutionally barred "second jeopardy."[79] Most courts faced with this problem have analogized to the concept of jeopardy "attachment" from multiple prosecutions cases to conclude that the first jeopardy occurred in whichever *proceeding* jeopardy first attached.[80] Many have thus concluded that jeopardy attaches in criminal proceedings for purposes of the multiple punishment prohibition when evidence is first presented to the trier of fact rather than when punishment is imposed.[81] Some courts applying the prohibition have even extended this early attachment

78. See, for example, *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1215-16 (9th Cir. 1994) (analyzing a civil forfeiture proceeding following a criminal prosecution under double jeopardy's protection against "successive prosecutions—that is, against efforts to impose punishment for the same offense in two or more separate proceedings").

79. See *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) ("You can't have double jeopardy without a former jeopardy.").

80. See, for example, *Dawson v. United States*, 77 F.3d 180, 182-83 (7th Cir. 1996); *United States v. Gehring*, 87 F.3d 1323, 1323 (9th Cir. 1996) (unreported case); *United States v. Pierce*, 60 F.3d 886, 889-90 (1st Cir. 1995); *United States v. Aguilar*, 1995 U.S. Dist. LEXIS 4220 (N.D. Ill. 1995); *United States v. Whitley*, 896 F. Supp. 898 (W.D. Wis. 1995); *United States v. Stanwood*, 872 F. Supp. 791 (D. Or. 1994); *United States v. Groceman*, 882 F. Supp. 976 (E.D. Wash. 1995); *Oakes v. United States*, 872 F. Supp. 817 (E.D. Wash. 1994); *Torres*, 28 F.3d at 1465.

81. See, for example, *United States v. Linn*, 87 F.3d 1324, 1324 (9th Cir. 1996) (unreported case) (concluding that criminal conviction did not violate the multiple punishments prohibition when tbe jury was empaneled four days before defendant filed answer in civil forfeiture proceeding); *United States v. Brand*, 80 F.3d 560, 568 (1st Cir. 1996) (holding that jeopardy attached first in a criminal prosecution when the jury was empaneled and sworn, even though defendant was criminally sentenced after imposition of civil forfeiture); *Williams v. United States*, 1996 WL 117011 at 3 (7th Cir. 1996) (holding that jeopardy attached when jury was empaneled and sworn in criminal proceeding before it attached in civil proceeding).

rule to civil proceedings.[82] The early attachment rule, however, focuses on proceedings rather than punishments. It is premised on the defendant's interest in not having to risk the further stigma and psychological pressure of a second criminal proceeding.[83] These dangers are entirely irrelevant to the issue of whether or not a defendant has been *punished* twice. In fact, the ironic result of importing this attachment rule to the multiple punishments context is that jeopardy attaches in a proceeding before one even knows whether the proceeding will result in punishment at all.

Courts have also attempted to apply the multiple prosecutions rule of compulsory joinder in *Halper*-type cases. But while requiring joinder of all prosecutions based on the same criminal offense has not produced much procedural difficulty,[84] a corresponding joinder rule for civil and criminal proceedings presents extremely difficult procedural obstacles. These include differing burdens of proof, discovery rules, and constitutional safeguards.[85] Many believe, in fact, that such joinder is impossible.[86] Furthermore, even if such joinder were feasible, such rules could force Government attorneys to choose only one of two or more possible punitive routes for any given offense.[87] Courts reluctant to impose such a draconian rule on prosecutors have

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82. See, for example, *United States v. Idowu*, 74 F.3d 387, 396-97 (2d Cir. 1996) (holding that jeopardy attaches in a criminal trial when the defendant "is placed *at risk* of being punished"); *United States v. Levine*, 905 F. Supp. 1025, 1032 (M.D. Fla. 1995) (declaring that "[j]eopardy 'attaches' in a civil forfeiture proceeding at the beginning of the hearing, when evidence is first presented to the trier of fact"). But see *United States v. Tamez*, 881 F. Supp. 460, 466 (E.D. Wash. 1995) (holding that jeopardy did not attach in civil forfeiture action until court entered forfeiture decree); *United States v. Stanwood*, 872 F. Supp. 791, 800 (D. Or. 1994) (same).

83. In *Bretz*, the Court explained that the rule

> reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns—the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury—have combined to produce the federal law that in a jury trial jeopardy attaches when the jury is empaneled and sworn.

437 U.S. at 38.

84. The Federal Rules of Criminal Procedure allow joinder of a broader range of offenses than those that would constitute the "same offense" under the *Bloekburger* test. See generally FRCrP 8 and 14.

85. See King, 144 U. Pa. L. Rev. at 142 n.123 (cited in note 7) (noting the inability of government attorneys to bring civil, administrative, and criminal penalties in the same proceeding); Henning, 31 Am. Crim. L. Rev. at 55 (cited in note 7) (criticizing the Court for ignoring the fact that the government cannot bring civil and criminal actions together); Linda S. Eads, *Separating crime from Punishment: The Constitutional Implication of* United States v. Halper, 68 Wash. U. L. Q. 929, 978-83 (1990) (discussing the inability to join civil and criminal actions).

86. See generally sources cited in note 85.

87. See King, 144 U. Pa. L. Rev. at 145 (cited in note 7) ("By barring later efforts to punish defendants with penalties that cannot be joined with penalties obtained in earlier prosecutions, the Court has forced government attorneys to choose only one penalty.").

endorsed ad hoc totality of the circumstances analyses to find that overlapping civil and criminal proceedings actually constitute a "single, coordinated prosecution."[88]

3. *United States v. Ursery* and the Decline of the *Halper* Model

This past term the Supreme Court granted certiorari to hear *United States v. Ursery*,[89] a separate proceedings double jeopardy case. Thus, it had an opportunity to alleviate the confusion in the lower courts over application of the multiple punishments prohibition. Rather than clarifying *Halper* and *Kurth Ranch*, however, the Court avoided applying those cases at all by holding that a civil forfeiture statute simply did not constitute punishment for purposes of the Double Jeopardy Clause.[90] Only three years earlier, however, in *Austin v. United States*,[91] the Court held that the same civil forfeiture statute *did* constitute punishment for purposes of the Excessive Fines Clause.[92] Thus, the *Ursery* holding seems rather suspect.

Justice Rehnquist's majority opinion offered little to justify the conclusion that "punishment" means different things in different constitutional clauses. He stated that in the excessive fines context, *Austin* requires courts to make a threshold determination of whether a forfeiture constitutes punishment and then make a second determination of whether that punishment is excessive.[93] However, under Justice Rehnquist's reading of *Halper*, the same sanction would only constitute "punishment" for purposes of the Double Jeopardy Clause if

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88. See, for example, *United States v. Volanty*, 79 F.3d 86, 89 (8th Cir. 1996) (stating that a civil forfeiture action and a criminal prosecution can constitute a "single, coordinated prosecution" if they are initiated at nearly the same time and if they are connected in an obvious way); *United States v. Smith*, 75 F.3d 382, 386 (8th Cir. 1996) (stating that civil and criminal action could constitute the "same procedural entity" if government pursued remedies concurrently); *United States v. Millan*, 2 F.3d 17, 20-21 (2d Cir. 1993) (holding that civil forfeiture action and criminal action were a single proceeding for purposes of the *Halper* analysis); *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994) (holding that the "simultaneous pursuit" of criminal and civil sanctions rendered government action a "single, coordinated prosecution"); *United States v. Cartagena*, 1995 U.S. Dist. LEXIS 17011 (E.D. Pa. 1995) (seeking civil and criminal sanctions in same indictment constituted "single proceeding" despite separate administrative and judicial execution of the sanctions). But see *United States v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements*, 908 F. Supp. 1070, 1083 (D. R.I. 1995) (finding no single coordinated prosecution where civil and criminal actions were tried at different times, by different fact finders and would end twenty-two months apart).

89. 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996).

90. Id. *Ursery* actually decided two cases which were consolidated by the Court.

91. 509 U.S. 602 (1993).

92. Id. at 621-22.

93. *Ursery*, 116 S. Ct. at 2146.

a court determined it was *excessive* in the first place.[94] Therefore, the Court reasoned, the threshold level of punitiveness needed to render a sanction "punishment" for the Eighth Amendment is lower than that needed for the Fifth.[95] A brief reading of *Halper* and *Austin* makes Justice Rehnquist's formalistic reasoning appear disingenuous. The *Austin* Court recognized no distinction between the meaning of "punishment" in different constitutional clauses—indeed, the Court explicitly applied *Halper*'s double jeopardy definition of punishment to conclude that civil forfeitures constitute punishment in the excessive fines context.[96]

Thus, instead of clarifying *Halper*, the *Ursery* decision further confused the Court's jurisprudence.[97] Not even sure whether to address multiple prosecutions or multiple punishments, the Court tried to cover all its bases by declaring that the civil forfeiture at issue was neither "criminal" nor "punishment."[98] This Note suggests that the *Ursery* decision most likely represents an effort to restrict the *Halper* and *Kurth Ranch* model of multiple punishments. In other words, instead of disentangling *Halper* and *Kurth Ranch*'s focus on proceedings from the traditional multiple punishments analysis, the Court ducked the issue.[99]

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94. Id.

95. Id. at 2147.

96. *Austin*, 509 U.S. at 621-22.

97. The explicit holdings of *Halper*, *Austin* and *Ursery* can be stacked together to produce a baldly fallacious logical syllogism.

> [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, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already bas 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.

Halper, 490 U.S. at 448-49 (internal citation omitted). "[W]e cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense . . . .' " *Austin*, 509 U.S. at 622 (citing *Halper*, 490 U.S. at 448). "These [§ 881(a)(7)] civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy Clause.' " *Ursery*, 116 S. Ct. at 2138 (not citing *Halper* or *Austin*).

A thorough analysis of the constitutional definition of "punishment" is beyond the scope of this Note. The criticism of tbe Court's inconsistency in the area is raised only to illustrate the shaky doctrinal ground on which the Court's multiple punishment jurisprudence rests.

98. *Ursery*, 116 U.S. at 2149.

99. Writing before *Ursery*, Professor King remarked on this strategy emerging in the opinions of the individual justices in *Kurth Ranch*. Professor King first criticized Justice O'Connor's unfaithful reading of the *Halper* definition of punishment. She then went on to acknowledge that "it is more expedient to avoid the consequences of [the *Halper*] rule by refusing to find that a penalty constitutes punishment that to challenge the rule directly." King, 144 U. Pa. L. Rev. at 175 (cited in note 7).

Clearly, the *Ursery* Court's evasion of the multiple punishments issue did nothing to remedy the Court's ailing multiple punishments jurisprudence. Indeed, by holding that civil forfeiture does not constitute punishment for purposes of the Double Jeopardy Clause, the *Ursery* Court probably eliminated most cases in which it would have to address *Halper* claims.[100] The problem of *Halper* and *Kurth Ranch* was not their holding that certain civil sanctions constitute punishment for purposes of double jeopardy. Rather, the weakness of the decisions lies in their failure to articulate clearly that the focus of analysis in the multiple punishments context should be punishments, not proceedings. The Court could clear up a lot of the confusion by focusing on the basic question of what the multiple punishments prohibition actually protects and identifying a main interest or principle that guides it.

IV. THE MULTIPLE PUNISHMENTS PROHIBITION AND THE INTEGRITY OF FINAL JUDGMENTS

A. Redefining Multiple Punishments Rules in Terms of the Interest They Protect

Much ink has been spilled criticizing the weaknesses of the Supreme Court's multiple punishment jurisprudence. Many commentators have faulted the *Halper* Court for interfering with the legislature's power to punish.[101] Others claim that the Court's focus on multiple punishments is really a clumsy attempt to vindicate interests more properly protected under the Eighth Amendment.[102] Still others charge the Court with protecting procedural finality interests when none exist in the civil arena.[103]

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100. By holding that civil forfeiture does not constitute punishment for purposes of the Double Jeopardy Clause, the *Ursery* Court probably cut away the bulk of the cases in which *Halper* claims could protect defendants. Civil forfeiture has been described as the government's "tactical nuclear weapon" in the war on crime. Michael de Courcy Hinds, *States Seek Tougher Drug Forfeit Laws*, N.Y. Times, at A11 (July 16, 1990) (quoting Richard M. Wintory, Director of the National Drug Prosecution Center).

101. For sources discussing the impossibility of joining civil and criminal proceedings, see notes 85 and accompanying text.

102. See King, 144 U. Pa. L. Rev. at 145 (cited in note 7) ("A mandate to use only one of several authorized penalties is a poor way to prevent punishment from exceeding a constitutional ceiling on severity.").

103. See Jahncke, 66 N.Y.U. L. Rev. at 136 (cited in note 67) ("The interest in finality of a criminal prosecution, protected by the prohibition against successive prosecutions, simply was not present in *Halper*.").

These problems have arisen because the Court has only defined the multiple punishments prohibition in terms of its function in different contexts. Viewed separately, each model of multiple punishments fails to justify reading a prohibition into the Double Jeopardy Clause.

The legislative deference model strains the language of the Double Jeopardy Clause. A prohibition on punishment exceeding legislatively authorized limits for its own sake would seem more at home in the Due Process Clause than in the landscape of double jeopardy doctrine.[104] The Due Process Clause—with its general requirement that all punishment be in accord with the law of the land[105] and its corollary rule of strictly construing statutes in favor of lenity—parallels closely the multiple punishments prohibition's requirement of legislative authorization and presumption against cumulation.[106]

The *Halper* and *Kurth Ranch* model blurs the distinction between the multiple punishment prohibition and the bar on multiple prosecutions. By focusing the multiple punishments inquiry on separate proceedings, and characterizing a civil tax proceeding as the "functional equivalent" of a second prosecution,[107] *Halper* and *Kurth Ranch* suggest a finality interest in avoiding the dangers of duplicative proceedings. Civil proceedings, however, do not create the kind of procedural burdens associated with more oppressive criminal prosecutions.[108] Furthermore, if a civil proceeding culminating in punishment were indeed the "functional equivalent" of a prosecution, one would suppose that the Constitution's other procedural safeguards (for example, the right to counsel and the right against self-incrimination) would attach to those proceedings as well.[109] Yet they clearly do not. The Court's apparent concern with "separate proceedings" thus seems misplaced.

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104. Justice Scalia uses this criticism to advocate scrapping the multiple punishments prohibition entirely. In Justice Scalia's opinion the Double Jeopardy Clause does not prohibit multiple punishments at all. "Instead, the Due Process Clause keeps punishment within the bounds established by the legislature . . . ." *Kurth Ranch*, 114 S. Ct. at 1958.

105. Id. at 1959.

106. The relationship between the due process rule of strict construction and double jeopardy's presumption against cumulation is firmly established. See Comment, 75 Yale L. J. at 311-21 (cited in note 18) (comparing double jeopardy limits on multiple punishments with similar due process rules of construction).

107. See Part III.B.1.

108. See Jahncke, 66 N.Y.U. L. Rev. at 135-38 (cited in note 67) (arguing that the *Halper* Court identified a procedural finality interest where none existed in the civil arena).

109. See generally Eads, 68 Wash. U. L. Q. at 929 (cited in note 85) (warning that the *Halper* rationale could lead to an improper mandatory application of the Eigbth, Fifth, and Sixth Amendments to government-initiated civil penalty cases).

Thus the two freestanding models of the multiple punishment prohibition appear unrelated to each other and only vaguely connected with the clause they are supposed to inhabit. This Note argues that the Court should identify the interest that guides the various applications of the right. Rather than defining the prohibition in terms of its requirements, the Court should define its requirements in terms of the interest they serve. What then is the interest that underlies the multiple punishments prohibition?

Some claim that the prohibition serves the sole purpose of ensuring that punishment does not exceed that authorized by the legislature.[110] These criticisms of the *Halper* decision are premised on the notion that the sole interest underlying the multiple punishments prohibition is ensuring legislative authorization for all punishment. But even putting aside *Halper* and *Kurth Ranch*, precedent reveals that the multiple punishments prohibition's original purpose was not so narrowly restricted.

Almost a century after *Lange*, and twenty years before *Halper*, the Court in *North Carolina v. Pearce*[111] struck down a punishment under the multiple punishments prohibition *despite* the fact that the sentence was within the legislatively authorized maximum.[112] In one of the lesser known companion cases decided with *Pearce*, a defendant by the name of Rice had been convicted of certain crimes in an Alabama trial court and sentenced to ten years imprisonment.[113] After serving two and one half years of his sentence, Rice had the judgments set aside on the ground that he was denied his constitutional right to counsel.[114] The case was retried in state court and the defendant was again convicted.[115] This time, however, the trial judge sentenced Rice to twenty-five years in prison.[116] The judge refused to credit the time Rice had already spent in prison toward the second sentence.[117] On appeal, Rice argued that the court's refusal to credit the time served to the new sentence violated the Double Jeopardy Clause. The new sentence, however, even if combined with the years already spent in prison, was within the statutory maximum of thirty

110. See Jahncke, 66 N.Y.U. L. Rev. at 117 (cited in note 67).

111. 395 U.S. 711 (1969).

112. Id. at 726. Justice Scalia's contention, therefore, that "until *Halper*, the Court never invalidated a legislatively authorized successive punishment," *Kurth Ranch*, 114 S. Ct. at 1956, is in error.

113. *Pearce*, 395 U.S. at 714.

114. Id.

115. Id.

116. Id.

117. Id.

years.[118] Thus, if the multiple punishments prohibition's only purpose is ensuring that punishment does not exceed legislative limits, the twenty-seven-year sentence should have passed constitutional muster.

Yet the Supreme Court agreed with Rice. The Court first noted that the multiple punishments violation would indeed be dramatically evident in a case where the sum of uncredited time served and the sentence upon reconviction exceeded the legislatively authorized maximum.[119] The Court, however, went on to hold that the multiple punishments prohibition still applies "whenever punishment already endured is not fully subtracted from any new sentence imposed."[120] According to the *Pearce* Court, all punishments exacted pursuant to a first conviction must be fully "credited" toward any new punishment imposed upon reconviction after appeal.[121]

Clearly, then, the legislative deference model of the multiple punishment prohibition cannot justify the result in *Pearce*. Yet neither can the decision be explained by any procedural finality interest implied by the Court in *Halper* and *Kurth Ranch*. If the multiple punishment prohibition protects against the burdens of a subsequent proceeding, then Rice could not lawfully have been resentenced in the second trial.[122] The *Pearce* decision, however, *is* consistent with the Double Jeopardy Clause's purpose of preserving the integrity of final judgments. The multiple punishments violation occurred because the uncredited time served exceeded the limits of the final valid judgment of twenty-five years. By failing to account for the two and one half year imprisonment, the trial court effectively sentenced Rice to

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118. Id. at 719 n.14. Rice was convicted on three counts of second-degree burglary, each count carrying a maximum sentence of ten years. Id.

119. Id. at 718. The Court elaborated:

> The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction. Suppose, for example, in a jurisdiction where the maximum allowable sentence for larceny is 10 years' imprisonment, a man succeeds in getting his larceny conviction set aside after serving three years in prison. If, upon reconviction, he is given a 10-year sentence, then, quite clearly, he will have received multiple punishments for the same offense. For he will have been compelled to serve separate prison terms of three years and 10 years, although the maximum single punishment for the offense is 10 years' imprisonment.

Id.

120. Id. The Court stated that the same rule would apply to a defendant who had paid a fine upon the first conviction: "Any new fine imposed upon reconviction would have to be decreased by the amount previously paid." Id. at 718 n.12.

121. Id. at 718-19.

122. See *DiFrancesco*, 449 U.S. at 135 (discussing *Pearce* and noting that "if any rule of finality had applied to the pronouncement of a sentence, the original sentence would have served as a ceiling on the one imposed at retrial").

twenty-seven and one-half years' imprisonment when its own final judgment only authorized a sentence of twenty-five years.

Pearce demonstrates the importance of understanding multiple punishment rules in terms of the broader interest they serve. One could, of course, read the *Pearce* rule narrowly in terms of the specific context in which it operates. Stated in those terms, *Pearce* requires punishment imposed under a previous conviction to be fully credited to any new sentence imposed after appeal. This reading of the decision, however, would simply add another freestanding rule to the Court's already cloudy multiple punishments jurisprudence. If *Pearce* is understood in terms of double jeopardy's original purpose of preserving the integrity of final judgments, the decision would prohibit *any* punishment not accounted for by the first final judgment.[123] If a punishment is not accounted for, then that punishment exceeds the limits on punishment set by the sentencing authority and undermines the integrity of the final judgment.[124]

This interpretation of the interest behind the multiple punishments prohibition is borne out by the case which gave birth to the protection—*Lange*. Although the Court in *Lange* did not articulate the interest underlying the newly identified prohibition on multiple punishments, its result seems entirely consistent with the interest in preserving the integrity of final judgments. The defendant in *Lange* had served one of two maximum alternative penalties when he paid the $200 fine. Insofar as the fine constituted an authorized punishment for his offense, the defendant had endured a single punishment under a final judgment. Of course, the original sentence of fine and imprisonment was erroneously severe, but that error did not nullify the valid portion of the judgment that the defendant had

123. Justice Stevens noted this aspect of the multiple punishment prohibition in *Ursery*. After reaching issues not reached by the majority, he stated that a punitive civil forfeiture must be joined with a criminal prosecution at the sentencing stage, for "a single judgment encompassing the entire punishment for the defendant's offense is precisely what the Douhle Jeopardy Clause requires." 116 S. Ct. at 2163 (Stevens, J., dissenting). Although Justice Stevens cited no authority for this proposition and did not explain his reasons for making it, his insight essentially corresponds to the thesis of this Note.

124. Some commentators have hinted at/suggested such a rule as an aspect of the multiple punishment prohibition. See, for example, Note, *A Definition of Punishment for Implementing the Double Jeopardy Clause's Multiple-Punishment Prohibition*, 90 Yale L. J. 632, 636 (1981) (noting that one of the multiple punishment prohibition's limitations requires the sentencing court to "take full account of all separate punishments imposed for a single offense"); Westen and Drubel, 1978 S. Ct. Rev. at 109 (cited in note 45) (noting that "the protection against double punishment is not limited to penalties in excess of legislative authority but also extends to 'excessive' penalties as defined by the body possessing final sentencing authority under the domestic law").

satisfied.[125] By paying the fine the defendant rendered the judgment of punishment (to the extent it imposed the maximum authorized fine) final and valid.[126] Any further punishment under a second judgment would undermine the integrity of the first. First, as a matter of pure statutory interpretation, it would constitute a second punishment when the legislature had authorized only one. Second, it would arbitrarily subject the defendant to punishment in excess of the court's first final judgment. If the legitimacy or integrity of judgments is defined by the punitive limits set by the legislature and the judiciary, either of these flaws would undermine the integrity of the first judgment.

Consider how this reading of *Pearce* and *Lange* applies to the seemingly inconsistent models prevailing in the modern Court's multiple punishments jurisprudence.

The results in *Halper* and *Kurth Ranch* follow quite naturally from the broader rule of *Pearce*. In those cases, the punishments imposed in the civil proceedings were not accounted for in the final judgments imposed in the prior criminal prosecutions.[127] *Halper* and *Kurth Ranch* struck down the legislatively authorized civil punishments not because the separate civil proceeding implicated finality interests, but because the civil "punishments" would have undermined the integrity of the valid criminal judgment.

The legislative deference model of multiple punishments demonstrates that punishment not accounted for by the legislature undermines the integrity of judgments as surely as punishment not accounted for by the sentencing authority.[128] If a judge imposes punishment in excess of legislatively authorized limits, she punishes as if the defendant had been convicted more than once for the same offense. To the extent that a court imposes punishment in excess of its

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125. In response to the Government's argument that the first judgment must be treated as "no judgment" the Court stated that "[t]he error of the Court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." *Lange*, 85 U.S. at 174.

126. The Court noted that "if no part of the sentence had been executed, [the court] could have rendered a judgment for two hundred dollars fine after vacating the first." Id.

127. The primary difference between the *Halper* and *Kurth Ranch* decisions and the *Pearce* decision is that in the former, the government attorneys, rather than the trial judge, induced the multiple punishment violation when they sought punishment in excess of the final judgment.

128. This, perhaps, is what the Pearce Court meant when it stated that a multiple punishments violation would be more "flagrantly apparent" in a case where the sum of uncredited time served and punishment imposed upon reconviction exceeded the legislative maximum. See note 119.

authority, its judgment cannot be considered valid in the first place.[129] Such punishment, therefore, exceeds the scope of the final valid judgment and violates the multiple punishment prohibition.

By thus defining its various applications of the multiple punishments prohibition in terms of the double jeopardy interest the prohibition serves, the Court could do much to rid its jurisprudence of apparent anomalies and inconsistencies. Instead, the Court has emphasized proceedings and legislative maximums as if each had some independent double jeopardy significance. The Court should place the multiple punishment focus where it belongs: on final judgments of punishment.

B. Applying the Multiple Punishments Prohibition

Explicitly acknowledging the interest in preserving the integrity of final judgments would resolve many of the vexing issues lower courts have had to deal with in the wake of *Halper* and *Kurth Ranch*. One problem facing the lower courts in the context of overlapping proceedings has been determining which punishment constitutes the second prohibited jeopardy. As discussed above,[130] courts have awkwardly analogized to the multiple prosecutions concept of "attachment" to solve this dilemma. But attachment of double jeopardy prohibitions at the outset of the trial protects an interest in limiting the dangers associated with criminal prosecutions[131]—dangers which are not implicated in the multiple punishments context.[132] The multiple prosecutions concept of jeopardy attachment thus provides an awkward fit in the multiple punishments context.

Focusing on the first final and valid judgment of punishment provides a more appropriate method of determining which punishment constitutes the prohibited jeopardy. Jeopardy in the multiple punishments context attaches when a final judgment of punishment is imposed, for it is only at that point that the defendant has

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129. The multiple punishments rule, therefore, requires such a sentence to be reduced until all separate punishments imposed in the judgment render it a single, valid judgment. An illustration of this remedy is provided by the Court's decision in *Jones*. The trial court sentenced the defendant to two consecutive sentences: one for felony murder and one for the underlying felony of attempted robbery, with the shorter of the two sentences to run first. *Jones*, 491 U.S. at 378. The legislature had not intended to allow cumulative punishments. Id. After the defendant had finished serving the shorter sentence, the trial court vacated that sentence and credited the time served to the longer sentence for felony murder. Id. at 379.

130. See notes 79-83 and accompanying text.

131. See note 83 and accompanying text.

132. Id.

an interest in preserving the integrity of the final judgment.[133] The second jeopardy would therefore be any punishment, civil or criminal, that is not accounted for in first final and valid judgment of punishment.[134]

Many courts have also had to decide when overlapping proceedings are "separate" for purposes of the multiple punishments prohibition such that they produce separate (multiple) punishments.[135] In light of the procedural difficulties of joining civil and criminal proceedings, courts have devised de facto joinder rules based on the simultaneous or coordinated prosecutorial pursuit of the criminal and civil sanctions.[136] But courts need not strain the meaning of "separate proceedings" to allow prosecutors to impose both civil and criminal sanctions. Since the multiple punishment prohibition is not concerned with any procedural finality interest, there is no reason criminal and punitive civil proceedings must be joined for trial purposes. The multiple punishments prohibition is only implicated when all punishments are not accounted for in the final judgment of punishment. The single judgment rule would only require joinder at the sentencing stage so that all punishments can be accounted for in the final valid judgment.[137] Prosecutors could thus pursue separate civil and criminal proceedings up until the sentencing stage without facing any of the joinder obstacles posed by

133. Several Supreme Court holdings are consistent with the proposition that only a final judgment of punishment will limit a defendant's exposure to additional punishment. The Court has held, for example, that an erroneous sentence that falls *below* the statutory minimum can later be increased without violating the Double Jeopardy Clause. See *Bozza v. United States*, 330 U.S. 160, 166-67 (1947) (noting that the trial court "only set aside what it had no authority to do and substitute[d] directions required by the law to be done upon the conviction of the offender" (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). Similarly, the Court has held that, at least in some circumstance, the Government may timely appeal a trial court's sentence. *DiFrancesco*, 449 U.S. at 143. Such holdings reflect the notion that punishment by itself cannot trigger any finality interest. Rather, the multiple punishments prohibition is only concerned with preserving integrity of a judgment that is *already* final.

134. A comparison of *Pearce* and *Halper* is illustrative of this point. In *Pearce* the Court prohibited the first two and one-half year sentence by requiring it to count toward the satisfaction of the second twenty-five year sentence. This is because the second punishment constituted the first final judgment of punishment (since the first sentence was reversed on appeal). The uncredited time served under the first nonfinal judgment thus undermined the integrity of the first *final* judgment of punishment. In *Halper*, on the other hand, the first final judgment of punishment occurred in the criminal trial. Preserving the integrity of that first final judgment thus required the prohibition of the later civil punishment. The prohibited punishment, therefore, may occur first or second depending on when the first final judgment occurs.

135. See note 79 and accompanying text.

136. See notes 84-87 and accompanying text.

137. Justice Stevens, dissenting in *Ursery*, recognized this point. 116 S. Ct. at 2163 (Stevens, J., dissenting).

disparate burdens of proof, discovery rules, and procedural safeguards.[138]

C. The Multiple Punishments Prohibition and Arbitrary Punishment

This Note has attempted to show that, notwithstanding the Court's unclear and apparently inconsistent jurisprudence, the multiple punishment prohibition has a solid doctrinal basis in the Double Jeopardy Clause's original purpose of preserving the integrity of final judgments. Nevertheless, some argue that the Double Jeopardy Clause is ill-suited to serve as a limit on punishment. Other constitutional rights, they claim, are better designed to avoid arbitrary or excessive punishments. Accordingly, this last section explains how preserving the integrity of final judgments protects defendants from arbitrary punishments arising peculiarly from multiplicity in modern law enforcement strategies.[139]

Protection against arbitrary and excessive punishments is a function traditionally associated with the Eighth Amendment.[140] The Eighth Amendment, however, does not adequately protect defendants when legislatures may divide punitive sanctions among different offenses and proceedings.[141] Punishments that are not disproportionate individually can become disproportionate when cumulated.[142] Requiring trial judges to take account of all punishments in

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138. In response to an *Ursery* prosecutor's argument that civil and criminal sanctions "cannot be (and never have been) joined together in a single trial" Justice Stevens explained:

> I cannot agree with the Government's view that there is any procedural obstacle to including a punitive forfeiture in the final judgment entered in a criminal case. The sentencing proceeding does not commence until after the defendant has been found guilty, and I do not see why that proceeding should not encompass all of the punitive sanctions that are warranted by the conviction.

Id. (Stevens, J., dissenting). Even if Justice Stevens were wrong in this regard, legislatures could easily overcome the problem by passing a law that removes the procedural obstacle. See *Helvering v. Mitchell*, 303 U.S. 391, 402 n.6 (1938) (stating that the Constitution presents no barrier to bringing a civil sanction in a criminal prosecution). When the proceedings end at different times this requirement may necessitate a stay of judgment in either the civil or the criminal proceeding pending the liability outcome of the other.

139. See *Kurth Ranch*, 114 S. Ct. at 1959 (Scalia, J., dissenting) (noting that the Due Process Clause ensures that punishment is authorized by the legislature and that the Eighth Amendment restricts excessive punishment).

140. The Eighth Amendment prohibits "excessive fines" and "cruel and unusual punishments." U.S. Const., Amend. VIII.

141. See King, 144 U. Pa. L. Rev. at 150 (cited in note 7) (noting that "[j]udges . . . are used to evaluating the proportionality of penalties one at a time," and stating that double jeopardy law has "held cumulative penalties somewhat in check").

142. Id. at 151 (stating that "proportionate penalties can add up to disproportionate punishment").

one final judgment ensures that they have considered the cumulative effect of all punishments, and that appellate courts can evaluate the excessiveness of the *full* punishment for the offense if the cumulative punishment is appealed.[143]

Furthermore, the multiple punishments prohibition is a necessary supplement to the multiple prosecutions prohibition. As a limit on prosecutors, the multiple punishments prohibition is more significant today than when the Supreme Court decided *Pearce* in 1969. When prosecutors had only criminal punishments at their disposal, the bar on retrial after a conviction generally ensured that a single judgment would account for all of a defendant's punishments for a given offense.[144] Today's legislatures, however, rely more than ever upon nontraditional, non-criminal penalties to combat crime.[145] Prosecutors today, therefore, have at their disposal a vast range of potentially punitive options, including various types of civil monetary sanctions, taxes on illegal activity, civil forfeitures of all types, registration of sex offenders, treble damages for antitrust violations, and punitive damages shared with the state.[146] Because of the various civil and administrative procedural settings in which these sanctions are sought, defendants cannot rely on the right against retrial after a conviction to ensure that their punishments are all accounted for in a single judgment. Thus, the multiple punishments prohibition steps in to guard against excessive punishments imposed in separate proceedings.

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143. Professor King offers an alternative solution to the problem of multiple punishments and proportionality review under the Eighth Amendment. She argues that the Eighth Amendment review should be broadened to consider the proportionality of all separate punishments for a given course of conduct whether such punishments are fines or imprisonment, civil or criminal, in separate or single proceedings, etc. Under Professor King's approach the Eighth Amendment would displace double jeopardy for review of punishments resulting from multiple punishments and multiple prosecutions. The Double Jeopardy Clause would place no limits on multiple punishments *or even multiple prosecutions* other than those prescribed by the legislature. See generally id. at 101.

144. See *Kurth Ranch*, 114 S. Ct. at 1957 (Scalia, J., dissenting) ("[U]ntil *Halper* was decided . . . the Double Jeopardy Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred.").

145. See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L. J. 1325 (1991) (discussing the use of civil remedies to combat criminal behavior); Mann, 101 Yale L. J. at 1998 (cited in note 50) (noting that punitive civil sanctions have largely replaced criminal law in such areas as white collar crime and drug prosecutions).

146. See King, 144 U. Pa. L. Rev. at 158-60 (cited in note 7). Professor King's article contains a partial list (spanning three pages) of the civil sanctions that could constitute punishment for purposes of the Eighth Amendment.

Punishment for the same offense[147] becomes increasingly arbitrary when it results from the separate judgments of different tribunals. For example, two sentencers acting independently will probably impose greater cumulative punishment than if a single tribunal had punished under both statutes because each tribunal may never know the full extent of the defendant's punishment.[148] Recent empirical studies tend to support this intuitive conclusion.[149] Arbitrariness may also occur when different tribunals impose punishments for the "same offense" that are vastly disparate in severity. At least one state supreme court recognized an analogous problem when related but separately tried offenses are not joined at the sentencing stage.[150] If criminal offenses that are *related* can give rise to concerns of arbitrariness, then the danger of disparate and arbitrary punishments seems even greater when the offenses are the "same offense" for purposes of the Double Jeopardy Clause.[151]

By requiring joinder at the sentencing stage when prosecutors seek both criminal and punitive civil sanctions, the multiple punishments prohibition thus prevents prosecutors from subjecting the defendant to the varying discretion of different punishing tribunals. The *Halper* Court gave a quick nod to this function when it stated that the multiple punishments prohibition prevents prosecutors from seeking punishment in a second proceeding because they are dissatisfied with the one obtained in the first.[152] The multiple punishments joinder rule thus functions as a limited analogue to the broader rule of

147. See discussion of *Blockburger* in note 20.

148. Commentators have noted that when related offenses are punished together, sentencing judges are likely to impose more lenient cumulative punishment than would result if those offenses were punished separately. See Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 Vand. L. Rev. 1181, 1192 (1996) (noting the likelihood that defendants will get a lower cumulative sentence for related crimes when they are pleaded and sentenced all at once).

149. See Paul H. Robinson and John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 189-97 (Westview, 1995) (conducting an empirical study that supported the notion of a "multiple offense discount" and noting that cumulative sentences grow more lenient when offenses are committed closer in time).

150. See, for example, *State v. Pillot*, 560 A.2d 634, 643 (N.J. 1989) (noting that where related offenses were not consolidated at the sentencing stage, the "differing attitude of each judge toward the defendant" resulted in "idiosyncratic sentencing difference"). In order to remedy this problem of "idiosyncratic sentencing difference," that court used its constitutional authority to modify joinder rules so that defendants can move to consolidate related offenses at the sentencing stage. Id.

151. Concern about disparate sentences for similar offenses underlies Congress's passage of the Sentencing Guidelines. Comprehensive Crime Control Act of 1984, S. Rep. No. 98-225, 98th Cong., 2d Sess. 38, reprinted in 1984 U.S.C.C.A.N. 3182, 3221 (criticizing the "unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances").

152. See notes 61-62 and accompanying text.

compulsory joinder in the multiple prosecutions context.[153] In an age when prosecutors may avoid the strictures of the multiple prosecutions prohibition by seeking any number of punitive sanctions in non-criminal proceedings, the multiple punishments rule is of paramount importance.[154]

V. CONCLUSION

The multiple punishments prohibition today rests on shaky ground. The Supreme Court's articulation of the right as prohibiting punishment greater than that authorized by the legislature no longer explains its own application of the prohibition in *Halper* and *Kurth Ranch*. The Court's failure to articulate a coherent principle behind the multiple punishments prohibition makes its applications of the doctrine appear inconsistent. In this environment, the criticisms of those who would discard the right altogether grow harder to ignore.

Rather than simply explaining the multiple punishments prohibition (or even discarding it altogether), the *Ursery* Court chose to avoid applying its own multiple punishments rules. Ducking the issue, however, will provide only temporary relief. As long as law enforcement strategies continue to change and defendants face growing exposure to punitive civil sanctions, the multiple punishments issue will arise again. It is time for the Court to tie its multiple punishments jurisprudence to a single double jeopardy interest. The Court's varying applications of the right can be understood as different ways of preserving the integrity of final

153. See note 20 and accompanying text.

154. The notion that double jeopardy policy must be defined in terms of society's criminal procedure is not new. In his famous Comment on double jeopardy policy, Larry Simon observed:

> Some of these [policy considerations] are recommended more by the realities of current criminal procedure than by history. But no apology is in order .... For double jeopardy, in its early days, was integral to a different society and different criminal proceduure .... The policy and purpose of double jeopardy must be a function of the criminal law and procedure of a social system. Double jeopardy, even when established as a general principle, may be empty of specific content.

Comment, 75 Yale L. J. at 266 n.14 (cited in note 18).

judgments. By thus identifying the interest that informs the rules, the Court would clarify the operation of those rules and the harms they were meant to redress.

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