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Department of Revenue of Montana v. Kurth Ranch: The Demise of Civil Tax Fraud Consequences?

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RECENT DEVELOPMENT

Department of Revenue of Montana v. Kurth Ranch: The Demise Of Civil Tax Fraud Consequences?

I. INTRODUCTION

In *Department of Revenue of Montana v. Kurth Ranch*[1] the United States Supreme Court held, for the first time, that a state tax statute violated the Double Jeopardy Clause of the Federal Constitution.[2] The future impact of this decision has been the subject of much recent speculation.[3] In particular, commentators have debated *Kurth*'s effect on the civil consequences labeled "additions to tax" found in the Internal Revenue Code which are assessed and collected in connection with criminal taxpayer fraud.[4] These additions were examined in *Helvering v. Mitchell*[5] over fifty years ago, and upheld against a double jeopardy challenge.[6] However, the continuing validity of *Mitchell* is questionable in light of the Court's decision in *Kurth*. The *Kurth* majority expressly cited *Mitchell* as justification for subjecting a tax statute to double jeopardy analysis.[7] Moreover, the reasoning and language in *Kurth* itself, when applied to the current equivalent of the addition to tax upheld in *Mitchell*, arguably invalidates the provision.

In order to demonstrate the potentially broad scope of the *Kurth* decision, this Recent Development will show how the *Kurth* reasoning could invalidate additions to tax for fraud under a double jeopardy challenge. This Recent Development will first briefly discuss

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1. 114 S. Ct. 1937, 128 L. Ed. 767 (1994) ("*Kurth*"). Justice Stevens delivered the opinion of the court and was joined by Justices Blackmun, Kennedy, Souter and Ginsburg. Dissenting opinions were filed by Justices Rehnquist, O'Connor and Scalia, who was joined by Justice Thomas.

2. Id. at 1947-48. The Double Jeopardy Clause states in pertinent part: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. Const., Amend. V.

3. See generally John J. Tigue, Jr. and Linda A. Lacewell, *Taxes are for Revenue, Not Punishment*, 211 N.Y. L. J. 1 (1994); Leonard Reed Rosenblatt, *Has the Tax Man Finally Grabbed Too Much?*, 17 Legal Times 23 (1994); Elkan Abramowitz, *Double Jeopardy and Civil Sanctions*, 212 N.Y. L. J. 3 (1994).

4. See 26 U.S.C. § 6663 (1989); I.R.C. § 6663 (CCH 1994).

5. 303 U.S. 391 (1938).

6. Id. at 398-405.

7. *Kurth*, 114 S. Ct. at 1946 n.16.

the facts and procedural history of *Kurth*. Part III will examine the history of the Double Jeopardy Clause, especially in the area of parallel civil and criminal proceedings, and will briefly survey the Supreme Court's past treatment of constitutional challenges to tax statutes. Part IV will then detail each decision handed down by the Supreme Court in its disposition of *Department of Revenue of Montana v. Kurth Ranch*. Part V will focus on additions to tax for fraud and *Kurth*'s effect on the constitutionality of such additions under the Double Jeopardy Clause.

II. *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*: FACTS AND PROCEDURAL HISTORY

In October of 1987, Montana law enforcement officers raided a farm operated by six members of the extended Kurth family,[8] arrested the Kurths, and confiscated marijuana plants, materials, and paraphernalia which were being used in the family's marijuana business.[9] Not only did this raid terminate the Kurths' marijuana business, it also instigated a series of four legal proceedings involving the Kurth family.[10] In the third proceeding, the Montana Department of Revenue sought to collect $900,000 in taxes under the 1987 version of the Montana Dangerous Drug Tax Act,[11] which provided for a

8. Id. at 1939. The family members involved were Richard and Judith Kurth, their children, Douglas Kurth and Cindy Halley, and their spouses, Rhonda Kurth and Clayton Halley, respectively. Id. at 1942 n.6.

9. *In re Kurth Ranch*, 145 Bankr. 61, 66 (Bkrtcy. D. Mont. 1990).

10. First, criminal charges were filed against all members of the family for conspiracy to possess drugs with the intent to sell under Montana Code Annotated § 45-4-102 or, in the alternative, possession of drugs with the intent to sell under Montana Code Annotated § 45-4-102. *Kurth*, 114 S. Ct. at 1942. Each family member eventually entered into a plea agreement, and Richard and Juditb were sentenced to prison, while the others received suspended or deferred sentences. Second, a civil forfeiture action was instituted seeking recovery of cash and equipment used in the marijuana operation. The action was settled with an agreement to forfeit $18,016.83 in cash and equipment. Third, the Department of Revenue ("DOR") applied the 1987 version of the Montana Dangerous Drug Tax Act, Mont. Code Ann. §§ 15-25-101 through 15-25-123 (1987), for the first time, and attempted to collect over $900,000 in taxes. Although the Kurths contested this assessment in administrative proceedings, this action was stayed upon the initiation of the fourth proceeding. Fourth, a petition for bankruptcy was filed by the Kurths under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 362(a). It was in this proceeding that the Kurths challenged the constitutionality of the Dangerous Drug Tax. *Kurth*, 114 S. Ct. at 1942-43.

11. Mont. Code Ann. §§ 15-25-101 through 15-25-123. Since the Supreme Court's decision in *Kurth*, the Montana legislature has repealed §§ 15-25-101, 15-25-102, 15-25-111, 15-25-112, 15-25-113, 15-25-114, 15-25-115, 15-25-121, 15-25-122, 15-25-123. *Legislative Review: A Summary of Enactments in the 54th Montana Legislature* 181-82 (Mont. Legis. Council, 1995).

possession and storage tax on dangerous drugs.[12] The drug tax was to be collected only after any state or federal fines or forfeitures have been satisfied,[13] and is the greater of ten percent of the market value of the drugs or a specified amount, according to the character of the drug possessed.[14] Under regulations adopted by the Department of Revenue to administer the Dangerous Drug Tax Act, a taxpayer must file a tax return within seventy-two hours of arrest for illegal drug activity[15] in order to determine the tax liability due.

The constitutional questions raised by application of the Dangerous Drug Tax Act to the Kurths were first addressed in the bankruptcy proceedings initiated by the Kurths as a result of their arrest.[16] The bankruptcy court concluded that because the assessments on the five marijuana plants and oil were "arbitrary" and made without any factual basis, they were invalid as a matter of state law.[17] The court further held that although an assessment of $181,000 on 1,811 ounces of harvested marijuana was authorized by the Act,[18] the assessment violated the Double Jeopardy Clause of the Federal Constitution.[19] The bankruptcy court rejected the state's argument that the tax was remedial and designed to reimburse the government for its law enforcement costs.[20] Instead, the court noted various aspects of the Act[21] which led it to the conclusion that the goal of the drug tax was to deter and punish, and therefore its primary purpose was punitive.[22]

The District Court affirmed,[23] and concluded that the Montana Dangerous Drug Tax Act violated the Double Jeopardy Clause by

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12. Mont. Code Ann. § 15-25-111.

13. Id. at § 15-25-111(3).

14. Id. at § 15-25-111(2).

15. Mont. Admin. Rule 42.34.102(1) (1988). In addition, regulations required a law enforcement official to prepare a dangerous drug information report at the time of arrest, to allow the taxpayer the option to sign it, and if that option was not exercised, to file the form within 72 hours of arrest. Id. at Rule 42.34.102(3).

16. *Kurth*, 114 S. Ct. at 1943.

17. *In re Kurth Ranch*, 145 Bankr. at 69.

18. The Act authorized a tax on marijuana at the rate of $100 per ounce. Mont. Code Ann. § 15-25-111(2).

19. *In re Kurth Ranch*, 145 Bankr. at 69.

20. Id. at 74. The bankruptcy court relied primarily on *United States v. Halper*, which held that a civil penalty would coustitute punishment for purposes of the Double Jeopardy Clause if it bore no rational relationship to the goal of compeusating the government for its damages and costs. 490 U.S. 435, 448-49 (1989).

21. The bankruptcy court noted, for example, that the Drug Act resulted in a tax eight times the product's market value, that drug taxes have historically been viewed as penal in nature, and that the tax applies to acts already treated as a crime and is imposed only on criminals. *In re Kurth Ranch*, 145 Bankr. at 75-76.

22. Id. at 76.

23. *In re Kurth Ranch*, No. CV-90-084-GF, 1991 U.S. Dist. LEXIS 21133 (D. Mont. 1991).

punishing the Kurths a second time for the same criminal conduct.[24] Although the Court of Appeals for the Ninth Circuit also affirmed, it did not hold the Act unconstitutional on its face.[25] Instead the court held that the Kurths were entitled to an accounting to determine whether the sanction imposed was rationally related to the damages that the government suffered.[26] In the absence of any such accounting by the government in this case, the court concluded that the tax was unconstitutional as applied to the Kurths.[27]

While *In re Kurth Ranch* was pending on appeal, the Montana Supreme Court held that the Dangerous Drug Tax Act did not violate the Double Jeopardy Clause,[28] because the legislature intended to establish a civil, not a criminal, penalty,[29] and because the tax had a remedial purpose apart from its goals of retribution and deterrence.[30] Since the holding and reasoning of the Montana Supreme Court was at odds with that of the federal courts in the *Kurth* proceedings, the United States Supreme Court granted certiorari.[31] The Court, in a five-four decision,[32] held that the Montana Dangerous Drug Tax Act violated the Double Jeopardy Clause of the Federal Constitution by imposing a second punishment in a proceeding that was the functional equivalent of a successive criminal prosecution.[33]

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24. Id. at *13. Like the bankruptcy court, the district court relied on *Halper* and invalidated the punitive civil consequences because they sought only the goals of retribution and deterrence. Id. See note 20 (discussing the *Halper* case).

25. *In re Kurth Ranch*, 986 F.2d 1308, 1312 (9th Cir. 1993).

26. Id. at 1311-12. The *Halper* Court required this accounting in order to determine whether a consequence was reimbursement or punishment. 490 U.S. at 449-50.

27. Id. at 1312.

28. *Sorensen v. State Dept. of Revenue*, 254 Mont. 61, 836 P.2d 29, 31 (1992).

29. This reasoning is consistent with the statutery construction test articulated in *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938), and discussed in detail in Part III.A.1. The Montana Supreme Court refused to apply *Halper*, stating that its holding was self-limiting, as being only for the "rare case," and that it was distinguishable as *Halper* dealt with penalties and not taxes. *Sorensen*, 836 P.2d at 32-33.

30. Id. at 31-33.

31. 114 S. Ct. 38, 125 L. Ed. 2d 788 (1993).

32. Justice Stevens delivered the opinion of the Court, in which Justices Blackmun, Kennedy, Souter and Ginsburg joined. Dissenting opinions were filed by Justices Rehnquist, O'Conner, and Scalia. Justice Scalia's dissent was joined by Justice Thomas.

33. *Kurth*, 114 S. Ct. at 1948.

III. LEGAL BACKGROUND

The concept of double jeopardy has been a part of jurisprudential systems since Greek and Roman times.[34] A literal reading of the Double Jeopardy Clause[35] and a study of the English common law origins of the protection indicates that the provision was originally thought to apply only to criminal consequences[36] and to prohibit only penalties involving "life or limb" in a second prosecution for the same offense.[37] However, this interpretation was rejected by the Supreme Court,[38] and today the concept is a constitutional protection on both the federal and state[39] levels, applicable to civil[40] as well as criminal[41] cases.

The Double Jeopardy Clause contains two distinct protections. First, the clause prohibits multiple punishments.[42] Second, the clause prohibits multiple prosecutions.[43] The Supreme Court recognized

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34. Comment, *Twice in Jeopardy*, 75 Yale L. J. 262, 262 n.1 (1965). See also Donald Eric Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 Ohio St. L. J. 799, 800 (1988) (stating that "[s]ome kind of double jeopardy maxim has existed 'in almost all systems of jurisprudence throughout history.' "). See generally Jay A. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 2-37 (Cornell, 1969) (tracing the concept's development from ancient to modern times).

35. The Federal Constitution states: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. Const., Amend. V.

36. Andrew Z. Glickman, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after* United States v. Halper, 76 Va. L. Rev. 1251, 1251 n.2 (1990); 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, 113 & n.15 (1991).

37. See Sigler, *Double Jeopardy* at 5 (cited in note 34) (stating that the phrase referred to penalties of death or physical mutilation). See also Glickman, 76 Va. L. Rev. at 1254 (cited in note 36); Jahncke, 66 N.Y.U. L. Rev. at 113 (cited in note 36).

38. *Ex Parte Lange*, 85 U.S. (18 Wall) 163, 172-73 (1873) (holding that the Double Jeopardy Clause covers misdemeanors and felonies of any type).

39. *Benton v. Maryland*, 395 U.S. 784, 796 (1969) (incorporating the Double Jeopardy Clause of the Federal Constitution to the states through the Fourteenth Amendment).

40. *Halper*, 490 U.S. at 451 (holding that a civil penalty constituted punishment for purposes of the Double Jeopardy Clause's multiple punishment protection as it bore no rational relationship to the goal of compensating the government for its losses or costs). Cases prior to *Halper* held, specifically, that the clause applied only to criminal proceedings. See, for example, *Mitchell*, 303 U.S. at 398-99.

41. *Lange*, 85 U.S. at 172-73.

42. Id. at 173 (stating 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"). Although the language of the Double Jeopardy Clause does not include the prohibition against multiple punishments, several commentators have stated that the concept was contemplated by the framers and was possibly included in early drafts of the provision. See, for example, charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. Tex. L. J. 735, 769 (1983); Comment, 75 Yale L. J. at 265-66, nn. 12-13 (cited in note 34); Sigler, *Double Jeopardy* at 28, 32 (cited in note 34); George C. Thomas, III, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1, 3 n.3 (1985).

43. See *Lange*, 85 U.S. at 172-73; *North Carolina v. Pearce*, 385 U.S. 711, 717 (1969).

these two protections as the foundation of the Double Jeopardy Clause in *North Carolina v. Pearce*,[44] stating that a defendant may not be subjected to a second prosecution for the same offense after acquittal or conviction, nor subjected to multiple punishments for the same offense.[45]

A multiple prosecution violation occurs when a defendant's conduct violates two or more criminal statutes. If the defendant is prosecuted under one statute and is either convicted or acquitted, a later prosecution for the same underlying conduct under any other statute which proscribes such conduct constitutes a multiple prosecution violation.[46] However, unless the statutes in question proscribe the "same offense" as mandated by the Double Jeopardy Clause, a multiple prosecution violation has not occurred. Moreover, if proof of an additional fact is required under one of the subsequent statutes, then the exact same offense is not being prosecuted, and no constitutional violation has occurred.[47] By preventing the defendant from being tried several times for the same illegal acts,[48] the protection against multiple prosecutions preserves the finality of the first judgment for the benefit of both the defendant and the judicial system as a whole.[49]

There are several situations in which a multiple punishment violation occurs. First, a defendant's conduct may be punishable un-

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44. 395 U.S. 711 (1969).

45. Id. at 717. Although the prohibition of multiple punishments is now constitutionally recognized, there are several common situations when the multiple punishments protection of the Double Jeopardy Clause is erroneously invoked, such as when multiple punishments are imposed by separate sovereigns, when the multiple punishments are imposed in the same judicial proceeding, and when the two punishments are of a civil and criminal nature and the civil penalty retains its remedial nature. Lauren Orchard Clapp, Note, United States v. Halper: *Remedial Justice and Double Jeopardy*, 68 N.C. L. Rev. 979, 984 n.49 (1990).

46. Jahncke, 66 N.Y.U. L. Rev. at 115 (cited in note 36).

47. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). There is scholarly debate concerning the exact value of *Blockburger* to the issue of multiple prosecution violations. Compare Jahncke, 66 N.Y.U. L. Rev. at 119-20 (cited in note 36) (stating that while *Blockburger*'s application to multiple punishment cases has been diminished, it has survived and been enhanced as applied to multiple prosecution cases), with Eli J. Richardson, Recent Development, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 Vand. L. Rev. 273, 279 (1991) (stating that *Blockburger* does not provide the exclusive test for determining whether successive prosecutions violate the Double Jeopardy Clause).

48. The multiple prosecution protection operates as a type of collateral estoppel, ensuring that a prior judgment between the same parties in a different cause of action binds those parties or their privies as to those matters or issues previously decided. *Black's Law Dictionary* 261 (West, 6th ed. 1990). In addition, the multiple prosecution protection can be seen as a type of res judicata, ensuring that a matter once judicially decided is final. Id. at 1305-06.

49. Jahncke, 66 N.Y.U. L. Rev. at 116 (cited in note 36); Richardson, 45 Vand. L. Rev. at 277 (cited in note 47).

der more than one statute.[50] Second, a defendant's conduct may be fragmented so that each unit of the conduct constitutes a separate violation of the statute.[51] In both situations the concern is that the sentences will exceed those statutorily authorized by the legislature.[52] Third, a defendant's misconduct may give rise to both civil and criminal consequences.[53] In such a situation, if the civil consequence is punitive, rather than remedial, it operates as punishment for double jeopardy purposes and may not be imposed following a criminal consequence.[54]

Although there are clear theoretical distinctions between multiple punishment and multiple prosecution protections under the Double Jeopardy Clause, the Supreme Court did not adhere to such distinctions[55] when finally applying the clause's protections to civil proceedings in its landmark decision in *United States v. Halper*.[56] Consequently, the scholarly debate in this area is of questionable significance.[57]

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50. These cases have traditionally been labeled double description violations. See Clapp, 68 N.C. L. Rev. at 984 n.47 (cited in note 45) (citing examples of double description cases); Glickman, 76 Va. L. Rev. at 1255, 1255 n.22 (cited in note 36) (same); Jahncke, 66 N.Y.U. L. Rev. at 115-116 (cited in note 36) (giving a hypothetical example of a double description case).

51. These cases have traditionally been called unit-of-prosecution cases. See Clapp, 68 N.C. L. Rev. at 984 n.48 (cited in note 45) (citing examples of unit-of-prosecution cases); Jahncke, 66 N.Y.U. L. Rev. at 116 n.34 (cited in note 36) (same).

52. See *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983); *Lange*, 85 U.S. (18 Wall) at 168. Justice Scalia would recognize only these two types of multiple punishment violations. *Kurth*, 114 S. Ct. at 1955-57. Moreover, he would categorize them as violations of the Due Process Clause rather than as the so-called multiple punishments prong of the Double Jeopardy Clause. Id. Justice Scalia reasons that exceeding the amount of punishment authorized by the legislature violates the Due Process Clause's guarantee of legislative authorization for punishment, erroneously called the multiple punishment protection. Id. See text accompanying notes 176-82.

53. When civil and criminal consequences are invoked in separate proceedings, a parallel proceeding is said to have occurred. See Part III.A.

54. *Halper*, 490 U.S. at 448-49 (holding that a defendant who has already been punished in a criminal proceeding may not be subjected to an additional civil sanction to the extent that the second sanction may be characterized as a deterrent or as retribution, rather than as remedial).

55. Glickman, 76 Va. L. Rev. at 1262 & nn. 68 & 69 (cited in note 36) (noting the significance of the Supreme Court's characterization of *Halper* as a multiple punishment case and reviewing the confusion in the briefs to the Court concerning the case's status as a multiple prosecution case). See Paul F. Kirgis, Note, *The Constitutionality of State Allocation of Punitive Awards*, 50 Wash. & Lee L. Rev. 843 (1993) (stating that the Supreme Court's decision in *Halper* was a great divergence from precedent as it prohibited multiple punishments in successive prosecutions).

56. 490 U.S. at 448-49 (holding that the civil penalty under consideration constituted punishment for purposes of the Double Jeopardy Clause's multiple punishment protection).

57. See generally Richardson, 45 Vand. L. Rev. 273 (cited in note 47) (discussing the two distinct protections, their unique operations, and the Supreme Court's recent interpretation of them); Jahncke, 66 N.Y.U. L. Rev. at 114 (cited in note 36) (noting the clause's tangled history of judicial interpretation); Kirgis, 50 Wash. & Lee L. Rev. at 865 n.161, 867 (cited in note 55)

Although the Double Jeopardy Clause was originally thought to apply only to the most serious of criminal consequences, today the Clause's protections apply to all civil tax consequences imposed in parallel proceedings. In theory, this application encompasses non-remedial tax statutes. Until *Kurth*, however, a tax statute had never been invalidated under the Double Jeopardy Clause. In fact, challenges to tax statutes under other constitutional provisions were, in large part, equally unsuccessful.

A. Double Jeopardy in Parallel Civil and Criminal Proceedings

When a regulation or statute authorizes concurrent civil sanctions and criminal penalties for an illegal activity,[58] and both civil and criminal actions are instituted based upon the same facts,[59] a parallel proceeding has occurred.[60] There is no constitutional violation in such a situation if both the criminal and civil consequences are imposed in the same proceeding,[61] or if the civil consequence operates only as a remedy to compensate the government for its losses and costs.[62] However, if the civil consequence simply serves the goals of punishment—retribution and deterrence[63]—and follows criminal conse-

(discussing the confusion surrounding the two protections in the context of *Halper*); Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S. Ct. Rev. 81, 82-84 (discussing the confusion surrounding Supreme Court precedents concerning the Double Jeopardy Clause).

58. For an extensive list of such statutes and regulations, see Glickman, 76 Va. L. Rev. at 1278 n.145 (cited in note 36).

59. Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 Harv. L. Rev. 1023, 1023 n.5 (1985). See Jahncke, 66 N.Y.U. L. Rev. at 122 (cited in note 36) (giving a hypothetical example of a parallel proceeding-double jeopardy situation).

60. See Note, 98 Harv. L. Rev. at 1023 (cited in note 59) (outlining the different protections afforded by the criminal and the civil processes which conflict when parallel civil and criminal proceedings are instituted). 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 history and effects of blending criminal and civil consequences in the context of several constitutional protections).

61. *United States v. Killough*, 848 F.2d 1523, 1534 (11th Cir. 1988).

62. *Halper*, 490 U.S. at 448-49. See Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1046 (1993).

63. *Halper*, 490 U.S. at 448-49. But see Glickman, 76 Va. L. Rev. at 1265 n.87 (cited in note 36) (stating that the precedent relied upon in *Halper* to support the statement that retribution and deterrence are not legitimate nonpunitive governmental objectives does not actually support that conclusion).

quences, a multiple punishment violation has occurred triggering the protection of the Double Jeopardy Clause.[64]

Judicial application of the Double Jeopardy Clause to civil sanctions in parallel proceedings has evolved from a statutory construction test[65] heavily favoring the government and its labeling of a consequence as civil,[66] to a judicial inquiry into the actual goals and effects of the consequence in question.[67]

1. Development of the Statutory Construction Test

The Court first articulated the statutory construction test in *Helvering v. Mitchell*.[68] In *Mitchell*, the defendant was acquitted at his criminal trial for willful evasion of taxes.[69] However, Mitchell was subsequently subjected to a civil action to collect the tax deficiency due to his alleged misconduct plus a fifty percent addition to the tax.[70] Mitchell's double jeopardy claim asserted that the fifty percent addition to tax was intended as punishment, thus making the second procedure inherently criminal. Consequently, he argued that the government was barred from collecting the addition to tax by the Double Jeopardy Clause's prohibition of successive prosecutions.[71]

The Court characterized this question as one of statutory construction[72] and held that the sanction imposed a civil, rather than criminal, consequence for several reasons. First, the revenue statute established a civil proceeding for the collection of the sanction.[73] Second, the additions to tax were found under the heading "Interest and Additions to the Tax," rather than under the heading "Penalties,"

64. For a discussion of the protections afforded by the Double Jeopardy Clause, including the operation of the multiple punishments prong, see notes 42-57 and accompanying text.

65. *Mitchell*, 303 U.S. at 399.

66. *United States v. Ward*, 448 U.S. 242, 248-49 (adding to the statutory construction test the promise that only the clearest proof would suffice to establish a punitive purpose or effect). See Dudley, 79 Va. L. Rev. at 1044 (cited in note 62) (stating that "it is fair to say that the Court most often sided with the government, and it always gave great deference to legislative judgment in designating a particular penalty or proceeding civil or criminal").

67. *Halper*, 490 U.S. at 448.

68. 303 U.S. 391 (1938).

69. Id. at 396.

70. Id. at 395. This addition to tax is the same civil consequence discussed in Part V of this Recent Development. It is noteworthy that since Mitchell was acquitted in his prior criminal trial, and therefore received no actual punishment, he was forced to construct an argument under the multiple prosecution prong of the Double Jeopardy Clause. Id. at 398-99, 405-06.

71. Id. at 398.

72. Id. at 399.

73. Id. at 401-402.

which imposed criminal consequences.[74] Third, safeguarding the protection of the revenue[75] and reimbursing the government for costs incident to taxpayer misconduct were legitimate remedial and civil purposes for such additions to tax.[76] Finally, the Court pointed out that such consequences had historically been recognized as civil.[77]

Under the statutory construction test created in *Mitchell*, a court determined the remedial or punitive character of a consequence by conducting a simple inquiry into what the legislature intended the penalty to be. Such an inquiry essentially translated into a consideration of the label, language, and procedures that the legislature attached to the consequence.[78] Because the Court adhered to the legislature's characterization of a consequence as civil or criminal, it often denied double jeopardy claims without inquiry into the actual operation or effect of a particular consequence.[79]

In *Kennedy v. Mendoza-Martinez*,[80] the Supreme Court created an objective test to determine whether a proceeding was civil or criminal, which included inquiries into the consequence's character and effect.[81] However, this objective test rarely resulted in a finding that a penalty was criminal.[82] Nearly twenty years later in *United*

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74. Id. at 404-405.

75. It is arguable that safeguarding the revenue is a deterrent rather than a remedial purpose, which would clothe these additions to tax in a criminal, rather than a civil light and render them invalid after *Halper*. Glickman, 76 Va. L. Rev. at 1257 n.35 (cited in note 36).

76. *Mitchell*, 303 U.S. at 401. As some commentaters point out, the idea of compensating the government is construed loosely since it is not necessary for the government to prove the exact amount of damages, or even in some cases, actual damages at all. See Clapp, 68 N.C. L. Rev. at 986 n.60 (cited in note 45); Glickman, 76 Va. L. Rev. at 1266 (cited in note 36). See also *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) (stating that the failure of the government to allege any quantifiable monetary damages was "not fatal" to recovery of a fine).

77. *Mitchell*, 303 U.S. at 400.

78. See Glickman, 76 Va. L. Rev. at 1256-61 (cited in note 36) (detailing the application and development of the statutory construction test in the years following *Mitchell*).

79. See, for example, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-50 (1943) (finding that because the legislature intended civil penalties for double damages plus $2,000 under the False Claims Act following the imposition of criminal consequences to be remedial, and not criminal, plaintiff's multiple punishment claim failed); *Rex Trailer Co.*, 350 U.S. at 153-54 (stating that the sanction, clearly intended to be civil by the legislature, did not become penal even though it might exceed the government's actual damages).

80. 372 U.S. 144 (1963).

81. Id. at 168-69. This objective test was composed of seven factors: (1) whether the sanction involved an affirmative disability or restraint; (2) whether it had historically been regarded as a punishment; (3) whether it was imposed only upon a finding of scienter; (4) whether its operation would promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applied was already a crime; (6) whether an alternative purpose te which it may rationally be connected was assignable for it; and (7) whether it appeared excessive in relation te the alternative purpose assigned. Id.

82. See Cheh, 42 Hastings L. J. at 1358 (cited in note 60) (stating that there has been no subsequent case in which the factors resulted in a finding that a proceeding was "criminal for all

States v. Ward,[83] the Supreme Court re-examined its double jeopardy analysis in the civil-criminal parallel proceedings context, again attempting to conduct a meaningful inquiry as to whether a consequence's effect was remedial or punitive. The Court added to the statutory construction test a second inquiry: whether the intent and label given the consequence by the legislature were negated by the punitive purpose or effect of the statutory scheme.[84] Nonetheless, only the clearest proof under the second step would override the legislative intent, as manifested through the use of a civil label.[85] The inquiry into the consequence's effect thus became illusory in practice,[86] and the main focus remained on the legislative label and the consequence's stated purpose,[87] until the Court's landmark decision in *United States v. Halper*.[88]

2. *United States v. Halper*: The Demise of the Statutory Construction Test

In *Halper*, the Court held that consequences labeled civil under the False Claims Act[89] were actually punitive in operation, and therefore triggered double jeopardy protection.[90] Departing from the statutory construction test, the Court stated that in the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription against multiple punishments, a violation can be identified only by addressing the character of the actual sanctions as imposed on the individual.[91] The Court stated that where a civil conse-

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constitutional purposes"); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365-66 (1984) (stating that the *Mendoza-Martinez* factors would be helpful in its characterization of the consequence as penal or remedial, but finding that those factors, upon application, resulted in a determination that the consequence was remedial and civil, just as Congress had labeled it).

83. 448 U.S. 242 (1980).

84. Id. at 248. This two part test was utilized by the Supreme Court in later double jeopardy decisions. See, for example, *89 Firearms*, 465 U.S. at 362-63, 365.

85. *Ward*, 448 U.S. at 248-49 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). See also 89 *Firearms*, 465 U.S. at 365.

86. See generally Glickman, 76 Va. L. Rev. at 1260-61 (cited in note 36) (summarizing the result of the litigation following *Mitchell* and the tests and standards as they stood prior to *Halper*); Jahncke, 66 N.Y.U. L. Rev. at 122-28 (cited in note 36) (same).

87. But see Cheh, 42 Hastings L. J. at 1364, n.209 (cited in note 60) (pointing out that the legislative definition will not always control).

88. 490 U.S. 435 (1989).

89. 31 U.S.C §§ 3729-31 (1982), as amended by the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).

90. *Halper*, 490 U.S. at 448-51.

91. Id. at 447. This language in the Court's opinion reaffirmed and revitalized the inherent justification of the Double Jeopardy Clause as a safeguard of individual rights. It further recognized the "intrinsically personal" nature of the double jeopardy protection, which had not been of paramount importance in earlier Supreme Court decisions concerning double jeopardy

quence bears no rational relation to the goal of compensating the government for its loss,[92] but appears to qualify only as punishment,[93] the defendant is entitled to an accounting[94] of the government's damages and costs to determine whether the second consequence in fact constitutes a second punishment.[95]

Halper thus entitles the government to "rough remedial justice" in a parallel civil proceeding, as it may recover damages and costs due to the defendant's misconduct.[96] The government may not, however, impose a consequence labeled civil when in operation it serves the goals of punishment.[97]

When *Kurth* arose, *Halper* was the leading case applying a double jeopardy analysis to civil penalties.[98] The *Kurth* majority[99] found, however, that because *Halper* did not specifically

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in parallel proceedings. See Clapp, 68 N.C. L. Rev. at 992 & n.17 (cited in note 45) (noting this important aspect of *Halper*).

92. It was on this point that the Court distinguished earlier cases which upheld civil sanctions against double jeopardy challenges. The Court stated that the *Halper* decision would affect only the rare case in which the penalty imposed greatly exceeds the damage caused by the defendant's misconduct. As the Court reasoned, none of its earlier cases upholding civil sanctions against double jeopardy challenges had involved such a disparity between the civil recovery and the purported damages suffered by the government. *Halper*, 490 U.S. at 441-46.

93. The *Halper* Court defined the goals of punishment as retribution and deterrence. Id. at 448. Cheh defines non-punishment goals as recompense, regulation, or treatment. Cheh, 42 Hastings L. J. at 1378-79 (cited in note 60). In *Huntington v. Attrill*, the Court stated that it would be helpful in defining punishment to look at whether the wrong is one against the public or an individual, and whether the liability imposed is related to and limited by the actual damages. 146 U.S. 657, 668 (1892).

94. It is within the trial court's discretion to order and assess a government accounting. *Halper*, 490 U.S. at 449-50.

95. Id.

96. The Supreme Court acknowledged that calculating exact damages and costs would be problematic. The Court nonetheless gave trial courts the discretion to order an accounting when the defendant establishes a plausible second punishment double jeopardy claim, and based on that accounting, to determine whether the size of the civil consequence had crossed the line between remedy and punishment. Id. at 449-50; Cheh, 42 Hast. L. J. at 1378 n.281 (cited in note 60).

97. *Halper*, 490 U.S. at 448.

98. Even so, scholars severely criticized *Halper* on the grounds that it muddled the two prongs of double jeopardy protection by prohibiting multiple punishments in successive prosecutions, Kirgis, 50 Wash. & Lee L. Rev. at 867 (cited in note 55), encouraged interference with government assessment of various civil penalties, Glickman, 76 Va. L. Rev. at 1267-68 (cited in note 36); Clapp, 68 N.C. L. Rev. at 992-93 (cited in note 45), and possibly barred a criminal action when the government had already imposed a civil penalty, Kirgis, 50 Wash. & Lee L. Rev. at 867; Glickman, 76 Va. L. Rev. at 1272.

99. Justice O'Connor, in a dissenting opinion, argued that *Halper* was the correct standard to apply, and upon application of its principles, concluded that the tax should he upheld against a double jeopardy challenge. *Kurth*, 114 S. Ct. at 1953-55 (O'Connor, J., dissenting). See Part IV.C.

address the issue of whether a *tax* may be characterized as punitive for double jeopardy purposes, that case did not control.[100]

B. Taxes and the Constitution

Prior to *Kurth*, the Supreme Court had never found that a tax statute violated the Double Jeopardy Clause.[101] Originally the Court refused to apply certain constitutional protections to taxes at all. For example, in *A. Magnano Co. v. Hamilton*,[102] the Court held that the Due Process Clause of the Federal Constitution did not limit the legislature's taxing power unless the tax was so arbitrary that it fell entirely outside the legislature's taxing power.[103] The Court stated repeatedly that the mere fact that a tax statute regulated, deterred, or discouraged conduct was not sufficient to remove the tax from the taxing power of the legislature.[104] The Court defined the proper role of a tax as providing support for the government, and simply characterized taxes that went beyond that function as penalties[105] subject to closer constitutional scrutiny as such.[106]

Notwithstanding the traditional deference afforded them, tax statutes were by no means insulated from constitutional scrutiny. The Court recognized that a tax on unlawful conduct could violate a taxpayer's right against self-incrimination due to its reporting requirements.[107] Additionally, although the Court found the addition

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100. *Kurth*, 114 S. Ct. at 1944-45.

101. Id.

102. 292 U.S. 40 (1934).

103. Id. at 43-44.

104. See, for example, *United States v. Sanchez*, 340 U.S. 42, 45-46 (1950) (holding that a federal marijuana tax was not invalid because it regulated, deterred, and discouraged certain conduct); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (stating that all taxes regulate and deter and that the extent to which a tax restricts an activity or implements the hidden motives of Congress is irrelevant so long as the statute is a valid exercise of the taxing power).

105. See *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (finding that a tax provision of the National Prohibition Act was a penalty); *LaFranca*, 282 U.S. 568, 572 (1931) (same).

106. See *Lipke*, 259 U.S. at 562 (finding that a tax provision of the National Prohibition Act was subject to due process requirements); *United States v. LaFranca*, 282 U.S. at 572 (remanding a tax provision of the National Prohibition Act to determine whether it violated the Double Jeopardy or Self-Incrimination Clauses of the Constitution as a penalty). The Court also avoided subjecting taxes to constitutional scrutiny in other ways. See, for example, *United States v. Constantinc*, 296 U.S. 287, 295 (1935) (holding that a federal excise tax on the sale of liquor in violation of state law was a matter within the police powers of the states, rather than the taxing power of the Congress).

107. *Marchetti v. United States*, 390 U.S. 39, 48 (1968) (holding that the reporting requirements of a federal occupational tax as applied to an illegal wagering business violated the Self-Incrimination Clause of the Federal Constitution).

to tax in question to be valid in *Mitchell*, it did scrutinize the tax statute under the Double Jeopardy Clause.[108]

Drug taxes have recently been the subject of many constitutional challenges, both successful and unsuccessful.[109] State courts addressing the constitutionality of these taxes have sometimes characterized them as serving the goals of punishment and deterrence.[110] While the Supreme Court also recognized the deterrent and regulatory effect of the federal marijuana tax in *United States v. Sanchez*,[111] it found that fact to be of little constitutional consequence and upheld the tax's validity.[112] However, the Supreme Court may have permanently altered its future treatment of constitutional challenges to drug taxes with its decision in *Kurth*.

IV. *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*: OPINIONS OF THE COURT

A. The Majority Opinion

The majority in *Kurth* stated that *Halper*'s determination of when a civil penalty constitutes punishment for purposes of the Double Jeopardy Clause did not control the determination of whether Montana's tax had punitive characteristics which would subject it to double jeopardy scrutiny.[113] The Court nonetheless utilized *Halper* to

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108. *Mitchell*, 303 U.S. at 398-405.

109. Micheal A. LeMay, *Nebraska's Marijuana and Controlled Substances Tax Stamp Act and Self-Incrimination:* State v. Ganza, 27 Creighton L. Rev. 313, 331-36 (1993) (discussing several successful and unsuccessful challenges to state drug taxes on the state level).

110. For statements of the deterrent and retributive characteristics of drug taxes, see *Sims v. State Tax Commission*, 841 P.2d 6, 13 (Utah 1992); *Rehg v. Illinois Department of Revenue*, 152 Ill.2d 504, 605 N.E.2d 525, 531 (1992); *State v. Gallup*, 500 N.W. 2d 437, 445 (Iowa 1993); *State v. Roberts*, 384 N.W.2d 688, 691 (S.D. 1986); *State v. Berberich*, 284 Kan. 854, 811 P.2d 1192, 1200 (1991); *State v. Durrant*, 244 Kan. 522, 769 P.2d 1174, 1181 (1989).

111. 340 U.S. 42, 44-46 (1950).

112. Id. at 45-46 (stating that the tax was nonetheless civil as it merely recovered the expense of investigation and as it was collected in a civil proceeding).

113. *Kurth*, 114 S. Ct. at 1944-45. The Court noted that were *Halper* the correct standard to apply in this case, the Montana tax would still be struck down since the government did not show that its assessment remotely approximated the costs of the defendant's violation or that it was in any way rationally related to damages actually caused. Id. at 1948. Even though the majority explicitly rejected *Halper* as controlling, some courts have read *Kurth* as applying and extending *Halper*. See, for example, *United States v. Torres*, 28 F.3d 1463, 1464-65 (7th Cir. 1994); *State v. Walker*, 35 Conn. App. 431, 646 A.2d 209, 211 (1994).

Additionally, the Court noted that while taxes differ from sanctions due to their goal of raising revenue, at some point the assessment labeled a "tax" may approach punishment, at which point the Double Jeopardy Clause is invoked regardless of the different labels attached.

justify its examination of a tax under the Double Jeopardy Clause.[114] Thus, although the majority refused to view *Halper*'s reasoning as controlling, it did adhere to its rejection of labels as dispositive of the civil-criminal distinction.[115] Moreover, the Court adopted *Halper*'s theory that the actual character of the sanctions[116] determines whether the true purpose and effect of the statute is punitive in nature.[117] The Court then analyzed the Montana Dangerous Drug Tax Act to determine whether it operated as a "punitive tax," thereby invoking the protections of the Double Jeopardy Clause.[118]

The Court concluded that the tax was indeed punitive, because it contained several "unusual features" which deviated so far from the operation of a normal revenue law that it became a form of punishment.[119] These features included a high rate of taxation[120] and a deterrent purpose.[121] The Court noted that although these two features would not automatically mark the tax as a form of punishment, they lent support to the characterization of the drug tax as a penalty.[122] The fact that the statute conditioned collection of the tax on the commission of a crime further signaled a penal and prohibitory intent

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Id. at 1946. See also *A. Magnano Co.*, 292 U.S. at 44 (stating that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment") (citing *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)).

114. The Court pointed out that it had never previously held that a tax violated the Double Jeopardy Clause, but cited *Mitchell* for the proposition that one might. *Kurth*, 114 S. Ct. at 1945-46, & n.16. As discussed in Part III.A.1, the *Mitchell* Court faced a challenge to the civil "additions to tax" imposed on Mitchell due to tax violations. While the *Kurth* Court stated that these "additions" might have been better characterized as sanctions for tax fraud, it cited *Mitchell* as support for a double jeopardy challenge te a tax, since, according to the majority, the *Mitchell* Court described those additions interchangeably as a tax, a sanction, and an assessment. *Kurth*, 114 S. Ct. at 1946 n.16 (citing *Mitchell*, 303 U.S. at 396, 398, 405-06).

115. Id. at 1945, 1946.

116. *Halper*, 490 U.S. at 447.

117. *Kurth*, 114 S. Ct. at 1946.

118. Id.

119. Id. at 1947-48. In applying *Kurth*, courts have stated that the Supreme Court did not intend to lay down a definitive test, and that a tax neod not have all the punitive features of the Montana tax in order to constitute punishment for purposes of the Double Jeopardy Clause. See, for example, *Clifft v. Indiana Dept. of Revenue*, 641 N.E.2d 682, 691-93 (Ind. Tax Ct. 1994).

120. The Montana Dangerous Drug Tax Act imposed taxes at rates ranging from eight to eight hundred percent of a drug's market value. *Kurth*, 114 S. Ct. at 1943 n.12, 1946 n.17. These rates result from the formula in The Montana Dangerous Drug Tax Act which provided for assessment of the tax at the greater of ten percent of the drugs' market value or a per ounce tax according to the type of drug possessed. See Mont. Code Ann. § 15-25-111(2).

121. The Act's preamble stated that the tax would provide for anticrime measures by "burdening" the law breakers instead of the "law abiders." Mont. Code Ann. § 15-25-122.

122. *Kurth*, 114 S. Ct. at 1947. It appears that the Court's purpose in expressly noting that these two features were not equivalent to a punitive consequence was to insulate "sin taxes," including a threatened increase in the cigarette tax, from double jeopardy challenge. See id. at 1946 n.17.

rather than a revenue raising intent.[123] The Court distinguished the Montana tax from sin and mixed-motive taxes, where the government has an interest in both deterring behavior and providing the economic benefits of a product to the community.[124]

The Court also characterized the Montana tax as a form of punishment for double jeopardy purposes because, although the statute purported to tax the possession of drugs, the drugs had already been confiscated at the time the tax was assessed.[125] Moreover, the tax was exacted only after the taxpayer had been arrested for the conduct giving rise to the tax in the first place.[126] The majority's opinion repeatedly made note of the fact that this statute, purportedly intended to be a revenue raising tax, imposed a tax only upon criminals.[127] Based upon these features, the Court concluded that the Montana tax imposed a second punishment collected in the functional equivalent of a successive criminal prosecution, thus subjecting the Kurths to a second penalty for the same offense.[128]

The Court left open several questions of constitutional import. First, the Court did not address the fact that only Richard Kurth had been judged guilty of the possession count and was therefore the only one actually subject to a second punishment for the illegal conduct of drug possession.[129] Second, the Court did not address the issue of whether a subsequent criminal action would be barred by a prior

123. Id. at 1947. The Court distinguished the federal marijuana tax since it was conditioned not upon criminal drug conduct, but upon failing to pay the tax, and therefore retained its civil characteristics. Id. at 1947 n.20 (citing *Sanchez*, 340 U.S. at 45).

124. Id. at 1947.

125. Id. at 1948.

126. Id. at 1942, 1947.

127. Id. at 1947-48.

128. Id. at 1948. Important to double jeopardy analysis and the future application of this case is the fact that the Supreme Court framed this issue as falling under the multiple punishments prong of double jeopardy protection. Id. at 1945-46. After outlining the factors which characterized the tax as a punishment, however, the Court stated that due te the criminal nature of the tax, the second proceeding in which it was assessed must be the equivalent of a successive criminal prosecution. Id. at 1948. This mixing of the two protections of the Double Jeopardy Clause began in *Halper*. See Kirgis, 50 Wash. & Lee L. Rev. at 867 (cited in note 55). The implication may be that whenever a consequence is deemed criminal the proceeding also becomes criminal, thus invoking all the constitutional protections afforded a criminal defendant.

129. The other members of the Kurth family were found guilty ouly on the conspiracy count. *Kurth*, 114 S. Ct. at 1942 n.9. The Court did not address this issue since it was not raised below, but when evaluating the case this fact is quite important to the precedent's value. If the others had never incurred a criminal consequence for possession, a subsequent civil, or criminal, consequence for that act would not raise a multiple prosecution or punishment problem, since the consequences would he based on completely different conduct, i.e., conspiracy.

collection of a punitive civil consequence.[130] And finally, the Court did not address the possible implications of multiple punishments imposed in the same proceeding.[131]

B. Justice Rehnquist's Dissent

Although he dissented, Justice Rehnquist agreed with the majority on several key points. First, he too rejected the statutory construction test and inquired into the actual purpose and effect of the tax.[132] Second, he agreed that *Halper* was an inappropriate precedent for this case since the purpose of a civil penalty (to recover costs), differs from that of a tax (to raise revenue).[133] Justice Rehnquist also acquiesced in the majority's statement that a tax could cross the threshold and become, in effect, a penalty.[134] He fundamentally disagreed, however, with the majority's finding that the Montana tax under consideration crossed that line.[135]

In addition, Justice Rehnquist objected to the majority's reading of and reliance upon *Mitchell*. Whereas the majority cited *Mitchell* as supporting its application of double jeopardy analysis to a tax,[136] Justice Rehnquist stated that *Mitchell* concerned an addition to tax, or tax penalty, and that the majority's reference to *Mitchell* was simply unwarranted.[137] Justice Rehnquist therefore stated that the Court had never previously contemplated subjecting a tax statute to double jeopardy analysis.[138]

Justice Rehnquist's review of the Court's past decisions concerning taxes and constitutional protections led him to the conclusion that such challenges were regularly turned aside by the Supreme Court.[139] He cited prior cases that stated that taxes may be enacted to deter or even suppress the taxed activity[140] and that a tax does not cease to be valid merely because it regulates, discourages, or deters the activity taxed.[141] Justice Rehnquist therefore objected to the ma-

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130. Id. at 1947 n.21. This same question was left open by *Halper*. See Glickman, 76 Va. L. Rev. at 1272 (cited in note 36). See also note 188 and accompanying text.
131. *Kurth*, 114 S. Ct. at 1947 n.21.
132. Id. at 1952 (Rehnquist, C.J., dissenting).
133. Id. at 1949-50.
134. Id. at 1951.
135. Id at 1951-52.
136. Id at 1946 n.16.
137. Id. at 1949 n.1
138. Id at 1949.
139. Id. at 1950.
140. Id. at 1949-50.
141. Id. at 1950 (citing *Sanchez*, 340 U.S. at 44).

jority's holding that a deterrent purpose and high rate will mark a tax as a punishment.[142]

After attacking the majority's scrutiny and invalidation of a tax statute under the Double Jeopardy Clause, Justice Rehnquist criticized the "hodgepodge of criteria"[143] relied upon by the majority to characterize the Montana tax as a punishment. First, Justice Rehnquist confronted the majority's reliance on the fact that the Montana tax was conditioned upon the commission of a crime.[144] According to Justice Rehnquist, the practice of assessing and collecting the tax only after arrest simply recognized the reality that a taxpayer would not voluntarily file a tax return to reflect the amount of illegal drugs he possessed.[145] He also found the majority's distinction between mixed-motive or sin taxes and taxes on completely illegal activities to be illusory.[146]

Next, Justice Rehnquist discussed the majority's reliance on the fact that the taxpayer no longer had possession of the drugs on which he was paying a "possession" tax.[147] He stated that in this instance the majority exalted form over substance.[148] Although the Montana tax is described as a tax on storage and possession, it was clearly passed in order to raise revenue from the profitable underground drug business,[149] and therefore actual and current possession was unnecessary under the Act.[150]

As to the alleged high rate of taxation, Justice Rehnquist compared the rate in *Kurth* to that in *United States v. Constantine*,[151] where an excise tax on the sale of alcohol forty times greater than the normal retail tax[152] was invalidated as a penalty.[153] Justice Rehnquist stated that *Constantine* clearly supported upholding the Montana tax since, unlike the sale of alcohol in *Constantine*, the entire illegal drug

142. Id. at 1949-50.
143. Id. at 1949.
144. Id. at 1947.
145. Id. at 1950 & n.2. In support of this point Justice Rehnquist noted that other voluntary and anonymous taxing schemes have failed to raise revenue. Id.
146. Id. at 1950-51.
147. Id. at 1951.
148. Id.
149. The preamble to the Montana Act stated that it was appropriate to tax drug related offenses due to the economic impact of manufacturing, selling, and use of such substances. Id. at 1941 n.4 (citing 1987 Mont. Laws, ch. 563, p. 1416).
150. Id.
151. 296 U.S. 287 (1935).
152. Id. at 295.
153. Id. at 295-96.

enterprise went untaxed.[154] In addition, the rate of the Montana tax was not as disproportionate as the excise tax in *Constantine*.[155] While the majority believed that the tax rate imposed on the Kurths constituted a punishment because it was "unrivaled,"[156] Justice Rehnquist stated that a tax became punishment only if the rate was so high that the tax could only be explained as serving a punitive purpose.[157] He concluded that the Montana rate[158] did not reach that point especially when compared to the rate of valid sin taxes.[159] Justice Rehnquist concluded that the tax statute had legitimate, non-penal, revenue-raising, and deterrent purposes, and that it should therefore be insulated from double jeopardy scrutiny completely.[160]

C. Justice O'Connor's Dissent

Justice O'Connor based her dissent upon the premise that a tax could be subject to double jeopardy analysis. Recognizing the great possibility that the state would use a drug tax to punish a defendant twice for the same crime, she found no constitutional distinction between a fine and a drug tax under double jeopardy analysis.[161] Justice O'Connor then sought to determine whether the Montana drug tax actually violated the Double Jeopardy Clause. To make this determination, Justice O'Connor applied the *Halper* test, asking whether the sanction was truly civil, or whether it instead served the goals of punishment and was excessive in relation to the damages caused by the defendant's conduct.[162]

Justice O'Connor characterized the Montana tax as a civil consequence, or liquidated damage award, which approximated the damages caused by the Kurths and generated by the larger war on drugs.[163] These damages included $27 billion spent by state and

154. *Kurth*, 114 S. Ct. at 1951-52 (Rehnquist, C.J., dissenting).
155. Id.
156. Id. at 1946 n.17.
157. Id. at 1952.
158. Id. at 1951-52. Justice Rehnquist noted that the higher quality marijuana was taxed at a rate of only eighty percent of market value, and stated that even a four hundred percent rate would not be dispositive of the punitive issue. Id.
159. Id. at 1952. It is noteworthy that while the majority strained to distinguish the Montana tax from sin taxes, Justice Rehnquist placed the Montana tax along side sin taxes, defending the validity of both. Id. at 1952.
160. Id.
161. Id. at 1952-53 (O'Connor, J., dissenting).
162. Id. at 1953-54.
163. Id.

federal governments on drug control activities every year[164] and at least $120,000 for the apprehension, prosecution, and incarceration of the Kurths in Montana.[165] Justice O'Connor then stated that the government is not required to prove exact damages in order to collect a purely civil fine,[166] and concluded that the assessments made in the Montana Act were fair and valid approximations.[167]

Justice O'Connor directly addressed the court of appeals' finding that an accounting of the government's damages was necessary, and lacking, in this case.[168] Outlining the *Halper* test, Justice O'Connor pointed out that a government accounting is only required after the defendant has proven that the sanction bears no rational relationship to compensating the government for its loss.[169] Since the Kurths never met this initial burden of proof in the course of the bankruptcy proceedings, no accounting was required.[170]

Justice O'Connor believed that the majority's refusal to apply *Halper*'s reasoning to the Kurth's case would have a far-reaching and negative impact.[171] She predicted that the majority's decision would bar states from imposing drug taxes on those punished for a possessory drug offense,[172] would entitle a taxpayer to all the constitutional protections afforded a criminal defendant during a tax collection proceeding,[173] and would cause law-abiding citizens to bear the burden of reimbursing the government for the immense costs incurred in prosecuting criminal drug activity.[174] Instead of effecting an unwarranted expansion of double jeopardy jurisprudence, Justice O'Connor determined that the Court should rely on the Excessive Fines Clause to protect criminals from potential governmental overreaching.[175]

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164. U.S. Department of Justice, Bureau of Justice Statistics, *Fact Sheet: Drug Data Summary* 5 (April 1994).

165. Montana Board of Crime Control, *Per-Unit and Per-Transaction Expenditures in the Montana Criminal Justice System* 8, 15, 19, 21, 22-23, and Tables 21, 23 (1993) ("Montana Criminal Justice Expenditures").

166. *Kurth*, 114 S. Ct. at 1954 (O'Connor, J., dissenting). See *Rex Trailer Co.*, 350 U.S. at 153-54 (stating that the amount of damages may be difficult or impossible to ascertain); *Halper*, 490 U.S. at 452-53 (Kennedy, J., concurring) (stating that a penalty roughly proportionate to the damage caused is valid).

167. *Kurth*, 114 S. Ct. at 1954 (O'Connor, J., dissenting).

168. Id.

169. Id. at 1954-55.

170. Id. at 1955.

171. Id.

172. Id.

173. Id. Justice O'Connor based this prediction on the majority's characterization of the second proceeding in the *Kurth* case as the functional equivalent of a second criminal prosecution. See note 128 and accompanying text.

174. Id. at 1955.

175. Id.

D. Justice Scalia's Dissent

Justice Scalia's opinion departed significantly from both the majority and dissenting opinions in that he refused to recognize any multiple punishment prong of double jeopardy protection.[176] To support his contention, Justice Scalia read *Ex Parte Lange*,[177] the first case to articulate this protection,[178] as a Due Process Clause case.[179] Justice Scalia characterized the decision this way because the "multiple punishments" involved in *Lange* were not authorized by the legislature to be imposed cumulatively.[180] Therefore, the imposition of both civil and criminal consequences violated the Due Process Clause's guarantee of prior legislative authorization for punishment.[181]

In addition, Justice Scalia noted that all cases subsequent to *Lange* that are considered to be multiple punishment cases actually dealt with this lack of legislative authorization under the Due Process Clause.[182] According to Justice Scalia, the defendants in these cases need not have advanced a multiple punishment claim to establish a violation of the Double Jeopardy Clause. Because they subjected the defendants to a second criminal prosecution, the statutes in these cases independently violated the multiple prosecution prong of the Double Jeopardy Clause.[183]

Therefore, according to Justice Scalia, the Court did not actually create and apply the multiple punishment prohibition[184] until *Halper*.[185] Justice Scalia stated that *Halper* was decided in plain error, because it extended the Double Jeopardy Clause to prohibit multiple punishments in successive civil proceedings, a result not forbidden by the language of the amendment.[186] To Justice Scalia, the dangers of this unwarranted extension of the Double Jeopardy Clause's protections to encompass civil consequences were obvious.

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176. Id. at 1955, 1956-57 (Scalia, J., dissenting).
177. 85 U.S. (18 Wall) at 163.
178. Id. at 172-73.
179. *Kurth*, 114 S. Ct. at 1956 (Scalia, J., dissenting).
180. Id.
181. Id.
182. Id. at 1956-57 (citing *In re Bradley*, 318 U.S. 50, 51-52 (1943); *Ohio v. Johnson*, 467 U.S. 493, 499 (1984); *Whalen v. United States*, 445 U.S. 684, 687-88 (1980); *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980)).
183. Id. at 1957.
184. Justice Scalia refers to the multiple punishment prong of the Double Jeopardy Clause as the "*Halper*-created multiple punishments prohibition." Id. at 1958.
185. Id. at 1957.
186. Id.

First, it forced lower courts to determine at what specific dollar amount a civil and remedial consequence becomes a criminal and punitive consequence.[187] Second, it set the precedential basis for finding that a successive criminal procedure is barred by a prior civil procedure.[188] Justice Scalia believed that the same protections and rights protected by the so-called multiple punishment prong of the Double Jeopardy Clause could be protected through application of the Cruel and Unusual Punishment, Excessive Fines, and Due Process Clauses, as well as the Double Jeopardy Clause's prohibition of successive criminal prosecutions.[189]

Responding to the majority opinion, Justice Scalia stated that although the opinion was clothed in multiple punishment language, the majority actually concluded that since the tax was punitive, it must, of necessity, have been collected in a second criminal proceeding.[190] This collection of the tax after criminal proceedings had occurred constituted a violation of the multiple prosecution protection of the Double Jeopardy Clause.[191]

Justice Scalia next stated that the majority's statements equating retribution and deterrence with punishment for double jeopardy purposes constituted an extreme deviation from precedent.[192] Using language from *Kennedy v. Mendoza-Martinez*[193] and *United States v. Ward*,[194] Justice Scalia stated that the key question in *Kurth* was whether the proceeding, rather than the consequence, was criminal.[195] According to Justice Scalia, although the *Kennedy-Ward* test did consider whether a consequence served the goals of retribution and deterrence, that factor was only one among many. Therefore, that factor was not dispositive of the double jeopardy inquiry, as the *Kurth* majority had found it to be.[196] Justice Scalia also criticized the majority for failing to reconcile its decision with *Mitchell*'s validation

187. Id. at 1958.

188. Id. at 1958-59. Justice Scalia pointed out that the lower courts have refused to allow this result to flow from the reasoning of *Halper*, citing *United States v. Newby*, 11 F.3d 1143 (3d Cir. 1993) and *United States v. Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991). Similarly, courts have noted that *Kurth* did not resolve this question. See *Clifft*, 641 N.E.2d at 693 n.16. But see *Fant v. State*, 881 S.W.2d 830, 834 (Tex. Ct. App. 1994) (finding that double jeopardy barred a criminal trial after a pretrial civil forfeiture was assessed from the defendant).

189. *Kurth*, 114 S. Ct. at 1959 (Scalia, J., dissenting).

190. Id.

191. Id.

192. Id. at 1959-60.

193. 372 U.S. 144 (1963).

194. 448 U.S. 242 (1980).

195. *Kurth*, 114 S. Ct. at 1959-60 (Scalia, J., dissenting).

196. Id.

of the collection of severe tax sanctions in civil proceedings.[197] Finally, Justice Scalia noted that the reasoning of the majority was internally inconsistent if it truly held that a tax proceeding was the functional equivalent of a criminal prosecution.[198] If that statement were true, argued Justice Scalia, then the tax would be invalid without any reference to the Double Jeopardy Clause, because imposing criminal consequences in a civil proceeding is simply unconstitutional.[199] Justice Scalia concluded that the tax proceeding was civil under a proper application of the *Kennedy-Ward* test, that the collection of the tax and the imposition of criminal consequences did not violate the Due Process Clause's requirement of legislative authorization,[200] and therefore, that there was no constitutional violation in the proceedings against the Kurths.[201]

V. THE *KURTH* DECISION AND TAX FRAUD

As noted in Part I, the impact of the Supreme Court's opinion in *Kurth* has been the subject of much speculation and uncertainty.[202] Soon after the decision was handed down, several commentators speculated as to its potential impact on Internal Revenue Code provisions imposing an addition to tax for taxpayer fraud.[203] These additions to tax[204] are commonly referred to, and considered to be, civil penalties[205] and may thus be collected in combination with the criminal consequences[206] imposed for tax fraud without violating the Double Jeopardy Clause.

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197. Id. at 1960.

198. Id.

199. Id.

200. Justice Scalia interprets the multiple punishment prong of the Double Jeopardy Clause to require this due process requirement of legislative authorization. See notes 176-183, and accompanying text. Since the legislature indeed authorized the taxes in addition to the criminal consequences, no violation occurred.

201. Id.

202. See note 3 and authorities cited therein.

203. I.R.C. § 6663 (CCH, 1994). See, for example, Tigue and Lacewell, 211 N.Y. L. J. at 1 (cited in note 3); Rosenblatt, 17 Legal Times at 23 (cited in note 3).

204. I.R.C. §§ 7206-07 (CCH, 1994).

205. *Mitchell*, 303 U.S. at 399, 401-402; 17 Op. Att'y Gen. 433 (1882); 23 Op. Att'y Gen. 398 (1901); Rosenblatt, 17 Legal Times at 23-24 (cited in note 3); Tigue and Lacewell, 211 N.Y. L. J. at 4 (cited in note 3).

206. See, for example, *Barnette v. Commissioner*, 95 Tax Ct. 341, 347-48 (1990) (requiring the defendant to pay civil addition to tax fines as well as criminal penalties). For a more extensive discussion of the relationship between the civil and criminal consequences for tax fraud see Parts V.A and V.B.

However, if the Court applied *Kurth* to these additions to tax, it could reach a contrary conclusion under the Double Jeopardy Clause. This contrary conclusion would be at odds with *Mitchell*,[207] in which the Supreme Court upheld additions to tax against a double jeopardy challenge,[208] and would nullify similar dispositions of double jeopardy challenges to additions to tax by lower courts.[209] Moreover, the *Kurth* Court's use of *Mitchell* itself to support its examination and eventual invalidation of a tax statute under the Double Jeopardy Clause[210] explicitly calls into question the continuing validity of *Mitchell*.

A. Anatomy of a Tax Fraud Case

If a taxpayer is suspected of fraud, and the Criminal Investigation Division of the IRS approves an investigation,[211] an agent is assigned to the case,[212] and the tax fraud procedure begins.[213] After the agent has completed her investigation of the taxpayer's activities and prosecution is recommended, a report is prepared and submitted to the regional counsel's office.[214] If the regional counsel reaches the same determination concerning prosecution, the report is sent to the Department of Justice.[215] If the Department of Justice also recommends prosecution, the case is sent to the appropriate attorney general for indictment.[216]

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207. 303 U.S. at 399-406.

208. Id. The additions to tax discussed below are the functional equivalent of those addressed in *Mitchell*, prior to the rate increase from fifty to seventy-five percent. See notes 232-41 and accompanying text. For a discussion of the rate increase see Part V.C.1.b.

209. See Part V.B for a detailed discussion of several courts' holdings that imposition of both civil and criminal consequences for tax fraud does not violate the Double Jeopardy Clause.

210. *Kurth*, 114 S. Ct. at 1946 n.16.

211. A need to investigate may be indicated by informers' tips, discoveries by revenue agents, and even suspicion of classes of taxpayers. James J. Freeland, Stephen A. Lind and Richard B. Stephens, *Cases and Materials on Fundamentals of Federal Income Taxation* 1019 n.3 (Foundation, 8th ed. 1994).

212. The agent who completes the investigation is called the revenue agent, but she is under the direct control of a special agent. Id. at 1019-1020.

213. This outline of the tax fraud procedure is extremely basic and rudimentary and is meant only to familiarize the reader with the general procedures which precede the actual tax fraud case. For a more detailed explanation, see George D. Crowley, *The Role of the Practitioner When His Client Faces a Criminal Tax Fraud Investigation*, 40 J. Tax 18, 18-24 (1974); Ray A. Knight and Lee G. Knight, *Criminal Tax Fraud: An Analytical Review*, 57 Mo. L. Rev. 175 (1992).

214. Freeland, Lind, and Stephens, *Cases and Materials* at 1020 (cited in note 211).

215. Id.

216. Id. See also Knight and Knight, 57 Mo. L. Rev. at 184-191 (cited in note 213) (providing a detailed overview of the entire procedure).

Throughout this process the taxpayer is afforded conferences with the officials conducting the investigation to discuss the allegations against him or her.[217] The taxpayer is entitled to constitutional safeguards such as the privilege against self-incrimination and protection against unreasonable searches and seizures.[218] The purpose of this investigatory process is to determine whether the taxpayer has committed civil[219] or criminal[220] tax fraud, as the statutory provisions define those violations in the Internal Revenue Code (the "Code").

There are two characteristics of the tax fraud proceedings that are of particular importance to this Recent Development. First, since the Code provides for both civil and criminal consequences for tax fraud, parallel proceedings frequently arise. Second, a taxpayer is precluded from denying fraudulent intent in a civil proceeding if such intent has been found in a previous criminal proceeding.

1. Parallel Proceedings

The Code contains both civil and criminal consequences for tax fraud. The occurrence of a parallel proceeding[221] in this context is quite common, because most criminal tax fraud investigations occur in conjunction with civil tax fraud investigations.[222] Code section 6663 contains the civil consequences, while sections 7206 and 7207 contain the criminal consequences.[223] Those actions proscribed by section 7206 constitute a felony[224] and are punishable by a fine of not more

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217. Freeland, Lind and Stephens, *Cases and Materials* at 1020-1021 (cited in note 211).

218. Id. at 1026. See generally Daniel J. Cramer, *Criminal Tax Fraud Investigations by Grand Jury*, 61 U. Detroit J. Urban L. 215 (1984) (discussing the protections afforded a taxpayer in an IRS investigation, as compared to those in a grand jury investigation for tax fraud); Knight and Knight, 57 Mo. L. Rev. at 211-216 (cited in note 213) (discussing the protections afforded taxpayers during fraud investigations).

219. The civil tax fraud consequences and elements are found in I.R.C. § 6663. This provision will be discussed in detail in Part V.A.1.

220. The criminal tax fraud consequences and elements are found in I.R.C. §§ 7206-07. These provisions will be discussed in detail in Part V.A.1.

221. A parallel proceeding occurs when both civil and criminal consequences are imposed upon the same defendant for the same misconduct in separate proceedings. For a discussion of this concept see Part III.A.

222. Cramer, 61 U. Detroit J. Urban L. at 215 (cited in note 218).

223. Knight and Knight, 57 Mo. L. Rev. at 178-79 (cited in note 213).

224. The activities categorized as felonious tax fraud are as follows: (1) making a false declaration under penalty of perjury; (2) willfully aiding or assisting in the preparation or filing of a document which is false or fraudulent as to any material matter; (3) fraudulently signing or executing any IRS document, or procuring the same; (4) concealing property with the intent to evade or defeat the tax imposed by its title; (5) making any false statement, concealing property, or falsifying or destroying records in connection with a compromise or closing agreement. I.R.C. § 7206.

than $100,000,[225] or imprisonment for not more than three years, or both,[226] plus interest[227] and the costs of prosecution.[228] The actions proscribed by section 7207 constitute a misdemeanor,[229] punishable by a fine of not more than $10,000,[230] or imprisonment for not more than one year, or both.[231]

Common to each of these criminal provisions is the element of a voluntary and intentional violation of a known legal duty, signified in each section by the word "willfully."[232] Therefore, the Supreme Court has stated that the only distinction between the two criminal provisions is the additional acts of misconduct required for a felony conviction.[233] As actions under these sections are criminal offenses, the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt.[234]

Section 6663 authorizes the imposition of additions to tax for fraud.[235] Specifically, this provision increases the tax due by seventy-five percent of any fraudulent underpayment.[236] If any portion of the underpayment is due to fraud, there is a presumption that the entire underpayment is fraudulent.[237] The taxpayer must prove, by a preponderance of the evidence, that some portion of the underpayment is not attributable to fraud in order to avoid the addition being assessed against the entire underpayment.[238]

Because this addition to tax is determined by the amount of underpayment, it is a necessary prerequisite to its collection that

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225. For corporations found to violate the provision, the fine is not more than $500,000. I.R.C. § 7206.

226. Id.

227. Section 6601 states that if any taxes are not paid by their due dato, interest will be assessed on the amount of taxes due, but not paid, at the rate set by section 6621 for the period of time between the due dato and the date on which the taxes are actually paid. I.R.C. § 6601 (CCH 1994).

228. I.R.C. § 7206.

229. The activity proscribed by this section includes willful delivery or disclosure of fraudulent lists, returns, accounts, statements or other documents and willfully failing to comply with public inspection requirements for tax-exempt and private foundations. I.R.C. § 7207.

230. For corporations that violate this provision, the fine is not more than $50,000. Id.

231. Id.

232. See I.R.C. §§ 7206-07.

233. *United States v. Bishop*, 412 U.S. 346, 358-61 (1973). See Knight and Knight, 57 Mo. L. Rev. at 180-81 (cited in note 213) (discussing the differences between the two criminal provisions).

234. *In re Winship*, 397 U.S. 358, 361-64 (1970).

235. I.R.C. § 6663.

236. Id. at § 6663(a).

237. Id. at § 6663(b).

238. Id.

there be an underpayment of tax, or a deficiency.[239] Instead of operating under the criminal burden of proof, imposition of the fraud penalty is based upon proof by clear and convincing evidence[240] that the taxpayer engaged in intentional wrongdoing with the specific intent to avoid a tax known to be due by actions aimed at concealing or otherwise preventing collection of the tax.[241] Once this burden of proof is established, the civil consequence may be imposed[242] without meeting the higher standard of proof required in a criminal case and without the constitutional protections afforded a criminal defendant.[243]

Establishing the fraudulent intent of the taxpayer is rarely possible through presentation of direct evidence,[244] and so the IRS has sought to determine the forms of conduct sufficient to justify a finding of tax fraud. Circumstantial evidence of fraud includes understatement of income, inadequate records, failure to file tax returns, implausible or inconsistent explanations of behavior, concealing assets, and failure to cooperate with tax authorities.[245] A pattern

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239. 14 Standard Fed. Tax Rptr. at ¶ 40,558.01 (CCH, 1995).

240. *Mosteller v. Commissioner*, 52 Tax Ct. Mem. Dec. (CCH) 758, 761-63 (1986).

241. Id. at 762. See also *Akland v. Commissioner*, 767 F.2d 618, 621 (9th Cir. 1985); *Bradford v. Commissioner*, 796 F.2d 303, 307-08 (9th Cir. 1986). The Ninth Circuit recently stated that the Service must prove the person acted with specific intent to defraud the government in the enforcement of its tax laws. *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990). However, the Tax Court recently articulated the Service's burden of proof as requiring proof first of intent to evade tax, and second of either the likely taxable source of the income or disproof of the taxpayer's alleged non-taxable source. *Parks v.Commissioner*, 94 Tax Ct. 654, 660-64 (1990). This disproof need not he in the form of contrary testimony or direct proof. Instead, the Service may merely show that the taxpayer's story is implausible and inconsistent with its reconstruction of the taxpayer's income and any other objective evidence. Id.

242. There is no statute of limitations for imposing this civil consequence. I.R.C. § 6501(c) (CCH, 1994).

243. Criminal defendants must be proven guilty beyond a reasonable doubt in United States jurisdictions. See note 234 and accompanying text. As to the absence of criminal constitutional protections in civil suits, see Knight and Knight, 57 Mo. L. Rev. at 211-16 (cited in note 213) (discussing the protections that are given taxpayers during criminal tax fraud investigations). See also *Guzzetta v. Commissioner*, 78 Tax Ct. 173, 178-79 (1982) (allowing evidence obtained in violation of the Fourth Amendment's Search and Seizure Clause to be admitted in a civil tax fraud case); *Adamson v. Commissioner*, 745 F.2d 541, 545-46 (1984) (similar); *Connell v. Commissioner*, 47 Tax Ct. Mem. Dec. (CCH) 925, 926 (1984) (finding that statements could not be suppressed under claims of self-incrimination because the proceeding was for civil penalties, rather than criminal consequences); *McAlpine v. Commissioner*, 47 Tax Ct. Mem. Dec. (CCH) 1403, 1410 (1984) (similar).

244. To qualify as direct, evidence must provide unquestionable proof of the willful omission of a specific item of income. Knight and Knight, 57 Mo. L. Rev. at 191-92 (cited in note 213).

245. *Bradford*, 796 F.2d at 303; *Edelson v. Commissioner*, 829 F.2d 828, 832 (9th Cir. 1987). See also Peter Barton, *The Criteria the Tax Court Uses in Determining if the Taxpayer is Liable for the Fraud Penalty*, 37 Drake L. Rev. 445, 448-455 (1988) (discussing each of these factors in greater detail).

of such activity constitutes strong and sometimes determinative evidence[246] that a taxpayer has committed fraud,[247] especially when combined with overt acts aimed at concealing the fraudulent behavior.[248] Courts have accepted well-pled facts in either deemed admissions or default judgments to support imposition of civil consequences forfraud.[249] Once fraudulent intent is proven by clear and convincing evidence, the IRS may collect civil additions to tax.[250]

2. Collateral Estoppel

Collateral estoppel, commonly referred to as issue preclusion, allows a court to prevent the re-litigation of an issue determined to have been settled in a previous case.[251] As applied to the parallel proceedings which occur in tax fraud cases, the doctrine precludes the re-litigation of fraudulent intent in a civil suit for the addition to tax if the taxpayer has been previously convicted under a criminal tax fraud provision.[252] Although courts originally allowed the taxpayer to deny fraud in a subsequent civil suit,[253] they now apply the doctrine mechanically and with less regard for equitable considerations in the

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246. *Mosteller*, 52 Tax Ct. Mem. Dec. (CCH) at 763.

247. For a contrary result, see *Wiseley v. Commissioner*, 185 F.2d 263, 266-67 (1950) (holding that a doctor's substantial understatement of income in two consecutive years was not sufficient to show fraud since there were factors making it impossible for him to keep accurate records).

248. *Parks*, 94 Tax Ct. at 664-65.

249. *Smith v. Commissioner*, 926 F.2d 1470, 1476-79 (1991). However, it should not be assumed that a finding of fraud is somehow a formality or automatic. See *Mosteller*, 52 Tax Ct. Mem. Dec. (CCH) at 763 (stating that mere suspicion of fraud is not adequate to meet the IRS's burden of proof); *Nard v. Commissioner*, 52 Tax Ct. Mem. Dec. (CCH) 476, 483 (1986) (stating that a taxpayer's history of failure to file returns was not determinative to the fraud question); *Forman v. Commissioner*, 55 Tax Ct. Mem. Dec. (CCH) 139, 140 (1988) (concluding that because the taxpayer's unreported income could be offset against his unclaimed deductions, he was not guilty of fraud).

250. *Walter B. Cox v. Commissioner*, 50 Tax Ct. Mem. Dec. 317 (CCH) (1985).

251. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). The doctrine requires that the issue be identical to that in the subsequent suit, be actually adjudicated by a valid and final judgment, and be essential to reaching the first judgment. The doctrine also requires that the party to the original action had a full and fair opportunity to litigate the issue. *Gray v. Commissioner*, 708 F.2d 243, 245-46 (6th Cir. 1983); *Fontneau v. United States*, 654 F.2d 810 (1st Cir. 1981); *Plunkett v. Commissioner*, 465 F.2d 299, 305-07 (7th Cir. 1972); *Amos v. Commissioner*, 43 Tax Ct. 50, 54 (1964), aff'd, 360 F.2d 358 (4th Cir. 1965).

252. *Grey*, 708 F.2d at 245-46; *Fontneau*, 654 F.2d at 10; *Plunkett*, 465 F.2d at 305-07; *Amos*, 43 Tax Ct. at 54 (1964). One exception to this general rule of issue preclusion is that a criminal conviction under I.R.C. § 7206(1) which does not include a finding of intent to evade taxes, as is required under the civil provisions, will not preclude the litigation of fraudulent intent in a subsequent civil proceding. *Cox*, 50 Tax Ct. Mem. Dec. (CCH) at 324. See also Barton, 37 Drake L. Rev. at 455 (cited in note 245) (noting this distinction).

253. *Blackwell v. Commissioner*, 20 Tax Ct. Mem. Dec. (CCH) 599, 617-18 (1961); *Slater Est. v. Commissioner*, 21 Tax Ct. Mem. Dec. (CCH) 1355, 1390 (1962).

tax fraud context than in other areas of the law.[254] Therefore, not only can the IRS currently collect both civil and criminal tax penalties without violating the Double Jeopardy Clause,[255] but it is usually also relieved of the obligation to even litigate the issue of fraudulent intent in a civil case subsequent to a criminal conviction.

B. The Addition to Tax and Constitutional Challenges

Constitutional challenges to the additions to tax for fraud have generally failed. Courts, in rejecting such challenges, have applied the reasoning that since the additions to tax are unquestionably established by the legislature as civil consequences, the procedure must also be civil, and therefore certain constitutional provisions do not apply. For example, taxpayers' attempts to invoke the prohibition against unreasonable searches and seizures[256] have failed on the ground that the Fourth Amendment does not apply to civil proceedings.[257] Similarly, statements obtained in violation of the Fifth Amendment[258] during the course of a criminal tax investigation have been admitted in civil tax fraud actions, because the proceeding and consequence is purely civil.[259] Challenges based upon constitutional prohibitions of ex post facto laws[260] and excessive fines[261] have been similarly unsuccessful because of the reasoning that these additions to tax were civil, not criminal, and therefore did not implicate constitutional protections.

Of most interest in the aftermath of *Kurth*, however, are those cases that deny double jeopardy protection when the additions to tax

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254. Kathleen H. Musslewhite, Comment, *The Application of Collateral Estoppel in the Tax Fraud Context: Does it Meet the Requirement of Fairness and Equity?*, 33 Am. U. L. Rev. 643, 648 (1984) (discussing in great detail the application of collateral estoppel in the tax fraud case).

255. See Part V.B for a discussion of this issue.

256. The Fourth Amendment states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . " U.S. Const., Amend. IV.

257. *Guzzetta*, 78 Tax Ct. at 178-79 (allowing evidence obtained in violation of the Fourth Amendment's Search and Seizure Clause to be admitted in a civil tax fraud case); *Adamson*, 745 F.2d at 541 (similar).

258. The Fifth Amendment states in pertinent part: ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . ." U.S. Const., Amend. V.

259. *Connell*, 47 Tax Ct. Mem. Dec. (CCH) at 926 (finding that certain statements could not be supressed under claims of self-incrimination because the proceeding was for civil penalties, rather than criminal consequences); *McAlpine*, 47 Tax Ct. Mem. Dec. (CCH) at 1410 (similar); *Spaulding v. Commissioner*, 55 Tax Ct. Mem. Dec. (CCH) 1619, 1623 (1988) (similar).

260. *DiLeo v. Commissioner*, 96 Tax Ct. 858, 878 (1991) (stating that the ex post facto prohibition applies only to criminal statutes, and is therefore inapplicable to an increase in the civil addition to tax for fraud).

261. *Thomas v. Commissioner*, 67 Tax Ct. Mem. Dec. (CCH) 2511, 2514-15 (1994) (finding the Excessive Fines Clause to be inapplicable to assessment of the additions te tax for fraud).

for fraud are sought after a criminal tax fraud conviction has been obtained. Courts have consistently held that since the civil additions to tax for fraud are remedial, rather than punitive, the Double Jeopardy Clause does not prohibit their collection.[262] After *Kurth*, however, use of that standard and reasoning may be inappropriate.

C. *Application of the* Kurth *Decision to the Collection of Additions to Tax For Fraud*

1. The Majority Opinion

As noted, the Supreme Court has previously addressed a double jeopardy challenge to the additions to tax for fraud imposed in the Code.[263] In *Mitchell*, the Supreme Court, applying the statutory construction test,[264] held that additions to tax for fraud could not violate the Double Jeopardy Clause, because the intent of Congress was to impose a remedial, and therefore civil, consequence.[265] However, the Supreme Court applied *Mitchell* in *Kurth* not to reaffirm its rejection of a double jeopardy challenge to the additions to tax for fraud, but instead to justify the Court's scrutiny of a tax statute under the Double Jeopardy Clause.[266]

Most notably, the *Kurth* majority interpreted *Mitchell* as making no distinction for double jeopardy purposes between taxes, sanctions, and additions to tax.[267] This characterization of the additions to tax for fraud is consistent with section 6665(a) of the Code, which states that additions to tax shall be treated, assessed, collected, and paid in the same manner as taxes, and that any reference in the Code

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262. This reasoning reflects that of the *Halper* test discussed previously in this Recent Development. See Part III.A.2. See, for example, *Barnette*, 95 Tax Ct. at 341; *Thomas*, 67 Tax Ct. Mem. Dec. (CCH) at 2513-14; *Colopy v. Commissioner*, 47 Tax Ct. Mem. Dec. 1087, 1091 (1984), *Mason v. Commissioner*, 47 Tax Ct. Mem. Dec. (CCH) 805 (1984).

263. *Mitchell*, 303 U.S. at 398-405 (holding that assessment of the addition to tax for fraud after a criminal acquittal for tax fraud did not violate the Double Jeopardy Clause).

264. The Court stated that "[t]he question for decision is . . . whether [the statute in question] imposes a criminal sanction. That question is one of statutory construction." Id. at 399. As discussed previously in this Recent Development, this test was highly deferential to the legislature's labeling of a consequence and rarely resulted in successful double jeopardy challenges to "civil" consequences. See Part III.A.1.

265. *Mitchell*, 303 U.S. at 401.

266. *Kurth*, 114 S. Ct. at 1946 n.16.

267. Id. Justice Rehnquist, in his dissent, took issue with this use of *Mitchell* by the majority. He stated that the majority's reading of *Mitchell* was incorrect and that *Mitchell* had no applicability to a case involving taxes, as it was a case involving civil sanctions, or penalties. Id. at 1949 n.1 (Rehnquist, C.J., dissenting).

to tax also refers to additions to tax.[268] Considering that the *Kurth* majority and the Code equate the additions to tax for fraud with taxes themselves, it would be plausible to argue that the additions to tax for fraud are now controlled by *Kurth* and thus barred by the Double Jeopardy Clause.[269]

a. A High Rate of Taxation

The majority in *Kurth* considered the high rates of taxation imposed by the Montana drug tax to be consistent with, although not dispositive of, a punitive character.[270] The rate of the addition to tax for fraud under the Code is seventy-five percent of the underpayment, all of which is presumed to be due to fraud once the government proves that any portion of the underpayment is due to fraud.[271] When compared to the rates imposed by the Montana tax which the Court labeled high enough to be punitive, the additions to tax for fraud appear to be punitive as well. Under the Montana Dangerous Drug Tax Act, the tax rates ranged from eighty to eight hundred percent of the market value of various drugs.[272] The Court specifically stated that a four hundred percent rate was "unrivaled" and that the eight hundred percent rate was "remarkably" high.[273] While the Court recognized that the rate under the Montana tax could be surpassed by the proposed increase in the cigarette "sin tax" it did not state what impact such an increase would have on its decision.[274]

Therefore, the Court did not draw an explicit line at the point where the Montana tax rates became high enough to be described as consistent with a punitive character.[275] While there is language in the opinion suggesting that the eighty percent rate might have been acceptable,[276] one might interpret the opinion as holding that all the

268. I.R.C. § 6665(a) (1)-(2) (CCH, 1994). The heading of this section is "Additions Treated as Tax." Id. The *Kurth* Court's use of *Mitchell*, combined with the clear language of the Code, would seem to override any reliance on the statements of the Attorney General in 1882 and 1901 that the addition to tax was a penalty, not a tax. 17 Op. Att'y Gen. 433; 23 Op. Att'y Gen. 398.

269. The unique features that the Court relied upon in *Kurth* were a high rate of taxation, a deterrent purpose, being conditioned on the commission of a crime and exacted only after arrest, and being assessed on the possession of something of which the taxpayer no longer has possession. *Kurth*, 114 U.S. at 1947-48.

270. Id.

271. I.R.C. § 6663(a)-(b). See notes 235-38 and accompanying text.

272. *Kurth*, 114 S. Ct. at 1943 n.12, 1946 n.17.

273. Id. at 1946 & n.17.

274. Id. at 1946 n.17.

275. Id. at 1946.

276. Id. at 1946 n.17.

rates under the Montana tax were punitive, including the eighty percent rate. If the opinion does indeed invalidate all the rates, then the addition to tax for fraud, imposed at a seventy-five percent rate and comparable to the lower rates imposed under the Montana Dangerous Drug Tax Act, may be fairly characterized as punitive. Under this reading of the case, then, the addition to tax for fraud is imposed at a rate which is consistent with a punitive character.

b. Deterrent Purpose

The majority in *Kurth* also considered the deterrent purpose of the Montana drug tax to be consistent with, although not dispositive of, a punitive character.[277] The Court stated that it was beyond question that the Montana drug tax was intended to deter people from participating in illegal drug activity.[278] It is equally beyond question that the additions to tax for fraud are intended to deter taxpayers from committing tax fraud.[279] When Congress changed the rate of the addition to tax for fraud from fifty to seventy-five percent in 1986, it cited as justification for the increase its concern that the additions at their prior rate may have been an insufficient deterrent.[280]

Furthermore, even if a taxpayer files an amended return before any fraud investigation or proceeding has been commenced, paying all tax due, he must still pay the addition.[281] Since the government has not yet begun an investigation in this situation, the purpose of such additions to tax for fraud cannot be to reimburse the government for investigatory costs or losses. To the contrary, their role is to prevent the filing of a fraudulent return in the first place. It is simply beyond question that one, if not the sole, reason for imposing additions to tax for fraud is deterrence.

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277. Id. at 1946.

278. Id.

279. See generally F. Phillip Manns, Jr., *Internal Revenue Code Section 162(f): When Does the Payment of Damages to a Government Punish the Payor?*, 13 Va. Tax Rev. 271 (1993) (concluding that courts must characterize IRS sanctions as punitive and treat them accordingly).

280. Tax Reform Act of 1986, S. Rep. No. 99-313, 99th Cong., 2d Sess. 180-82 (1986).

281. See *Fedechko v. Commissioner*, 60 Tax Ct. Mem. Dec. (CCH) 272, 275 (1990) (holding that the filing of amended returns and payment of all tax due did not vitiate the fraud perpetuated at the time the returns were due); *Badaracco v. Commissioner*, 464 U.S. 386, 391-401 (1984).

c. Conditioned on Commission of and Arrest for the Crime

Although the Montana drug tax's high rate and deterrent purpose were important to the Supreme Court's holding in *Kurth*,[282] the Court placed greater emphasis on the fact that the tax was conditioned upon the commission of a crime and was exacted only after the taxpayer had been arrested for that same conduct constituting the crime.[283] As the Court noted, the only people who incurred liability for this tax on possession were those who had already been arrested for possession of illegal drugs.[284]

The addition to tax for fraud operates in a comparable manner. The only people who incur liability for the addition to tax are those taxpayers who have been investigated and proven, by some quantum of evidence, to have acted with fraudulent intent to evade tax.[285] This is the same conduct that constitutes the crime of tax fraud, merely sustained under a lesser burden of proof.[286] The elements of criminal tax fraud under section 7206 are identical to those elements for civil tax fraud under section 6663.[287] The only reason a civil tax fraud conviction does not preclude the issue of fraud in a subsequent criminal trial is that the civil proceeding imposes a lower burden of proof and lacks the constitutional protections available in a criminal suit.[288]

The "unique features" of the drug tax in *Kurth* thus parallel the features of the additions to tax for fraud. In *Kurth*, the Court stressed that the taxpayer was only liable for the drug tax after being arrested for criminal conduct relating to that assessment.[289] In the collection of additions to tax for fraud, the taxpayer is only liable for the addition after she has been proven to have the necessary intent to commit fraud[290] by clear and convincing evidence.[291] If imposition of a

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282. 114 S. Ct. at 1946-47.

283. Id. at 1947.

284. Id.

285. See I.R.C. §§ 6663, 7206-07. See also Musslewhite, 33 Am. U. L. Rev. at 643-646, 662 (cited in note 254) (discussing the common elements of civil and criminal tax fraud in the context of collateral estoppel); Knight and Knight, 57 Mo. L. Rev. at 179-184 (cited in note 213) (outlining the statutory provisions for fraud consequences).

286. *Mosteller*, 52 Tax Ct. Mem. Dec. (CCH) at 761-63. For a discussion of this notion see Part V.A.1.

287. *Fontneau*, 654 F.2d at 10; *Amos v. Commissioner*, 360 F.2d 358, 359 (4th Cir. 1965); *Moore v. United States*, 360 F.2d 353, 355-58 (4th Cir. 1965); Musselwhite, 33 Am.. U. L. Rev. at 662 (citod in note 254).

288. *Mitchell*, 303 U.S. at 397.

289. *Kurth*, 114 S. Ct. at 1947.

290. The requisite intent is the same under both the criminal and civil provisions. See notes 251-55 and accompanying text.

291. This principle is discussed in detail in Part V.A.1.

consequence after there is probable cause to arrest a taxpayer for possession of drugs is too closely tied to the crime of drug possession to be considered a civil penalty, surely imposition of a consequence after there has been proof by clear and convincing evidence of tax fraud is equally, if not more, closely tied to the crime of tax fraud to be considered a civil penalty.

Granted, a double jeopardy claim would not arise in either situation unless an attempt was made to impose civil consequences following the actual imposition of criminal consequences in a parallel procedure. However, the *Kurth* Court did not base its analysis concerning the character of the Montana tax on the fact that the tax was collected after a criminal trial. Instead, it based its decision on the fact that the tax became due after an arrest, thereby making the tax inherently punitive.[292] By allowing an arrest for criminal conduct relating to the assessment of a civil consequence to be highly indicative of a punitive, and therefore criminal, consequence, the Supreme Court set a broad and potentially dangerous precedent. A great number of civil penalties and forfeitures are imposed after an individual has been arrested for the same conduct under a criminal statute. Such penalties are now suspect under this aspect of the *Kurth* decision.

To demonstrate, under *Kurth*'s reasoning the additions to tax for fraud would be too closely dependent upon the criminal conduct constituting tax fraud to retain their civil character for double jeopardy purposes anytime after the IRS and its agents collected enough evidence upon which to base a valid arrest for tax fraud. Although the IRS would be without authority to collect the addition to tax at that point under section 6663,[293] the possibility that the additions to tax could lose their civil characterization at such an early stage of the process raises several concerns. First, if the IRS could collect the addition to tax at this early point in the process, and did so, a subsequent criminal action could be barred under the Double Jeopardy Clause.[294] Second, such an application of the Double Jeopardy Clause constitutes a retreat from the Court's concern over a consequence's effect on the individual, and a return to the structural and linguistic

292. *Kurth*, 114 S. Ct. at 1947-48. See also *Clifft*, 641 N.E.2d at 691-93 (noting that the Kurths were arrested in October, 1987, and that the tax was assessed in December, 1987, but that the Kurths were not sanctioned pursuant to the criminal charges until July, 1988).

293. I.R.C. § 6663.

294. See Glickman, 76 Va. L. Rev. at 1272 (cited in note 36).

features of a consequence.[295] While in this instance such a regression results in greater protection for the individual by invalidating a second consequence, it could later be used by courts as justification for refusing to inquire into the true effect of a consequence on an individual. Third, fearing the invalidation of a civil consequence scheme due to a successful double jeopardy challenge, legislatures may simply raise the criminal fines, as suggested by the majority in *Kurth*.[296] While avoiding a double jeopardy challenge, these increased fines may still be unfair to the defendant and may become excessive, by layperson's and possibly by constitutional standards.

The strongest opposition to these arguments is the likelihood that the holding of *Kurth* will be confined in later years to cases involving actual taxes or even only state drug tax statutes, although the majority made no such distinction in its reasoning. Nonetheless, the potential for such undesirable consequences exists after *Kurth*.[297]

2. The Dissents

The reasoning employed in the various *Kurth* dissents could result in a conclusion contrary to that just demonstrated. Under Justice Rehnquist's reasoning, the additions to tax would not even be examined under *Kurth* since they would be characterized as penalties.[298] Considering Justice Rehnquist's response to the majority's misuse of *Mitchell*,[299] he would probably find that *Mitchell* controlled the case, and would presumably apply the *Halper* analysis of civil penalties as the appropriate standard for the additions to tax for fraud. Although predicting his answer would call for speculation, Justice Rehnquist's question under *Halper* would certainly be whether the additions to tax for fraud went beyond compensating the government for its losses in bringing the fraudulent actor to book.[300]

Justice O'Connor would also apply *Halper*'s reasoning to the additions to tax, but for different reasons. Since Justice O'Connor found no distinction between a fine and a tax in *Kurth*,[301] she would

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295. This is a regression to the statutory construction test under *Mitchell* and an abandonment of the progress made in *Halper* concerning the inquiry into a consequence's actual effect upon the individual. See Part III.A.

296. 114 S. Ct. at 1947.

297. Note that the "unusual feature" of a possession tax on material no longer in the taxpayer's possession is inapplicable in the area of taxpayer fraud. Id. at 1948.

298. Id. at 1949 n.1 (Rehnquist, C.J., dissenting).

299. Id.

300. Id. at 1949.

301. Id. at 1953 (O'Connor, J., dissenting).

probably analyze a challenge to the addition to tax for fraud under *Halper*, consistent with her analysis of the drug tax in her *Kurth* dissent. As Justice O'Connor justified her conclusion that the Montana tax was not punitive by stressing the immense financial damages caused by drugs in our society,[302] she could employ similar reasoning to reach the same conclusion in a double jeopardy challenge to the additions to tax for fraud by alluding to the billions of dollars lost each year due to tax fraud.[303]

Justice Scalia would almost certainly uphold the additions to tax. As Justice Scalia does not recognize a multiple punishments protection in the Double Jeopardy Clause,[304] his inquiry would consist of whether the additions to tax were imposed in a civil or criminal proceeding,[305] and whether they were authorized by the legislature.[306] This analysis would result in the finding that the legislature did indeed authorize the additions to tax in combination with the criminal tax fraud consequences, and that the proceeding established by the legislature was clearly civil.[307] Therefore, the imposition of both consequences in a parallel proceeding would not violate the Double Jeopardy Clause.

VI. CONCLUSION

The Supreme Court in *Kurth* set a precedent that could conceivably place many civil and criminal parallel consequences in jeopardy. Although it is arguably unfair for the Kurth family to have been subjected to jail time, over $18,000 in civil forfeitures, and over $900,000 in taxes,[308] the Court may have better dealt with that perceived unfairness under another constitutional provision, as suggested by Justice Scalia.[309] As the decision stands, a civil consequence imposed in conjunction with a criminal consequence could be subject to scrutiny under the "unusual features" test. Many parallel consequence regimes would probably fail this test. While the demise

302. Id. at 1953-54.

303. The federal government estimates its losses due to tax evasion and inaccurate reporting of taxable income at about $150 billion a year. *Federal "Cheating" Losses Estimated*, Facts on File, World News Digest 973 E3 (December 31, 1993).

304. *Kurth*, 114 S. Ct. at 1955-57 (Scalia J., dissenting).

305. Id. at 1959-60.

306. Id. at 1956-57.

307. See notes 176-83, 221-38 and accompanying text.

308. *Kurth*, 114 S. Ct. at 1942.

309. Id. at 1959 (Scalia, J., dissenting).

of parallel proceedings may appear to protect individuals from being subjected to large combinations of civil and criminal fines, it could also have a number of negative repurcussions. For instance, the decision could convince legislatures to increase criminal consequences or could encourage law enforcement officials either to pursue those heightened criminal sanctions more aggressively or simply to ensure that the civil consequence is imposed simultaneously with or prior to the criminal consequence.[310] The Court could avoid the potentially broad scope of *Kurth* by limiting its holding to cases involving state drug taxes. The majority, however, placed no such limitation on its holding. Consequently, its opinion could be used as a weapon with which to invalidate many civil consequences, thus resulting in widespread effects on legislation and law enforcement actions.

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310. See, for example, *United States v. Torres*, 28 F.3d 1463, 1464 (7th Cir. 1994) (stating that the U.S. would do well to seek imprisonment, fines, and forfeiture in one proceeding).

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