SUPREME COURT OF THE UNITED STATES

No. 93–144

DEPARTMENT OF REVENUE OF MONTANA, PETITIONER
v. KURTH RANCH ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 6, 1994]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

"To be put in jeopardy" does not remotely mean "to be punished," so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions. Compare the proposal of the House of Representatives, for which the Senate substituted language similar to the current text of the Clause: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." See 1 Annals of Cong. 434, 753, 767 (1789); 1 Senate Journal 105, 119, 130 (1789). The view that the Double Jeopardy Clause does not prohibit multiple punishments is, as Justice Frankfurter observed,

> "confirmed by history. For legislation . . . providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. . . . It

would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 555–556 (1943) (Frankfurter, J., concurring).

The belief that there is a multiple-punishments component of the Double Jeopardy Clause can be traced to *Ex parte Lange*, 18 Wall. 163 (1874). In that case, the lower court sentenced Lange to both one year of imprisonment *and* a $200 fine for stealing mail bags from the Post Office, under a statute that authorized a maximum sentence of one year of imprisonment *or* a fine not to exceed $200. The Court, acknowledging that the sentence was in excess of statutory authorization, issued a writ of habeas corpus. *Lange* has since been cited as though it were decided exclusively on the basis of the Double Jeopardy Clause, see, *e.g.*, *North Carolina* v. *Pearce*, 395 U. S. 711, 717, and n. 11 (1969); in fact, Justice Miller's opinion for the Court rested the decision on principles of the common law, and both the Due Process and Double Jeopardy Clauses of the Fifth Amendment. See *Lange*, 18 Wall., at 170, 176, 178. The opinion went out of its way *not* to rely exclusively on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving "life or limb." See *id*., at 170. It is clear that the Due Process Clause alone suffices to support the decision, since the guarantee of the process provided by the law of the land, cf. *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28–29 (1991) (SCALIA, J., concurring in judgment), assures prior legislative authorization for whatever punishment is imposed.

The basis for *Lange* was hardly clarified when, almost three-quarters of a century later and in a case involving nearly identical circumstances (a prisoner who had already paid a $500 fine was sentenced to prison under a contempt statute that permitted only a fine *or* imprisonment), the Court discharged the prisoner without express reference to the Double Jeopardy Clause and with only a citation of *Lange*. See *In re Bradley*, 318 U. S. 50, 51–52 (1943). Chief Justice Stone's dissent in *Bradley* displays his

uncertainty regarding the doctrinal basis for *Lange*—as well as his view that if the basis was the Double Jeopardy Clause it was wrong: "So far as *Ex parte Lange* is regarded here as resting on the ground that it would be double jeopardy to compel the offender to serve the prison sentence after remission of the fine on the same day on which it was paid, I think its authority should be reexamined and rejected." 318 U. S., at 53.

Between *Lange* and our decision five Terms ago in *United States* v. *Halper*, 490 U. S. 435 (1989), our cases often stated that the Double Jeopardy Clause protects against both successive prosecutions and successive punishments for the same criminal offense. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U. S., at 717; *Illinois* v. *Vitale*, 447 U. S. 410, 415 (1980); *Ohio* v. *Johnson*, 467 U. S. 493, 498–499 (1984). But the repetition of a dictum does not turn it into a holding, and an examination of the cases discussing the prohibition against multiple punishments demonstrates that, until *Halper*, the Court never invalidated a *legislatively authorized* successive punishment. The dispositions were entirely consistent with the proposition that the restriction derived exclusively from the due-process requirement of legislative authorization. Indeed, some cases expressed the restriction in precisely that fashion. See, *e.g.*, *Johnson*, 467 U. S., at 499, and n. 8 ("protection against cumulative punishmen[t] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *Albernaz* v. *United States*, 450 U. S. 333, 344 (1981) ("the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *United States* v. *DiFrancesco*, 449 U. S. 117, 139 (1980) ("No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense

there was punishable by both fine and imprisonment, even though that is multiple punishment"); *Whalen* v. *United States*, 445 U. S. 684, 688 (1980) ("the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized"); *id.*, at 697 (BLACKMUN, J., concurring in judgment) ("The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended") (emphasis in original); *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

To tell the truth, however, until *Halper* was decided, extending the "no-double-punishments" rule to *civil* penalties, it did not much matter whether that rule was a free-standing constitutional prohibition implicit in the Double Jeopardy Clause or (as I think to be the case) merely an aspect of the Due Process Clause requirement of legislative authorization. Even if it were thought to be the former, the Double Jeopardy Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution*, since the prosecution *itself* would be barred.[1] (It has never been imagined, of

[1]Thus, in the context of criminal proceedings, legislatively authorized multiple punishments are permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings. See *Missouri* v. *Hunter*, 459 U. S. 359, 368–369 (1983). *Halper*, see 490 U. S., at 450, and the Court's opinion in the present case, see *ante*, at 11, attempt to preserve that distinction in the context of civil proceedings. But of course the textual

course, that the commonplace practice of imposing multiple authorized punishments—fine and incarceration—after a *single* prosecution is unconstitutional. See *DiFrancesco*, 449 U. S., at 139.) But a *civil* proceeding successive to a criminal prosecution is *not* barred, even if (as in *Halper* itself) it has the potential to result in the imposition of a penalty. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354, 362 (1984); *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235 (1972). Thus, by extending the no-double-punishments rule to civil penalties, while simultaneously affirming that it demanded more than mere fidelity to legislative intent, *Halper* gave the rule a breadth of effect it had never before enjoyed.

Halper involved a medical doctor who had already been convicted and punished under the criminal false claims statute, 18 U. S. C. §287, for filing false medicare claims. The issue was whether he could then be fined for the same false claims under the civil provisions of the False Claims Act, 31 U. S. C. §§3729–3731. We held that the Double Jeopardy Clause prevented it, to the extent that the fine exceeded what was needed to cover "`legitimate nonpunitive governmental objectives,'" *Halper*, 490 U. S., at 448, quoting *Bell* v. *Wolfish*, 441 U. S. 520, 539, n. 20 (1979). The Government's contention in *Halper* was not that no constitutional prohibition on multiple punishments existed, but rather that it applied only to punishments meted out in a criminal proceeding. See Brief for United States in *United States* v. *Halper*, O. T. 1988, No. 87–1383, p. 11–12, 21–24. I found, and continue to find, that distinction incoherent: if the Constitution prohibits multiple punishments, the nature of the proceeding in which punishment is

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basis for it—the Double Jeopardy Clause's prohibition of successive prosecutions—does not exist: a civil proceeding is not a second jeopardy. See *infra*, at 11.

imposed should make no difference. Accordingly, I joined the Court's unanimous opinion. I continued to apply the rule of *Halper*—indeed, I thought I applied it more faithfully than the Court—in my dissent the next month in *Jones* v. *Thomas*, 491 U. S. 376, 388, 393 (1989).

The difficulty of applying *Halper*'s analysis to Montana's Dangerous Drug Tax has prompted me to focus on the antecedent question whether there *is* a multiple-punishments component of the Double Jeopardy Clause. As indicated above, I have concluded—as did Chief Justice Stone, see *In re Bradley*, 318 U. S. 50 (1943), and Justice Frankfurter, see *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943)—that there is not. Instead, the Due Process Clause keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses place substantive limits upon what those legislated bounds may be.[2]

Of course the conviction that *Halper* was in error is not alone enough to justify departing from it. But there is added to that conviction the knowledge, acquired from brief experience with the new regime, that the erroneous holding produces results too

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[2]The Excessive Fines Clause—which was rescued from obscurity only after *Halper* was decided, see *Alexander* v. *United States*, 509 U. S. ___, ___–___ (1993) (slip op., at 13–14) (first Supreme Court case applying the Clause to *in personam* criminal proceedings); *Austin* v. *United States*, 509 U. S. ___, ___–___ (1993) (slip op., at 3–16) (Clause applies to civil forfeitures)—may well support the judgment in *Halper*. Indeed, it may even *explain* the judgment in *Halper*, since much of the language of that opinion suggests that the Court was motivated by concern for the harsh consequences of applying a per-transaction penalty to a "prolific but small-gauge offender," *Halper*, 490 U. S., at 449.

strange for judges to endure, and regularly demands judgments of the most problematic sort. As to the latter: We dodged the bullet in *Halper*—or perhaps a more precise metaphor would be that we thrust our lower-court colleagues between us and the bullet—by leaving it to the lower courts to determine at what particular dollar level the civil fine exceeded the Government's "legitimate nonpunitive governmental objectives" and thus became a penalty. See *Halper*, 490 U. S., at 452. In the present case, however, the alleged punishment is not an adjudicated fine that can be judicially reduced to a lower level, but rather a tax; and so we grapple with the different, though no less peculiar, inquiry: when is a tax so high (or so something-else) that it is a punishment? Surely further enigmas await us.

And we have also learned from experience that we are unwilling to take the strong (and not particularly healthful) medicine that we poured out for ourselves in *Halper*. *Jones* was the first lesson, but even sterner ones are in store. In the present case, as in *Halper* itself, we confront the relatively easy task of disallowing a *civil* sanction because *criminal* punishment has already been imposed. But many cases, including one being held for this case, will demand much more of us: disallowing *criminal* punishment because a *civil* sanction has already been imposed. Although at least one lower court has optimistically suggested (without elaborating) that there might be a constitutional difference between the two situations, see *United States* v. *Newby*, 11 F. 3d 1143 (CA3 1993), if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference. Accord, *United States* v. *Sanchez-Escareno*, 950 F. 2d 193, 200 (CA5 1991). The social cost of vindicating the fictional, *Halper*-created multiple-punishments prohibition will be much higher when criminal penalties are at stake, and we will be no more willing

to pay it (nor should we) than the lower courts have been. Can a prison inmate who has been disciplined for an altercation with a guard subsequently be punished criminally for the same incident? See *Newby*, 11 F. 3d, at 1145–1146 (answering yes). Can a person who has paid a $75,000 fine and been permanently disbarred from commodity trading because of trading violations subsequently be sent to jail for the same violations? See *United States* v. *Furlett*, 974 F. 2d 839 (CA7 1992) (answering yes). Can a person who has suffered civil forfeiture for violation of law later be prosecuted criminally for the same violation? See *United States* v. *Tilley*, 18 F. 3d 295 (CA5 1994) (answering yes).

It is time to put the *Halper* genie back in the bottle, and to acknowledge what the text of the Constitution makes perfectly clear: the Double Jeopardy Clause prohibits successive prosecution, not successive punishment. Multiple punishment is of course restricted by the Cruel and Unusual Punishments Clause insofar as its nature is concerned, and by the Excessive Fines Clause insofar as its cumulative extent is concerned. Its multiplicity *qua* multiplicity, however, is restricted only by the Double Jeopardy Clause's requirement that there be no successive criminal prosecution, and by the Due Process Clause's requirement that the cumulative punishments be in accord with the law of the land, *i.e.*, authorized by the legislature.

The Court's entire opinion appears to proceed on the assumption that the relevant question is whether taxes assessed pursuant to Montana's Dangerous Drug Tax "violate the constitutional prohibition against successive punishments for the same offense." *Ante*, at 1. Nonetheless, after 16 pages addressing how Montana's marijuana tax inflicts

punishment, the Court adds, almost as an afterthought: "The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time `for the same offence.'" *Ante*, at 17.

The only conceivable foundation for that statement is the implicit assumption that any proceeding which imposes "punishment" within the meaning of the multiple-punishments component of the Double Jeopardy Clause is a criminal prosecution. That assumption parts company with a long line of cases, including *Halper*, without even the courtesy of a goodbye. Although a few of our cases include statements to the effect that a proceeding in which punishment is imposed is criminal, see, *e.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 167 (1963), the criterion of "punishment" for *that* purpose is significantly different (and significantly more deferential to the government) than the criterion applied in *Halper*. *United States* v. *Ward*, 448 U. S. 242 (1980), put it this way:

> "[W]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that `only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.'" *Id.*, at 248–249, quoting *Flemming* v. *Nestor*, 363 U. S. 603, 617 (1960) (citation omitted).

Halper's focus on whether the sanction serves the goals of "retribution and deterrence" is just one factor in the *Kennedy-Ward* test, see 372 U. S., at 168–169, and one factor alone is not dispositive, see *Ward*, 448 U. S., at 250–251.

The greater severity of the "criminal prosecution"

test is in fact precisely why *Halper* resorted to the multiple-punishments component of the Double Jeopardy Clause. The opinion distinguished between the test used to determine "whether proceedings are criminal or civil," 490 U. S., at 447, and the more searching analysis thought appropriate in the multiple-punishments context:

> "The Government correctly observes that this Court has followed this abstract [*Kennedy-Ward*] approach when determining whether the procedural protections of the Sixth Amendment apply to proceedings under a given statute, in affixing the appropriate standard of proof for such proceedings, and in determining whether double jeopardy protections should be applied. See *United States* v. *Ward*, 448 U. S., at 248–251. But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the `humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Ibid*.

The Court not only ignores the *Kennedy-Ward* test and this portion of *Halper*, it also does not attempt to reconcile its conclusion with our decision in *Helvering* v. *Mitchell*, 303 U. S. 391, 400 (1938):

> "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible *[sic]* by civil proceedings since the original revenue law of 1789. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." (citation

omitted) (citing cases).

Of course, if the Court were correct that the proceeding below was criminal in nature, there would be no particular reason to refer to this as a Double Jeopardy case. Assessment of a criminal punishment in a civil tax proceeding would violate not only the Double Jeopardy Clause, but all of the criminal-procedure guarantees of the Fifth and Sixth Amendments. And it would be invalid *whether or not* it was preceded by a traditional criminal prosecution. The Court's assertion that it would be lawful in isolation, see *ante*, at 11, thus contradicts the Court's contention that it is "the functional equivalent of a . . . criminal prosecution."

* * *

Applying the *Kennedy-Ward* test to the Montana tax proceeding, I do not find that it constituted a second criminal prosecution. And since the Montana legislature authorized these taxes *in addition to* the criminal penalties for possession of marajuana, these taxes did not violate that principle of due process sometimes called the multiple-punishments component of the Double Jeopardy Clause. The Constitution requires nothing more. For these reasons, I respectfully dissent.