

The Double Jeopardy Implications of *In Rem* Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation

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I. INTRODUCTION

Over the past decade, the government has escalated its “war on drugs.” Although the “war” has not decreased drug use or limited the availability of drugs on the street, the government continues to sacrifice the constitutional rights of its citizens in an effort to escalate the hostility. Since the “zero tolerance” policy of the Reagan Administration, the government has relied heavily on the forfeiture of property related to drug crimes as a tool to deter and punish the illegal distribution of drugs. The federal forfeiture statute, 21 U.S.C. § 881, allows the government to seize any property used to facilitate a drug offense.¹ Such property may include the real property where a drug deal takes place or vehicles used to travel to a location where a deal is consummated.²

Because the forfeiture statute is classified as “civil,” rather than “criminal,” the government need not prove its case beyond a reasonable doubt.³ Rather, it need only demonstrate probable cause to believe the property was connected to a drug offense to shift the burden of demonstrating innocence to the property owner.⁴ In the forfeiture action, the property owner is not entitled to a court appointed attorney,⁵ and it is unclear whether she has the right to a

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1. See 21 U.S.C.A. § 881(a)(4), (7) (West Supp. 1995).
2. See *id.* § 881(a)(7) (real property); § 881(a)(4) (vehicles and other conveyances).
3. *United States v. One 1977 Pontiac Grand Prix*, 483 F. Supp. 48, 49 (N.D. Ill. 1979).
4. See 21 U.S.C.A. § 881(b)(4) (West Supp. 1995).
5. See *United States v. Doe*, 743 F.2d 1033, 1038 (4th Cir. 1984) (stating that “only offenses where a sentence of imprisonment is imposed give the defendant a right to appointed

jury.⁶ Further, because such forfeitures are tied to the commission of a crime, the property owner is often incarcerated while the forfeiture action is pending. Thus, he must often choose between spending limited resources on defending the criminal action and attempting to save his property.

Civil forfeiture and criminal prosecution have been called "double-edged weapons," and until very recently, the government could wield these weapons "with virtual impunity."⁷ As one writer commented, before the relatively recent recognition of the constitutional problems engendered by parallel civil forfeiture and criminal prosecution based upon the same conduct,

[u]nrestrained prosecutors began to act like children without adult supervision, using these "nuclear weapons" in tandem to impoverish and then incarcerate defendants in record numbers, and with draconian sentences. . . .

It was like shooting fish in a barrel for prosecutors. Sometimes they would pursue civil forfeiture first under the lesser standard of proof required in a civil action and then seek conviction in a subsequent proceeding. This gave them a "dry run" at the trial, and put the defendant at a serious disadvantage, having to fight two fronts at once.⁸

Over the past several years, however, a number of appellate decisions have dramatically blunted these double-edged weapons.⁹

These decisions include a trio of Supreme Court cases: *United States v. Halper*,¹⁰ *Austin v. United States*,¹¹ and *Department of Revenue of Montana v. Kurth Ranch*.¹² These cases lead to the

counsel"). *But see* *Commonwealth v. \$9,847.00 U.S. Currency*, 637 A.2d 736, 746 (Pa. Commw. Ct. 1994) (concluding that the complainant contesting forfeiture action was constitutionally entitled to court appointed counsel because substantial private property interests and the Excessive Fines Clause were involved).

6. *See* *United States v. RR #1, Box 224*, 14 F.3d 864, 876 (3d Cir. 1994) (noting "uncertainty of the law" as to whether forfeiture claimant has a right to trial by jury). *But see* *Idaho Dep't of Law Enforcement v. Lot 2 in Block 5 of Vista Village Addition*, 885 P.2d 381, 386 (Idaho 1994) (concluding that the Idaho Constitution grants the right to a jury trial in an *in rem* forfeiture proceeding).

7. *See* *United States v. Stanwood*, 872 F. Supp. 791, 793 (D. Or. 1994).

8. BRENDA GRANTLAND ET AL., *FORFEITURE AND DOUBLE JEOPARDY: HOW TO TURN PROSECUTORIAL OVERREACHING INTO RELEASE OF PRISONERS OR RETURN OF SEIZED PROPERTY 5* (published by FEAR Foundation, 1994).

9. *See infra* note 24.

10. 490 U.S. 435 (1989).

11. 113 S. Ct. 2801 (1993).

12. 114 S. Ct. 1937 (1994).

inescapable conclusion that the civil forfeiture of crime-related property is punitive and such forfeitures can often violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.¹³

Despite the clear message of these Supreme Court cases, several lower federal courts and many state appellate courts have been reluctant to give meaningful effect to this newly understood constitutional protection. This Article will explain why parallel civil forfeiture and criminal prosecution, when based upon the same criminal conduct, violate the guarantee against double jeopardy. Further, it will explore how courts that have avoided this conclusion have misread and misapplied controlling precedent.

In their efforts to avoid granting relief to a culpable defendant when confronted with a clear violation of the prohibition against double jeopardy, many courts have relied on twisted reasoning or absurd legal fictions in the face of contrary Supreme Court precedent. As late as 1993, the argument that the government could not punish a person with incarceration and also forfeit his or her property without running afoul of the Double Jeopardy Clause was met with scorn, and attorneys making this argument were occasionally ridiculed.¹⁴

Perhaps because of the persistent reluctance of the lower courts to give meaningful effect to the prohibition against double jeopardy, the Supreme Court has addressed the forfeiture-punishment issue repeatedly in recent years, making it clear that the double jeopardy concerns created by parallel civil forfeiture and criminal prosecution must be taken seriously.

In 1994, many appellate courts began to give effect to these Supreme Court pronouncements and to dismiss criminal cases or return forfeited property to remedy apparent violations. Although the realization of the constitutional dilemma has been gradual, it is undeniable. As illustrated below, those courts that have refused to recognize the double jeopardy dilemma have been able to do so only by ignoring relevant precedent, as well as common sense.

II. THE GUARANTEE AGAINST DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution provides that no person "shall . . . be subject for the same offense to be twice

13. See discussion *infra* part III.A.

14. This writer, after making the argument in King County Superior Court in 1993, was told by the court that it was a nice argument but one with "absolutely no chance of success."

put in jeopardy of life or limb."¹⁵ This guarantee against double jeopardy is "one of the oldest ideas found in western civilization,"¹⁶ and is considered "fundamental" to the Anglo-American system of justice.¹⁷ The Double Jeopardy Clause applies to the states through the Due Process Clause of the Fourteenth Amendment.¹⁸

The guarantee against double jeopardy protects individuals from three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.¹⁹ In the context of civil forfeitures, the third protection is of paramount concern: protection from multiple punishments for the same offense.²⁰

III. DOUBLE JEOPARDY IN THE CIVIL FORFEITURE CONTEXT

Many courts have recognized that civil forfeitures arising from criminal conduct present serious double jeopardy concerns.²¹ In addressing the double jeopardy implications of these crime-related forfeitures, one must ask three primary questions: (1) Do both the criminal conviction and the forfeiture of crime-related property constitute "punishment"?; (2) Were the two punishments imposed for the "same offense"?; and (3) Were the two punishments imposed in "separate proceedings"?²² Relying primarily on the *Halper-Austin-Kurth Ranch* rule that civil forfeitures are punitive,²³ many courts have answered these questions in the affirmative.²⁴ Other courts,

15. U.S. CONST. amend. V. Most state constitutions have similar provisions. See, e.g., WASH. CONST. art. I, § 9 (providing that "no person shall be . . . twice put in jeopardy for the same offense"); ALASKA CONST. art. I, § 9 (providing that "no person shall be put in jeopardy twice for the same offense").

16. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

17. *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969).

18. *Id.* at 794.

19. E.g., *United States v. Halper*, 490 U.S. 435, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

20. See, e.g., *Oakes v. United States*, 872 F. Supp. 817, 823 (E.D. Wash. 1994); *Johnson v. State*, 882 S.W.2d 17, 18 (Tex. Ct. App. 1994).

21. See *infra* notes 24-25.

22. E.g., *United States v. Ursery*, 59 F.3d 568, 571 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); *Oakes v. United States*, 872 F. Supp. 817, 823 (E.D. Wash. 1994).

23. See *supra* text accompanying note 13 and discussion *infra* part III.A.

24. See, e.g., *Ursery*, 59 F.3d at 573-76 (finding that the civil forfeiture constituted punishment, that the forfeiture and criminal conviction were punishment for the same offense, and that the civil forfeiture and criminal prosecution were two separate proceedings such that the criminal conviction was barred by double jeopardy); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216, 1222 (9th Cir. 1994) (finding that a civil forfeiture action instituted in a

demonstrating a profound (and occasionally profane) reluctance to dismiss criminal convictions or overturn large forfeiture judgments where guilt has been proven or conceded, have found various ways to avoid granting the relief required under a fair reading of the Supreme Court precedents.²⁵ If the *Halper-Austin-Kurth Ranch* rule is given full effect, it is apparent that (1) the forfeiture of crime-related property is punitive;²⁶ (2) in many cases, the forfeiture and the criminal

separate proceeding and decided over a year after the criminal trial constituted punishment and, thus, was barred by double jeopardy), *amended on denial of reh'g*, 56 F.3d 41 (9th Cir. 1995), and *cert. granted*, 64 U.S.L.W. 3483 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); *United States v. Sherrett*, 877 F. Supp. 519, 527 (D. Or. 1995) (finding criminal charges of conspiracy barred by double jeopardy because prior civil forfeiture of property was based on conspiracy statutes); *United States v. McCaslin*, 863 F. Supp. 1299, 1303-04 (W.D. Wash. 1994) (finding that a defendant was subjected to double jeopardy when a criminal conviction and sentence were imposed in a separate proceeding months after forfeiture of the defendant's property for the same offense); *People v. Towns*, 646 N.E.2d 1366, 1371 (Ill. App. Ct. 1995) (finding that forfeiture proceedings under the Illinois Drug Asset Forfeiture Procedure Act constitute punishment and that forfeiture imposed in a separate proceeding from a criminal proceeding under the Act is barred by double jeopardy); *Fant v. State*, 881 S.W.2d 830, 834 (Tex. Ct. App. 1994) (holding that the double jeopardy clause prohibited punishment for criminal conduct when the defendant had already been punished in a civil forfeiture proceeding).

25. See, e.g., *United States v. Baird*, 63 F.3d 1213, 1219 (3d Cir. 1995) (finding that the defendant was not placed in risk of jeopardy because he never became a party to the forfeiture proceeding), *cert. denied*, 116 S. Ct. 909 (1996); *United States v. Barton*, 46 F.3d 51, 52 (9th Cir. 1995) (finding that the defendant could not vacate his criminal conviction because he plead guilty to the criminal charges before the forfeiture proceedings were completed); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.) (finding that jeopardy did not attach in the forfeiture proceeding because the defendant did not become a party to that proceeding), *cert. denied*, 115 S. Ct. 669 (1994); *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1499 (11th Cir. 1994) (finding the civil forfeiture of a defendant's home used for an illegal gambling operation was not barred by double jeopardy, even though the defendant had previously been punished by a criminal conviction for the same gambling offense); *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993) (finding that double jeopardy was not implicated because the criminal and civil forfeiture actions were part of a single proceeding, despite the fact that the actions were filed separately with their own docket numbers), *cert. denied*, 114 S. Ct. 922 (1994); *United States v. Nakamoto*, 876 F. Supp. 235, 238-39 (D. Haw.) (finding no double jeopardy where the defendant voluntarily chose not to contest the civil forfeiture and was not a party to that proceeding), *aff'd*, 67 F.3d 310 (9th Cir. 1995), *petition for cert. filed*, (U.S. Dec. 26, 1995) (No. 95-7313); *United States v. Walsh*, 873 F. Supp. 334, 337 (D. Ariz. 1994) (finding that the defendant waived his right to assert double jeopardy because he elected not to be a party to the civil forfeiture proceeding); *United States v. Stanwood*, 872 F. Supp. 791, 800 (D. Or. 1994) (finding that the defendant was not entitled to have his conviction vacated because jeopardy attached in the defendant's criminal case before it attached in the civil forfeiture action); *Crowder v. United States*, 874 F. Supp. 700, 703 (M.D.N.C. 1994) (finding that double jeopardy was not implicated when the defendant was convicted of conspiracy, while the property was forfeited for its connection to the underlying substantive crime); *United States v. Kemmish*, 869 F. Supp. 803, 806 (S.D. Cal. 1994) (finding that the defendant was not placed in jeopardy in the administrative forfeiture proceeding because he made no claim to the property and was therefore not a party to the proceeding).

26. See discussion *infra* part III.A.

prosecution are based on the same offense;²⁷ and (3) the civil forfeiture action and the criminal prosecution are separate proceedings.²⁸ As a result, the Double Jeopardy Clause prohibits imposition of both civil forfeiture and criminal conviction.²⁹

A. *Is the Forfeiture of Crime-Related Property "Punitive" for Purposes of the Double Jeopardy Clause?*

1. General Considerations

In *United States v. Halper*,³⁰ the Supreme Court held that a civil penalty imposed by the government can constitute "punishment" for purposes of double jeopardy analysis.³¹ Halper was convicted of sixty-five counts of violating the criminal False Claims Act³² for filing sixty-five fraudulent claims for Medicare reimbursement.³³ He was sentenced to two years in prison and fined \$5,000.³⁴ Following Halper's conviction, the Government brought an action under the *civil* False Claims Act,³⁵ seeking a \$2,000 civil penalty for each of the sixty-five separate violations.³⁶ The district court concluded "that in light of Halper's previous criminal punishment," a civil penalty of \$130,000 would violate the Double Jeopardy Clause because the penalty was "entirely unrelated" and bore "no rational relation" to the actual damages suffered or expenses incurred by the Government.³⁷ Accordingly, the district court held that the fine was a second punishment for the same offense,³⁸ declared the civil False Claims Act unconstitutional as applied to Halper,³⁹ and limited the Government's recovery to \$1,170, the amount of actual damages.⁴⁰

On direct appeal, the Supreme Court agreed with the district court that a civil sanction imposed by the government can constitute punishment for purposes of double jeopardy analysis.⁴¹ In so

27. See discussion *infra* part III.B.

28. See discussion *infra* part III.C.

29. See discussion *infra* part VI.

30. 490 U.S. 435 (1989).

31. *Id.* at 448-49.

32. 18 U.S.C.A. § 287 (West Supp. 1995).

33. *Halper*, 490 U.S. at 437.

34. *Id.*

35. 31 U.S.C.A. §§ 3729-3731 (West Supp. 1995).

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

37. *Id.* at 438-39.

38. *Id.* at 439.

39. *Id.* at 440.

40. *Id.*

41. *Id.* at 448-49.

holding, the Court rejected the notion that a sanction is not punitive merely because it is imposed in a civil rather than a criminal proceeding. Noting that "the labels 'criminal' and 'civil' are not of paramount importance,"⁴² the Court found that the determination of whether a given civil sanction constitutes punishment requires an inquiry into legislative intent.⁴³ If the legislature intended the statute to deter or punish illegal conduct, it is a punitive statute: "Simply put, a civil . . . sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."⁴⁴ Following this reasoning, the Court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."⁴⁵ This rule is the most significant aspect of the *Halper* case: A civil sanction must be solely remedial in order to escape classification as punishment.⁴⁶ If the sanction can be understood as at least partially deterrent or retributive, it constitutes punishment.⁴⁷ Such punitive penalties, imposed after criminal conviction,⁴⁸ run afoul of the Double Jeopardy Clause.⁴⁹

Although *Halper* did not address the double jeopardy implications of civil *in rem* forfeitures, the Court's method for determining whether a civil proceeding is punitive also applies in the forfeiture context. Thus, in *Austin v. United States*,⁵⁰ the Court relied on *Halper* in holding that crime-related civil forfeitures pursuant to 21 U.S.C. § 881 are punitive and therefore subject to review under the Eighth Amendment's Excessive Fines Clause.⁵¹

42. *Id.* at 447.

43. *See id.* at 447 & n.7.

44. *Id.* at 448; *see also* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (stating that the underlying question in determining whether the Double Jeopardy Clause applies to a particular type of proceeding is "whether [the] proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial").

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

46. *See id.*

47. *Id.* at 448-49.

48. The order in which the punishments are imposed is irrelevant. Whether criminal prosecution precedes civil *in rem* forfeiture or vice versa, the second punishment violates the Double Jeopardy Clause. *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, 506 U.S. 841 (1992). The reason for this is simple: The Double Jeopardy Clause prohibits the imposition of multiple punishments. Thus, the remedy for violation of the clause is relief from the second punishment—whether that happens to be imprisonment or property forfeiture.

49. *Halper*, 490 U.S. at 448-49.

50. 113 S. Ct. 2801 (1993).

51. *Id.* at 2812.

In *Austin*, the defendant was convicted and sentenced in state court following his guilty plea to possession of cocaine with intent to distribute.⁵² Following conviction, the United States filed an *in rem* action in federal district court seeking forfeiture of the defendant's mobile home and auto body shop under 21 U.S.C. § 881(a)(4) and (a)(7).⁵³ The Government alleged that this property was used to facilitate the drug offense.⁵⁴ The district court rejected Austin's argument that forfeiture of the property would violate the Eighth Amendment's Excessive Fines Clause.⁵⁵ The Eighth Circuit Court of Appeals affirmed, agreeing with the Government that the Eighth Amendment does not apply to civil *in rem* forfeitures.⁵⁶ The Supreme Court accepted review and reversed.⁵⁷

Citing *Halper*, the Court noted that "the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment."⁵⁸ Answering this question in the affirmative, the Court reiterated the holding in *Halper* that a statute which is not wholly remedial must be deemed punitive: "We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish."⁵⁹

After a careful review of the history of *in rem* forfeiture, the Court concluded that forfeiture, particularly statutory *in rem* forfeiture, has historically "been understood, at least in part, as punishment."⁶⁰ The Court then turned to a specific examination of the drug-related forfeitures authorized by 21 U.S.C. § 881(a). The Court found

52. *Id.* at 2803.

53. *Id.* Section 881(a)(4) subjects the following to forfeiture: "All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances] . . ." 21 U.S.C.A. § 881(a)(4) (West Supp. 1995). Section 881(a)(7) provides for the forfeiture of the following: "All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . ." *Id.* § 881(a)(7).

54. *See Austin*, 113 S. Ct. at 2803.

55. *Id.*

56. *See id.*

57. *Id.* at 2812.

58. *Id.* at 2806 & n.6.

59. *Id.* at 2806.

60. *Id.* at 2810.

“nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment.”⁶¹

The Court also found evidence of punitive legislative intent from the presence of an “innocent owner” defense in the forfeiture provisions⁶² and noted that “these [innocent owner] exemptions serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less” because they reveal a congressional intent to punish only those involved in drug trafficking.⁶³ Furthermore, the punitive nature of 21 U.S.C. § 881(a) is evident from the legislative history behind the statute⁶⁴ and because forfeiture is directly connected to the commission of a drug offense.⁶⁵

In reaching the conclusion that the federal drug forfeiture statute is not solely remedial and, therefore, must be considered punitive, the Court focused on the clear congressional motivation for enacting the drug forfeiture statute: to “deter and punish” illegal drug dealing.⁶⁶ The Court’s conclusion that deterrence and punishment are punitive goals, rather than remedial goals, is undeniable. Likewise, the Court’s ultimate conclusion that the federal drug forfeiture statute does not serve a solely remedial purpose and is, therefore, punitive and subject to the restrictions of the Eighth Amendment’s Excessive Fines Clause⁶⁷ clearly follows. Although the *Austin* court did not address the Double Jeopardy Clause, the Court’s opinion left no serious doubt that crime-related *in rem* forfeitures are punitive.

One year after *Austin*, in *Department of Revenue of Montana v. Kurth Ranch*,⁶⁸ the Court addressed the question of whether a tax imposed on illegally-possessed marijuana constitutes punishment for purposes of the Double Jeopardy Clause.⁶⁹ In *Kurth Ranch*, the defendants plead guilty in state court to possessing marijuana with intent to sell.⁷⁰ After conviction and sentencing, the state sought to collect a tax imposed on the illegally possessed marijuana.⁷¹ A federal bankruptcy court ruled that imposition of the tax in a separate proceeding following the criminal convictions violated the Double

61. *Id.*

62. *See* 21 U.S.C.A. § 881(a)(4)(C), (a)(7) (West Supp. 1995).

63. *Austin*, 113 S. Ct. at 2810-11.

64. *Id.* at 2811.

65. *Id.*

66. *See id.* at 2812.

67. *Id.*

68. 114 S. Ct. 1937 (1994).

69. *Id.* at 1941.

70. *Id.* at 1942.

71. *Id.* at 1942-43.

Jeopardy Clause.⁷² The district court affirmed the bankruptcy court's ruling, as did the Ninth Circuit Court of Appeals.⁷³ Because the Ninth Circuit's ruling was in apparent conflict with a ruling by the Montana Supreme Court,⁷⁴ the United States Supreme Court accepted review.⁷⁵

Noting the "unusual features" of the Montana tax, the Court held that imposition of the tax was punitive because it was "conditioned on the commission of a crime."⁷⁶ The Court found this fact to be "significant of penal and prohibitory intent rather than the gathering of revenue."⁷⁷ The Court noted that in previous cases it had relied "on the absence of such a condition to support its conclusion that a particular federal tax was a civil rather than a criminal sanction."⁷⁸ Finally, the Court found it significant that "the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place."⁷⁹

Because the tax was so closely tied to the criminal culpability of the taxpayer, the Court concluded that "[t]his tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment."⁸⁰ Because the tax was punitive, it could not constitutionally be imposed in a separate proceeding following criminal prosecution. The Court held that "this drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead, it is a second punishment . . . and therefore must be imposed during the first prosecution or not at all."⁸¹

The lesson of *Halper*, *Austin*, and *Kurth Ranch* is clear: A nominally civil sanction, an *in rem* forfeiture, or a tax, is punitive unless it serves a solely remedial purpose. A sanction that, even in part, serves the punitive goals of deterrence or retribution is punishment and, thus, is subject to the provisions of the Double Jeopardy

72. See *id.* at 1943.

73. *Id.*

74. See *Sorensen v. State Dep't of Revenue*, 836 P.2d 29 (Mont. 1992).

75. *Kurth Ranch*, 114 S. Ct. at 1944.

76. *Id.* at 1947-48.

77. *Id.* at 1947 (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)).

78. *Id.* at 1947 & n.20.

79. *Id.* at 1947.

80. *Id.* at 1948.

81. *Id.*

Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.⁸²

The lower federal courts that have considered the question since *Kurth Ranch* have, almost without exception, recognized that the forfeiture of property used to facilitate a drug offense is punitive.⁸³ In states having forfeiture provisions nearly identical to the federal forfeiture statute, courts have held the state statutes punitive and subjected such proceedings to double jeopardy analysis.⁸⁴ Similar forfeiture provisions linked to other criminal activity have also been determined punitive.⁸⁵

Some state courts have attempted to distinguish the *Halper-Austin-Kurth Ranch* rule on the basis of textual differences between state and federal forfeiture statutes.⁸⁶ For example, in *In re 2120 S. 4th*

82. Although the *Halper, Austin, and Kurth Ranch* decisions clearly establish that *in rem* forfeiture is punitive, the question of whether a claimant is entitled to the full panoply of criminal protections in a forfeiture proceeding remains open. Compare *United States v. \$94,000.00 in United States Currency*, 2 F.3d 778, 783-84 (7th Cir. 1993) (stating that "the penalty of civil forfeiture, while sufficiently akin to the criminal law to invoke . . . the strictures of the Eighth Amendment, does not convert a civil forfeiture proceeding into a criminal matter insofar as the allocation of the burden of proof is concerned.") with *Commonwealth v. \$9,847.00 U.S. Currency*, 637 A.2d 736, 746 (Pa. Commw. Ct. 1994) (concluding that the complainant contesting forfeiture action was constitutionally entitled to court appointed counsel because substantial private property interests and the Excessive Fines Clause were involved) and *Idaho Dep't of Law Enforcement v. Lot 2 in Block 5 of Vista Village Addition*, 885 P.2d 381, 386 (Idaho 1994) (concluding that the Idaho Constitution grants the right to a jury trial in an *in rem* forfeiture proceeding).

83. See, e.g., *United States v. Baird*, 63 F.3d 1213, 1216 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States v. Ursery*, 59 F.3d 568, 573 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); *United States v. Stanwood*, 872 F. Supp. 791, 796 (D. Or. 1994); *Oakes v. United States*, 872 F. Supp. 817, 826 (E.D. Wash. 1994) (holding that in light of *Austin* the court had "no choice" but to conclude that civil forfeiture constitutes punishment); *United States v. McCaslin*, 863 F. Supp. 1299, 1302 (W.D. Wash. 1994); see also cases cited *supra* note 24.

84. See, e.g., *People v. Towns*, 646 N.E.2d 1366, 1371 (Ill. App. Ct. 1995) (finding the Illinois Forfeiture Act punitive under federal double jeopardy analysis); *Fant v. State*, 881 S.W.2d 830, 834 (Tex. Ct. App. 1994) (holding Texas forfeiture law punitive under *Austin* analysis, thereby invoking double jeopardy protection); *State v. Clark*, 124 Wash. 2d 90, 97-98, 875 P.2d 613, 616 (1994) (finding that drug-crime-related forfeitures are "punishment" for purposes of federal Double Jeopardy Clause analysis); *Lot 2 in Block 5 of Vista Village Addition*, 885 P.2d at 383 (holding Idaho forfeiture law punitive under *Austin* and therefore subject to Eighth Amendment excessive fines analysis); see also *State v. 392 South 600 E.*, 886 P.2d 534, 540-41 (Utah 1994) (holding Utah forfeiture statute punitive and subject to an Eighth Amendment excessive fines analysis).

85. See, e.g., *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1498-99 (11th Cir. 1994) (holding that forfeiture statutes imposed on those convicted of illegal gambling were punitive); *United States v. Taylor*, 13 F.3d 786, 790 (4th Cir. 1994) (holding that forfeiture of home used for illegal gambling was sufficiently punitive to implicate the Eighth Amendment).

86. See *In re 2120 S. 4th Ave.*, 870 P.2d 417, 421 (Ariz. Ct. App. 1994) (holding that the Arizona drug forfeiture statute is remedial and therefore not subject to excessive fines analysis); *State ex. rel. McGehee v. 1989 Ford F-150*, 888 P.2d 1036, 1037 (Okla. Ct. App. 1994) (stating

Avenue,⁸⁷ an Arizona court relied on the legislative pronouncement that a forfeiture provision "is remedial and not punitive" to find that forfeiture under the state's racketeering statute is solely remedial within the context of the Excessive Fines Clause.⁸⁸ However, because the forfeiture statute has other punitive characteristics,⁸⁹ under *Halper*, the Arizona Legislature cannot simply avoid double jeopardy scrutiny by declaring the forfeiture provision remedial. As the *Halper* court noted, such labels "are not of paramount importance" in determining whether a given sanction is punitive.⁹⁰ Moreover, "the constitutionally 'impermissible' cannot be made into the 'permissible' even by a clear expression of Congressional intent to permit it."⁹¹ Thus, the Arizona court's transparent attempt, in *In re 2120 S. 4th Avenue*, to distinguish the Arizona forfeiture statute may be subject to attack in federal court.

Other courts have maintained the remedial fiction by ignoring the plain holding of *Austin*.⁹² In *Ward v. State*,⁹³ a Texas court declared the Texas forfeiture statute remedial, reasoning that "forfeited funds and funds derived from the sale of forfeited property [are to] be used for law enforcement purposes, and drug abuse and chemical dependency treatment programs."⁹⁴ According to the court, "[t]hese goals are clearly remedial in nature."⁹⁵ This approach is incorrect, as the same court recognized five months later in *Johnson v. State*.⁹⁶ "While we believe the purpose of the statute is remedial, we acknowledge it may not be solely remedial. If the forfeiture does not solely serve a remedial purpose, but also serves as a retributive or deterrent purpose, it is punishment."⁹⁷

The *Johnson* court's holding on this point indicates a reluctant, but inevitable, acceptance of the *Halper* rule: If a statute is even partially

that the provisions of the Oklahoma controlled substances forfeiture statutes are primarily remedial in nature).

87. 870 P.2d 417 (Ariz. Ct. App. 1994).

88. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13-2314(N) (1989)).

89. For example, forfeiture under the Arizona racketeering statute is dependent upon the commission of a crime, see ARIZ. REV. STAT. ANN. § 13-2314(G) (Supp. 1995), and the statute provides an "innocent owner" defense. See *id.* § 13-2314(F).

90. 490 U.S. at 447.

91. *United States v. Smith*, 874 F. Supp. 347, 349 (N.D. Ala. 1995) (interpreting *Halper* and its progeny).

92. See, e.g., *State v. Cole*, 128 Wash. 2d 262, 276-77, 906 P.2d 925, 934 (1995); see also *Ward v. State*, 870 S.W.2d 659, 663 (Tex. Ct. App.), cert. granted, 115 S. Ct. 567 (1994).

93. 870 S.W.2d 659 (Tex. Ct. App. 1994), cert. granted, 115 S. Ct. 567 (1994).

94. *Id.* at 663 (citing TEX. CODE CRIM. PROC. ANN. art. 59.06(c), (h) (West Supp. 1993)).

95. *Id.*

96. 882 S.W.2d 17 (Tex. Ct. App. 1994).

97. *Id.* at 19 (citations omitted).

motivated by punitive objectives, it is punitive. Despite the textual support for the argument that crime-related forfeitures are remedial, it is now widely apparent that such statutes are not *solely* remedial; therefore, they must be declared punitive under the *Halper-Austin-Kurth Ranch* rule.

The determination of double jeopardy in the forfeiture context has evolved beyond the preliminary issue of whether forfeiture statutes are punitive. As it is now virtually undisputed that drug-related forfeitures are punitive, many courts have found other ways to avoid true resolution of the double jeopardy concerns created by parallel civil forfeiture and criminal prosecution. Some courts have attempted to distinguish between forfeitures of property used to facilitate drug crimes and forfeitures of property constituting proceeds of a drug offense to avoid granting full relief to a culpable claimant or defendant. This distinction is fallacious.

2. "Proceeds" Versus "Facilitation" Forfeitures

While *Austin* and the cases cited above lead to the unavoidable conclusion that the forfeiture of property used to facilitate a drug offense is punitive, many courts have attempted to distinguish the forfeiture of proceeds derived from drug distribution activities.⁹⁸ While the distinction between the forfeiture of proceeds pursuant to 21 U.S.C. § 881(a)(6)⁹⁹ and the forfeiture of property used to facilitate a drug offense pursuant to 21 U.S.C. § 881(a)(7)¹⁰⁰ may provide a convenient line in the sand for courts unwilling to reverse criminal convictions or overturn large forfeiture judgments, the distinction is conceptually unsound. As one court recognized, the argument that the forfeiture of proceeds does not constitute punishment "not only

98. *United States v. Twenty One Thousand Two Hundred Eighty Two Dollars in U.S. Currency*, 47 F.3d 972, 973 (8th Cir. 1995) (finding that the forfeiture of drug-trafficking proceeds does not constitute punishment); *United States v. Tilley*, 18 F.3d 295, 299 (5th Cir.) (holding that civil forfeiture of proceeds from the sale of drugs was not punishment because it was solely remedial in nature), *cert. denied*, 115 S. Ct. 573-74 (1994); *United States v. Borromeo*, 1 F.3d 219, 221 (4th Cir. 1993) (holding that where forfeiture is proportional to remedial purpose, the forfeiture is not punitive); *United States v. \$288,930.00 in U.S. Currency*, 838 F. Supp. 367, 370 (N.D. Ill. 1993) (holding that forfeiture of narcotics distribution proceeds is not punishment because claimant does not rightfully own the forfeited property).

99. 21 U.S.C.A. § 881(a)(6) (West 1981) subjects the following to forfeiture:

All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter

100. See *supra* note 53.

misconceives the legal standard established in *Austin*, but also misstates the scope of the statutes involved."¹⁰¹

Courts holding that the forfeiture of illegal narcotics proceeds is not punitive have often reasoned that, since the claimant had no lawful right to the proceeds of his illegal activity, the deprivation of those proceeds is not punitive.¹⁰² For example, in *United States v. Tilley*,¹⁰³ the Fifth Circuit held that the forfeiture of proceeds from illegal activity was not punishment because the defendant had no property interest in the proceeds of illegal activity:¹⁰⁴

[I]nstead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within [sic] the plain meaning of the word."¹⁰⁵

The *Tilley* court's reasoning is an excellent example of a court ignoring precedent and logic to avoid granting relief. Under *Austin*, all drug-related forfeitures pursuant to section 881(a) are punitive, as a matter of law, because the purpose of the statute is to deter and punish narcotics offenses.¹⁰⁶ The loss of property pursuant to a punitive statute is punishment within the plain meaning of the word. Moreover, the proceeds forfeiture provision is part of the same statutory forfeiture scheme that was deemed punitive in *Austin*: "The legislative history of § 881 confirms the punitive nature of these provisions."¹⁰⁷ By declaring the entirety of section 881 punitive, the Court did not

101. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1220 (9th Cir. 1994), amended on denial of reh'g, 56 F.3d 41 (9th Cir. 1995), and cert. granted, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346).

102. See, e.g., *Tilley*, 18 F.3d at 300; *Cole*, 128 Wash. 2d 276-79, 906 P.2d at 934-36.

103. 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 573-74 (1994).

104. *Id.* at 300.

105. *Id.* (quoting *United States v. Halper*, 490 U.S. 435, 449 (1989)). In so holding, the *Tilley* court ignored not only *Austin* but its own precedent. In *Wood v. United States*, the same fifth circuit panel that decided *Tilley* reviewed the legislative history of 21 U.S.C. § 881(a)(6) and recognized the punitive nature of proceeds forfeitures by holding that such forfeitures "cannot seriously be considered anything other than an economic penalty for drug trafficking." 863 F.2d 417, 421 (5th Cir. 1989). *Tilley* totally ignores the holding of *Wood*.

Furthermore, *Tilley's* bank-robbery-proceeds analogy fails because the purpose of seizing funds stolen in a robbery is to return them to the robbery victim, not to punish the robber. If such funds were seized from a bank robber pursuant to a statute motivated by an intent to punish the robber rather than compensate the robbery victim, such a seizure would be punitive.

106. See *supra* text accompanying notes 50-67.

107. *Austin*, 113 S. Ct. at 2811.

draw a distinction between facilitation and proceeds forfeitures.¹⁰⁸ Thus, "there is no doubt that the forfeiture of property in a judicial forfeiture proceeding under 21 U.S.C. § 881(a)(6) constitutes punishment."¹⁰⁹

Even if forfeiture of narcotics distribution proceeds "merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme,"¹¹⁰ it is nonetheless punitive because the purpose of the forfeiture statute is not *solely* remedial.¹¹¹ Although the forfeiture of proceeds may indeed be *partially* remedial,

[I]f a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishment also serves remedial purposes.¹¹²

Thus, to avoid running afoul of the Double Jeopardy Clause, the government must forego forfeiture of narcotics proceeds, forego criminal prosecution, or pursue both remedies in the same proceeding.

Indeed, the government's refusal to pursue forfeiture as part of a criminal indictment is a frustrating aspect of the recent forfeiture-double jeopardy litigation. Of course, if the government seeks forfeiture of drug-related property as part of a criminal proceeding, the defendant will have an attorney, and the government will have the burden of proof. Avoiding the myriad protections afforded a criminal defendant provides strong motivation for the government to seek civil rather than criminal forfeiture, despite the double jeopardy issues engendered by such an approach.

Perhaps an even more important motivation for the government to seek civil rather than criminal forfeiture is the desire to attack the defendant on two separate fronts. This motivation is clear in that the government commonly uses the forfeiture of property as a plea

108. *Contra \$288,930.00 in U.S. Currency*, 838 F. Supp. at 370 (suggesting that Austin was limited to 21 U.S.C. § 881(a)(4) and (a)(7)).

109. *United States v. Nakamoto*, 876 F. Supp. 235, 237 (D. Haw.), *aff'd*, 67 F.3d 310 (9th Cir. 1995) *petition for cert. filed*, (U.S. Dec. 26, 1995) (No. 95-7313); *see also \$405,089.23 U.S. Currency*, 33 F.3d at 1220 (rejecting the argument that the forfeiture of proceeds is not punitive because such an argument "fails to recognize the legal standard that Austin established"); *Wood*, 863 F.2d at 421 (recognizing that proceeds forfeitures are punitive because they were designed "to augment 'the traditional criminal sanctions of fines and imprisonment'").

110. *Tilley*, 18 F.3d at 300.

111. *See supra* text accompanying notes 50-67.

112. *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994).

bargaining tool in the criminal case. Even if the government's criminal case is flawed or weak, a defendant may be willing to plead guilty to save his home or significant property. Thus, it is understandable that the government would rather wade into the double jeopardy quagmire than surrender its civil forfeiture weapon. As it becomes more clear that civil forfeiture violates the Double Jeopardy Clause when pursued in a separate proceeding to punish drug crimes, the government will likely recognize that criminal forfeiture, which is constitutionally acceptable, is a preferable procedure.

3. Disproportionality Analysis

Another disturbing trend followed by some courts, in their reluctance to give full force and effect to the *Halper-Austin-Kurth Ranch* rule, is to deny double jeopardy claims where the government can show that the amount of the forfeiture was roughly proportionate to the expense of detecting and prosecuting the crime. A good example of this "proportionality" analysis is *Johnson v. State*,¹¹³ in which the court, after recognizing that the statute at issue did not serve a solely remedial purpose, applied proportionality analysis to determine whether prosecution for the charged offenses would violate double jeopardy.¹¹⁴ According to the *Johnson* court, this analysis looks at "whether the forfeiture amount approximates the cost of investigating, apprehending, and prosecuting the defendant, or whether the forfeiture relates otherwise to any actual damages that the defendant caused the state."¹¹⁵ The *Johnson* court was mistaken in applying this proportionality analysis. The court's conclusion that the statute was partially punitive should have ended the inquiry.

Any argument that drug-related forfeiture is remedial, to the extent that it serves to reimburse the government for its actual costs, must be rejected. Under the *Halper-Austin-Kurth Ranch* rule, the legislative intent behind the statute, rather than its effect, controls the punitive nature of the statute.¹¹⁶ As discussed above, the Court in *Austin* declared that forfeiture provisions, like the one at issue in

113. 882 S.W.2d 17 (Tex. Ct. App. 1994).

114. *Id.* at 20; see also *Borromeo*, 1 F.3d at 221 ("In the wake of *Austin*, an inquiry into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture would seem to be in order.").

115. 882 S.W.2d at 20.

116. See *supra* text accompanying notes 62-66.

Johnson,¹¹⁷ are punitive; thus, regardless of the individual case facts, the imposition of such a forfeiture sanction is punishment.

Moreover, any argument that a forfeiture is remedial in a particular case should be rejected because any relationship between the value of property forfeited and the actual damages is both speculative and coincidental. As the *Austin* court noted, "the dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut [the argument that those provisions provide a reasonable form of liquidated damages]"¹¹⁸ because the value of the property forfeitable "can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental."¹¹⁹ Thus, in the forfeiture arena, the Supreme Court has rejected a case-by-case approach to the question of whether proceeds-forfeiture provisions are punitive.

Finally, a rule that a forfeiture is remedial if it reimburses the government for its costs is unworkable and unfair. Such a rule is unworkable because it is extremely difficult to assess the government's costs in a particular case. Are the government's costs limited to the hours spent by detectives investigating the case? Or do the costs include the salary of jail workers, drug lab technicians, prosecutors, public defenders, and others? For what length of time may the government legitimately charge its expenses? Can the police extend an investigation over a period of weeks, months, or years in order to increase the amount of the reimbursement they can eventually seek from the defendant? Can the police justify as costs the use of expensive investigative methods such as aerial surveillance and use those costs to justify the amount of a forfeiture? Such questions are difficult, if not impossible, to answer. In addition, they show that allowing forfeiture to reimburse the government for its costs would be subject to abuse. Indeed, the government could probably justify any forfeiture, no matter how large, by expanding the web of costs.

Allowing forfeiture to the extent that it reimburses the government would also be unfair. Assume the government can demonstrate that investigation and prosecution of a particular case cost \$10,000. To some defendants, \$10,000 may be a trifling sum, while to others it may

117. The Texas forfeiture statute at issue in *Johnson*, TEX. CODE CRIM. PROC. ANN. art. 59, like the federal forfeiture statute at issue in *Austin*, 21 U.S.C. § 881, has several punitive characteristics. For example, forfeiture is tied to the commission of a crime, see TEX. CODE CRIM. PROC. ANN. art. 59.01(2)-59.02(a) (West Supp. 1996), and a defense is provided for the "innocent owner." See *id.* art. 59.02(c).

118. 113 S. Ct. at 2812.

119. *Id.* at 2812 n.14.

represent a life savings. Such disproportionate punishment for the same offense is unfair. In sum, the argument that a forfeiture provision is remedial to the extent that it serves to reimburse the government for its costs and damages must be rejected.

B. *Are Criminal Prosecution and Forfeiture of Crime-Related Property Based on the "Same Offense"?*

"In order to prevail in a double jeopardy challenge, a defendant must not only show the existence of two 'punishments'. The defendant must also affirmatively establish he or she has been punished twice for the same offense."¹²⁰ Most courts have taken one of two approaches in resolving the same offense issue.¹²¹ Under the first approach, parallel criminal prosecution and civil *in rem* forfeiture are conclusively based on the same offense when they are based on the same violation of the same statute.¹²² Under the second approach, parallel criminal prosecution and civil *in rem* forfeiture are based on the same offense if neither offense contains an element not contained in the other.¹²³ This second approach is commonly known as the *Dixon-Blockburger* "same elements" test.¹²⁴

The following two sections will compare and analyze these approaches. Whichever test is applied, it is clear that punishing an individual for committing a drug offense, and then forfeiting her property because it was involved in that very same drug offense, constitutes the imposition of two punishments for the same offense.

1. The "Same Violation of the Same Statute" Approach

Where parallel criminal prosecution and civil *in rem* forfeiture are based on the same violation of the same statute, many courts have foregone elaborate analysis and reached the obvious conclusion that the

120. *State v. Clark*, 124 Wash. 2d 90, 101, 875 P.2d 613, 618 (1994) (employing federal double jeopardy analysis).

121. Alternatively, in *Clark*, the Washington Supreme Court did not adopt either approach. 124 Wash. 2d at 101-02, 875 P.2d at 618. Instead, the court stated that it was the defendants' burden to establish that they were punished twice for the same offense and held that they failed to do so. *Id.* at 101, 875 P.2d at 618. This approach is frustrating because it provides little guidance. It also demonstrates the court's reluctance to grapple with an issue which, when properly resolved, requires dismissal of a criminal conviction.

122. See *infra* part III.B.1.

123. See *infra* part III.B.2.

124. See *United States v. Dixon*, 113 S. Ct. 2849 (1993); *Blockburger v. United States*, 284 U.S. 299 (1932).

two punishments are based on the same offense.¹²⁵ Thus, in *Department of Revenue of Montana v. Kurth Ranch*, the Court declared, without much analysis, that the tax on the illegally possessed marijuana was based on the same offense as the underlying possession of marijuana.¹²⁶

In *United States v. \$405,089.23 U.S. Currency*,¹²⁷ the Ninth Circuit took a similarly straightforward and conceptually honest approach to the problem. In that case, the Government instituted a civil forfeiture action five days after the grand jury issued an indictment charging the claimants with conspiracy to manufacture methamphetamine, conspiracy to launder money, and money laundering.¹²⁸ The forfeiture complaint listed over half of a million dollars, a helicopter, an airplane, two boats, and eleven automobiles.¹²⁹ According to the Government, "the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions under 21 U.S.C. § 881(a)(6), and as property 'involved in' money laundering violations under 18 U.S.C. § 981(a)(1)(A)."¹³⁰ The district court held that the Government had established probable cause under both theories, and granted summary judgment in favor of the Government.¹³¹ On appeal, the Ninth Circuit held that the forfeiture action was based on the same offense as the criminal convictions and stated,

There can be little doubt that this case implicates the core Double Jeopardy protection. Over a year after the claimants' criminal convictions, a different district judge in a different proceeding awarded the government title to nearly all of the claimants' property, because of its connection with the *very offenses* that resulted in criminal punishment. The forfeiture complaint in this case was based on precisely the same conduct addressed in the claimants' criminal case, and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes. In short, this civil forfeiture action and the claimants' criminal

125. See, e.g., *Oakes v. United States*, 872 F. Supp. 817, 824 (E.D. Wash. 1994); *United States v. McCaslin*, 863 F. Supp. 1299, 1303 (W.D. Wash. 1994).

126. See 114 S. Ct. 1937, 1948 (1994).

127. 33 F.3d 1210 (9th Cir. 1994), *amended on denial of reh'g*, 56 F.3d 41 (9th Cir. 1995), *and cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346).

128. *Id.* at 1214.

129. *Id.*

130. *Id.*

131. *Id.* at 1214-15.

prosecution addressed the identical violations of the identical laws.¹³²

Clearly, *Kurth Ranch* and \$405,089.23 *U.S. Currency* indicate that where two punishments are imposed for the same violation of the same statute, both punishments are imposed for the same offense. Adopting this approach, the court in *United States v. Barton*¹³³ stated, quite simply, that "once convicted in a criminal case, a defendant cannot subsequently be punished in a civil forfeiture action based on the same violations of law."¹³⁴

In sum, although not all forfeitures are based on the same violation of the same statute that was at issue in the criminal case,¹³⁵ the same violation of the same statute approach is appealing and sensible. Where the forfeiture complaint and the criminal indictment are based on the same acts—the same crime occurring at the same time—it makes sense to say that both actions involve the same offense.

2. The *Dixon-Blockburger* Test

Despite the simplicity of the first approach, some courts have held that resolution of the same offense question requires application of the *Dixon-Blockburger* "same elements" test.¹³⁶ This test asks "whether

132. *Id.* at 1215-16; *see also* *United States v. Sherrett*, 877 F. Supp. 519, 527 (D. Or. 1995).

133. 46 F.3d 51 (9th Cir. 1995).

134. *Id.* at 52; *see also* *United States v. \$129,374 in United States Currency*, 769 F.2d 583, 588 (9th Cir. 1985) (stating that the "criminal conviction and the property involved in this civil forfeiture proceeding are integrally related parts of the same unlawful drug dealing scheme"), *cert denied*, 474 U.S. 1086 (1986); *United States v. 13143 S.W.* 15th Lane, 872 F. Supp. 968, 971 (S.D. Fla. 1994) (noting that the criminal prosecution and civil forfeiture were "based on the exact same facts"); *McCaslin*, 863 F. Supp. at 1303 (stating that there is "no doubt that McCaslin was subjected to the forfeiture of his residential property, and then to criminal sanctions, as punishments for the same offense"); *Fant v. State*, 881 S.W.2d 830, 834 (Tex. 1994) (concluding that "appellant has already been punished for his criminal conduct by the forfeiture of his property, and the Double Jeopardy Clause of the United States Constitution prohibits further punishment by the State for the same incident"); *Ex parte Tomlinson*, 886 S.W.2d 544, 547 (Tex. Ct. App. 1994) (declining to engage in *Dixon-Blockburger* analysis to determine whether two punishments were imposed for the same offense).

135. *See* *Quinones-Ruiz v. United States*, 873 F. Supp. 359, 362 (S.D. Cal. 1995) (holding that failure to report is a different offense from making false statements); *Crowder v. United States*, 874 F. Supp. 700, 703 (M.D.N.C. 1994) (holding that forfeiture was based on money laundering while criminal prosecution was based on actual distribution of marijuana).

136. *See* *Sherrett*, 877 F. Supp. at 525 (introducing *Dixon-Blockburger* test to determine whether prosecution of two statutory crimes offends double jeopardy); *United States v. Shorb*, 876 F. Supp. 1183, 1188 (D. Or.) (holding that prosecution for possession of marijuana with intent to distribute and money laundering were not based on the same offense as the forfeiture because each conviction "required proof of discrete, substantive elements not at issue in the civil forfeiture cases . . . [and] the forfeiture cases required a showing that the . . . properties were implicated in defendant's misconduct, an element not at issue in the criminal cases"), *aff'd in part, vacated in*

each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."¹³⁷

Even if the *Dixon-Blockburger* same elements test is the appropriate test, civil forfeiture and criminal conviction based on the same illegal conduct are the same offense because the forfeiture statutes contain all the elements of the underlying criminal statutes they incorporate. For example, the federal statute, 21 U.S.C. § 881, is triggered by the commission of a crime,¹³⁸ and it incorporates large portions of the federal Controlled Substances Act.¹³⁹ Similarly, in Washington State, the property sought to be forfeited under WASH. REV. CODE § 69.50.505 must be "traced to a violation" of Title 69.50, Washington's version of the Uniform Controlled Substances Act.¹⁴⁰ Where a statute incorporates another statute in this manner, the two statutes satisfy the same elements test and constitute the same offense for double jeopardy purposes.¹⁴¹

In *United States v. Dixon*,¹⁴² the Court addressed the question of whether a defendant could be punished for violation of a court order and also be punished for the act constituting the violation of that order.¹⁴³ The Court reasoned as follows:

[T]he "crime" of violating a condition of release cannot be abstracted from the "element" of the violated condition. The *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies. Here, as in *Harris*, the underlying substantive criminal offense is "a species of lesser-included offense."¹⁴⁴

Because the court order incorporated the entire criminal code, violation of both the order and the substantive statute constituted the same offense for double jeopardy purposes.

Crime-related forfeiture statutes generally incorporate the underlying drug offense in much the same way as the court order in *Dixon* incorporated the entire criminal code.¹⁴⁵ The federal forfeiture

part, 59 F.3d 177 (9th Cir. 1995), and petition for cert. filed, (U.S. Feb. 20, 1996) (No. 95-7949).

137. *Dixon*, 113 S. Ct. at 2856.

138. See 21 U.S.C.A. § 881(a) (West 1981 & Supp. 1995).

139. See *id.*

140. See WASH. REV. CODE § 69.50.505(a) (1994).

141. See *Dixon*, 113 S. Ct. at 2856-57.

142. 113 S. Ct. 2849 (1993).

143. *Id.* at 2853.

144. *Id.* at 2857.

145. See *supra* notes 138-140 and accompanying text.

statute specifies that in order to forfeit property, the government must prove that the property was involved in the commission of a crime.¹⁴⁶ In specifying which crimes may result in forfeiture, the forfeiture statute incorporates the entire subchapter of the code dealing with narcotics offenses.¹⁴⁷ Thus, even under the *Dixon-Blockburger* same elements test, civil forfeiture under section 881(a) and criminal prosecution under the same subchapter constitute the "same offense" as defined by *Dixon-Blockburger*.¹⁴⁸

In *Oakes v. United States*,¹⁴⁹ the court rejected the Government's argument that the applicable forfeiture provision (21 U.S.C. § 881(a)(7)) and the applicable controlled substance provision (21 U.S.C. § 841(a)(1)) possess separate elements.¹⁵⁰ The court recognized that "[s]ection 881(a)(7) is premised upon a violation of Title 21 section 801 *et seq.*"¹⁵¹ In other words, "[a]ny forfeiture under section 881(a)(7) . . . requires a preceding violation of the controlled substance statutes."¹⁵² Thus, the court found the Government's argument to be completely untenable: "To accept the Government's argument that the sections involve different elements simply because one section of the statute deals with property and the other people, would be to adopt a circular and illusory theory."¹⁵³

Another way of looking at the same offense issue is to examine whether the criminal statute has an element not contained in the forfeiture statute. While the forfeiture statute will always have elements not contained in the criminal statute, namely the involvement of the property in the drug crime,¹⁵⁴ the criminal statute does not contain any elements that are absent from the forfeiture statute because the forfeiture statute incorporates the criminal statute in its entirety.

Courts holding to the contrary demonstrate their reluctance to enforce constitutional guarantees where doing so would require reversing a criminal conviction. For example, in *United States v.*

146. See 21 U.S.C.A. § 881(a) (West 1981 & Supp. 1995).

147. See *id.*

148. See *Oakes*, 872 F. Supp. at 824; see also *United States v. Ursery*, 59 F.3d 568, 573 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); *McCaslin*, 863 F. Supp. at 1303.

149. 872 F. Supp. 817 (E.D. Wash. 1994).

150. *Id.* at 824.

151. *Id.*

152. *Id.*

153. *Id.*

154. *E.g., Shorb*, 876 F. Supp. at 1188 (recognizing that "the forfeiture cases required a showing that the . . . properties were implicated in the defendant's misconduct, an element not at issue in the criminal cases").

Shorb,¹⁵⁵ the court applied the *Dixon-Blockburger* test "in a strict fashion" to conclude that the defendants' criminal "convictions required proof of discrete, substantive elements not at issue in the civil forfeiture cases."¹⁵⁶ As a result, the court found no double jeopardy violation.¹⁵⁷ Perhaps recognizing the flaw in its argument that it could not specify the "discrete substantive elements" that were not at issue in the forfeiture case, the court proceeded to state that

[o]f course, . . . defendant could prevail on the double jeopardy issue at the appellate level. After all, there is no question that the . . . forfeitures were based generally on the same conduct addressed in the criminal cases. Under the circumstances, a Ninth Circuit panel might take the view that the first forfeiture and the criminal conviction constituted multiple punishments for the same offense.¹⁵⁸

Apparently, the *Shorb* court could not entirely ignore the Ninth Circuit holding in *\$405,089.23 U.S. Currency*, which compels the opposite conclusion.¹⁵⁹ Indeed, in *\$405,089.23 U.S. Currency*, the Government sought forfeiture of the defendant's property "because of its connection with the *very offenses* that resulted in criminal punishment."¹⁶⁰ Therefore, the court had little doubt that the core double jeopardy protection was at issue.¹⁶¹

Whether applying the common-sense same violation of the same statute approach or the *Dixon-Blockburger* same elements test, a fair reading of Supreme Court precedent commands that the forfeiture of property related to a criminal act and prosecution for that criminal act

155. 876 F. Supp. 1183 (D. Or. 1995), *aff'd in part, vacated in part*, 59 F.3d 177 (9th Cir. 1995), and *petition for cert. filed*, (U.S. Feb. 20, 1996) (No. 95-7949).

156. *Id.* at 1188.

157. *Id.*

158. *Id.*

159. See *\$405,089.23 U.S. Currency*, 33 F.3d at 1216. The court in *\$405,089.23 U.S. Currency* found a violation of double jeopardy where the Government obtained convictions in the criminal case and then continued to pursue a forfeiture action. *Id.* at 1214, 1222. In addressing the "same offense" issue, the court recognized:

The forfeiture complaint . . . was based on precisely the same conduct addressed in the claimants' criminal case, and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes. In short, this civil forfeiture action and the claimants' criminal prosecution addressed the identical violations of the identical laws; the only difference between the two proceedings was the remedy sought by the government.

Id. at 1216.

160. *Id.* at 1216.

161. *Id.*

constitute two punishments for the same offense for purposes of double jeopardy analysis.

C. *Were the Two Punishments Imposed in "Separate Proceedings"?*

The imposition of multiple punishments for the same offense violates the Double Jeopardy Clause only if the punishments are imposed in separate proceedings.¹⁶² Yet, some courts have avoided finding a double jeopardy violation by holding that the civil forfeiture of property used to commit a drug offense and the parallel criminal prosecution for that drug offense constitute a "single, coordinated prosecution" and therefore a single proceeding.¹⁶³ For example, in *United States v. Millan*,¹⁶⁴ the court found a single, coordinated prosecution because both the criminal charges and the forfeiture action "were issued as part of a coordinated effort to put an end to an extensive narcotics conspiracy."¹⁶⁵ The court in *United States v. 18775 North Bay Road*¹⁶⁶ reached a similar result.¹⁶⁷ However, because *Millan* and *18775 North Bay Road* were decided before *Kurth Ranch*, serious doubt is cast upon their continuing validity on this point.¹⁶⁸

Millan and other courts that have adopted the single, coordinated prosecution approach rely on the fact that the forfeiture actions and criminal prosecutions took place at approximately the same time and involved the same criminal violations.¹⁶⁹ However, this approach "contradicts controlling Supreme Court precedent as well as common sense."¹⁷⁰ In *Department of Revenue of Montana v. Kurth Ranch*, the tax was imposed as an important part of a broad state effort to deter illegal narcotics distribution.¹⁷¹ If this tax was not part of a single,

162. *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994), amended on denial of reh'g, 56 F.3d 41 (9th Cir. 1995), and cert. granted, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); see also *supra* note 22.

163. See, e.g., *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 972 (S.D. Fla. 1994).

164. 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).

165. *Id.* at 20.

166. 13 F.3d 1493 (11th Cir. 1994).

167. *Id.* at 1499 (finding that "the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions . . . falls within the contours of a single, coordinated prosecution").

168. *People v. Towns*, 646 N.E.2d 1366, 1372 (Ill. App. Ct. 1995); see also *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).

169. *Millan*, 2 F.3d at 20; see also *13143 S.W. 15th Lane*, 872 F. Supp. at 972.

170. *\$405,089.23 U.S. Currency*, 33 F.3d at 1216.

171. See 114 S. Ct. 1937, 1941 (1994).

coordinated prosecution, it is difficult to see how a civil forfeiture action can be considered a part of a parallel criminal prosecution.

The single, coordinated prosecution argument is another example of how courts have extended a legal fiction and stretched logic to avoid granting relief to a defendant twice punished. At least on the federal level, the Legislature has established a method for seeking both forfeiture and criminal punishment in a single coordinated prosecution: the government can add a forfeiture charge to the indictment and seek criminal forfeiture of drug-related property.¹⁷² If the government pursues criminal forfeiture, the matters are heard at the same time, by the same fact-finder, under the same cause number. This is a single, coordinated prosecution. Where the government seeks civil forfeiture, actions are filed at different times, under different cause numbers, and are resolved before different finders of fact. To say that this is a single, coordinated prosecution because both the civil forfeiture and the criminal prosecution are part of the government's effort to deter and punish illegal activity is absurd.

As the Ninth Circuit Court of Appeals noted in *\$405,089.23 U.S. Currency*, "two separate actions, one civil and one criminal, instituted at different times, tried at different times, before different factfinders, presided over by different district judges, and resolved by separate judgments," simply do not constitute the same proceeding.¹⁷³ While such actions could correctly be characterized as "parallel proceedings," they are not the same proceeding as required under the Double Jeopardy Clause.¹⁷⁴ Rather, "[a] forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time."¹⁷⁵ The Ninth Circuit, unlike the Second Circuit in *Millan* and the Eleventh Circuit in *18755 North Bay Road*, was unwilling "to whitewash the

172. *\$405,089.23 U.S. Currency*, 33 F.3d at 1216 (recognizing that the government "could have included a criminal forfeiture count in the indictment which led to the claimants' convictions").

173. *Id.*

174. *Id.*

175. *Id.*; see also *United States v. Stanwood*, 872 F. Supp. 791, 796 (D. Or. 1994) ("Applying the *\$405,089.23* decision to the undisputed facts of this case, it is clear that the criminal case against Stanwood and the civil forfeiture cases involving his property constituted separate proceedings for double jeopardy purposes."); *United States v. McCaslin*, 863 F. Supp. 1299, 1304 (W.D. Wash. 1994) (recognizing that "a civil action aimed at exacting a penalty, and a criminal prosecution directed to the same offense, even when filed close in time, constitute two proceedings when pursued in separate cases and concluded at different times").

double jeopardy violation . . . by affording constitutional significance to the label of 'single, coordinated prosecution.'"¹⁷⁶

In reaching their conclusions that the civil forfeiture actions and criminal prosecutions that were at issue constituted a single, coordinated prosecution, the *Millan* and *18755 North Bay Road* courts "also relied upon the absence of any showing 'that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action.'"¹⁷⁷ The problem with this reliance is fundamental: "[T]he prosecutor's state of mind cannot determine whether a defendant has been placed twice in jeopardy. In a jury case, for example, jeopardy attaches when the jury is sworn—before the prosecutor has occasion to feel 'dissatisfaction' with the sentence."¹⁷⁸ Thus, if the statutes that the government relies upon are "punitive," the target of those statutes has been punished regardless of whether the prosecuting authority acted vindictively.

In *United States v. Torres*,¹⁷⁹ the Seventh Circuit also rejected the notion that a criminal prosecution and civil forfeiture were part of a single, coordinated prosecution merely because they were instituted at the same time.¹⁸⁰ The court noted that

[c]ivil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema Separate administrative and criminal proceedings can lead to two trials, each of which produces a punishment for a single offense. Two trials, even if close in time, are still double jeopardy. This would be clear enough if the United States put Torres on trial, convicted him of attempting to buy the cocaine, and sentenced him to 37 months' imprisonment, then the next day held a second trial for the same offense and tacked on another 36 months, for a total of 73. Although 73 months would have been a lawful punishment after a single trial, Torres would have had an invulnerable defense of former jeopardy at trial No. 2.¹⁸¹

176. \$405,089.23 *U.S. Currency*, 33 F.3d at 1217; see also *Oakes v. United States*, 827 F. Supp. 817, 825 (E.D. Wash. 1994) (stating that "this court, like the Ninth Circuit, is unwilling to whitewash a potential double jeopardy violation").

177. *McCaslin*, 863 F. Supp. at 1305 (quoting *United States v. 18755 N. Ray Rd.*, 13 F.3d 1493, 1499 (11th Cir. 1994)).

178. *Id.*

179. 28 F.3d 1463 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994).

180. *Id.* at 1465.

181. *Id.*

The reasoning of *Torres* on this point is compelling, especially when compared with the simplistic approach adopted by the Second Circuit in *Millan* and the Eleventh Circuit in *18755 North Bay Road*. Indeed, in a recent federal case brought in the District of Hawaii, *United States v. Nakamoto*,¹⁸² the Government conceded that the forfeiture action was a separate proceeding from the criminal prosecution,¹⁸³ which perhaps indicates that the government has abandoned the single, coordinated prosecution argument, at least in the Ninth Circuit.

IV. SETTLEMENT, PLEA, AND WAIVER

In a further attempt to whitewash the protections of the Double Jeopardy Clause, the lower federal courts and some state appellate courts have adopted several ways to avoid following the *Halper-Austin-Kurth Ranch* rule, recognizing that to follow the rule would require dismissal of a judgment against a convicted drug offender. This section will discuss some of the theories that courts have applied to avoid the clear conclusion that the government may not impose both civil forfeiture and criminal conviction for the same offense. These theories include the following: (1) a person who fails to file a claim to seized property thereby waives any subsequent double jeopardy claim; (2) a person who reaches a settlement with the government in the forfeiture action thereby waives any subsequent double jeopardy claim; and (3) a defendant who pleads guilty in the criminal case thereby waives any subsequent double jeopardy claim. As explained below, each of the preceding theories must be rejected.

A. Failure to File a Claim

One of the most popular ways to avoid the *Halper-Austin-Kurth Ranch* rule is to assert that an individual who failed to file a claim to seized property thereby waived any double jeopardy claim.¹⁸⁴ While

182. 876 F. Supp. 235 (D. Haw.), *aff'd*, 67 F.3d 310 (9th Cir. 1995), *petition for cert. filed*, (U.S. Dec. 26, 1995) (No. 95-7313).

183. *Id.* at 236.

184. See, e.g., *United States v. Cretacci*, 62 F.3d 307, 310-11 (9th Cir. 1995) (holding that "an owner who receives notice of the intended forfeiture and fails to claim . . . the property has effectively abandoned it . . . [and] the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights"), *petition for cert. filed*, (U.S. Feb. 13, 1996) (No. 95-7955); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.) (holding that a defendant who did not make claim in civil forfeiture did not become a party to the forfeiture proceeding and was therefore not placed in jeopardy), *cert. denied*, 115 S. Ct. 669 (1994); *United States v. Sherrett*, 877 F. Supp. 519, 524 (D. Or. 1995) (holding that it was the defendant's burden to show a double jeopardy violation, and the defendant failed to establish prior jeopardy in proceeds forfeiture because he failed to file a claim); *United States v. Chaney*, 882 F. Supp. 829, 830 (E.D.

this holding provides an analytically clean method to resolve certain cases in the government's favor, its premise is faulty. In *United States v. Nakamoto*,¹⁸⁵ the court admitted that the "failure to claim constitutes waiver" holding was motivated by the desire to reach a result favoring the Government rather than by sound legal reasoning:

It is clear that the line must be drawn before extending double jeopardy protection to an uncontested administrative forfeiture. To do otherwise would invalidate the use of administrative forfeiture per se Neither the Ninth Circuit in \$405,089.23, nor the Supreme Court in *Halper*, *Austin*, and *Kurth Ranch* could have intended such a result.¹⁸⁶

The result-oriented nature of the court's reasoning is evident from this passage. The court all but admits that it has engaged in "line-drawing" rather than sound legal reasoning by basing its ruling on the belief that the Supreme Court could not possibly have intended to invalidate the use of administrative forfeiture. Contrary to the reasoning of the *Nakamoto* court, the Supreme Court precedents should perhaps be understood to mean that preservation of the constitutional prohibition against double jeopardy is more important than maintaining the government's unfettered ability to pursue administrative forfeiture.

Accepting, as we must, that forfeiture is punitive, it seems clear that the punishment consists of the loss of the property. Thus, where the defendant fails to file a claim to the property and thereby loses all title to it, he has nonetheless been punished because he has been deprived of his property pursuant to a punitive statute. As the Tenth Circuit noted, in a slightly different context, in *United States v.*

Wis. 1995) (holding that because defendant failed to file a claim to forfeited property, he was not placed in jeopardy in the constitutional sense); *United States v. Nakamoto*, 876 F. Supp. 235, 236-37 (D. Haw.) (holding that a defendant who did not contest civil forfeiture was never placed in jeopardy), *aff'd*, 67 F.3d 310 (9th Cir. 1995), *petition for cert. filed*, (U.S. Dec. 26, 1995) (No. 95-7313); *United States v. Walsh*, 873 F. Supp. 334, 337 (D. Ariz. 1994) (holding that the defendant was "not placed in jeopardy" because he did not file a claim or respond to notice of seizure and intended forfeiture and, thus, forfeiture of his property did not violate his personal constitutional rights even though he avowed ownership of the property during the narcotics prosecution); *United States v. Branum*, 872 F. Supp. 801, 803 (D. Or. 1994) (holding that jeopardy did not attach where defendant failed to file a claim to seized property); *Crowder v. United States*, 874 F. Supp. 700, 703-04 (M.D.N.C. 1994) (holding that defendant failed to establish jeopardy because he failed to file a claim); *United States v. Kemmish*, 869 F. Supp. 803, 805 (S.D. Cal. 1994) (holding that where a person from whom currency was seized did not claim property, he was not placed in jeopardy).

185. 876 F. Supp. 235 (D. Haw.), *aff'd*, 67 F.3d 310 (9th Cir. 1995), *petition for cert. filed*, (U.S. Dec. 26, 1995) (No. 95-7313).

186. *Id.* at 238.

Hudson.¹⁸⁷ “[I]f a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished.”¹⁸⁸

Imagine the absurdity of an argument that a defendant in a criminal prosecution was not punished because he did not contest his guilt. The incarceration that follows an uncontested criminal prosecution is no less punishment because the defendant did not raise a defense.¹⁸⁹ Similarly, the loss of property that follows an uncontested forfeiture is still punishment even if the defendant failed to file a claim to the seized property.¹⁹⁰

A different situation might be presented if there was real doubt as to whether the property belonged to the claimant prior to its seizure. However, in most cases, this is not an issue because the ownership of the seized property is readily discernible. Bank accounts, real property, and vehicles are all titled and registered. The ownership of these items will be apparent.¹⁹¹ Moreover, in order to prevail in the forfeiture action, the government must trace the property to a drug offense, usually a drug offense committed by the person from whom the property was seized.¹⁹² In such situations, although the defendant may not have proved ownership, he has demonstrated a possessory interest in the forfeited property that should entitle him to double jeopardy protection.

Moreover, requiring a defendant to file a claim to seized property to preserve any future double jeopardy claim would adversely impact the defendant's right to remain silent. In *Wohlstrom v. Buchanan*,¹⁹³ the court recognized the self-incrimination danger in forcing a defendant to file a claim to seized property or risk forfeiture:

187. 14 F.3d 536 (10th Cir. 1994).

188. *Id.* at 540.

189. See *United States v. Ursery*, 59 F.3d 568, 571 (6th Cir. 1995) (holding that uncontested forfeiture action is like a guilty plea in a criminal case), *cert. granted*, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346).

190. See *Oakes v. United States*, 872 F. Supp. 817, 827-29 (E.D. Wash. 1994) (stating that the defendant, who did not answer or contest the forfeiture complaint, was nonetheless punished by the forfeiture).

191. See, e.g., *Sherrett*, 877 F. Supp. at 521 (holding that the defendant failed to file a claim, while recognizing that the property in question was “his residence”).

192. See, e.g., *Torres*, 28 F.3d at 1464-65 (stating that there was “no reason to believe that [Torres] owned or had any interest in the money,” even though the \$60,000 forfeited to the Government was seized from Torres' person).

193. 884 P.2d 687 (Ariz. 1994).

Here, by invoking his right against self-incrimination, petitioner lost the ability to intervene in the proceedings, virtually assuring a forfeiture

. . . . [T]he trial court impermissibly forced petitioner to choose between "surrendering his constitutional privilege and forfeiting property." Putting one in such a quandary takes away the freedom to invoke the privilege without repercussions and abrogates any opportunity to make meaningful decisions.¹⁹⁴

Finally, requiring a defendant to assert a claim to the seized property in the absence of his good faith belief that he is entitled to prevail in the forfeiture proceeding would arguably violate Rule 11 of the Federal Rules of Civil Procedure, as it would require the defendant to file a frivolous claim.¹⁹⁵ Requiring a defendant to file a frivolous claim to seized property in order to preserve his constitutional right to be free from double jeopardy is clearly too burdensome and, thus, cannot be correct. Forfeiture constitutes punishment even if the defendant fails to file a claim to the seized property.¹⁹⁶

B. Settlement of the Forfeiture Proceeding

Just as some courts have found no double jeopardy violation where no claim to the property was filed, other courts have held that there is no double jeopardy where the defendant negotiates a settlement of the forfeiture action with the government and the case does not proceed to hearing.¹⁹⁷ This settlement-waiver theory is erroneous because jeopardy attaches when a defendant loses his right to property, whether by settlement or judgment, and waiver of any constitutional

194. *Id.* at 689-90 (citations omitted). *Contra Cretacci*, 62 F.3d at 311 (stating that "a defendant does not risk incriminating himself by claiming that he owns property that is subject to forfeiture").

195. FED. R. CIV. P. 11(b) (1995) states in part:

By presenting to the court . . . a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief . . . it is not being presented for any improper purpose, . . . [and] the claims, defenses, and other legal contentions therein are warranted by existing law.

196. *See Oakes* 872 F. Supp. at 827-29 (stating that an uncontested administrative forfeiture constitutes prior punishment).

197. *See, e.g., United States v. Sherrett*, 877 F. Supp. 519, 524-25 (D. Or. 1995) (holding that the defendant failed to establish prior jeopardy where forfeiture proceeding was resolved by agreement of the parties without entry of final judgment of forfeiture); *In re* 2120 S. 4th Ave., 870 P.2d 417, 421 (Ariz. Ct. App. 1994) (holding that because defendant conceded that his interest in the property was forfeitable, he has no double jeopardy claim).

right is invalid unless made knowingly, voluntarily, and intelligently.¹⁹⁸

In *United States v. Ursery*,¹⁹⁹ the court explained that settlement by a consent judgment does not preclude a double jeopardy analysis.²⁰⁰ The consent judgment in the *Ursery* forfeiture proceeding was an adjudication for double jeopardy purposes because jeopardy attached when the judgment of forfeiture was entered against the defendant.²⁰¹ In other words, the defendant was punished and jeopardy attached when he lost his rights to the property. The fact that this result was achieved in a consent judgment was irrelevant.

In *United States v. Hudson*,²⁰² the court reminded us that a valid waiver of constitutional rights, including double jeopardy, must be a knowing, voluntary, and intelligent waiver.²⁰³ Thus, waiver of a double jeopardy claim cannot be implied from a consent judgment that does not clearly indicate such a waiver. The *Hudson* court noted that the government must obtain an *express* waiver in a consent judgment situation: "If it was the Government's intent to have Appellants waive certain rights, the Government would have phrased the Waiver Provision in terms which clearly stated that Appellants were abandoning those rights so that they could have made a voluntary, intelligent and knowing waiver."²⁰⁴

The *Ursery* and *Hudson* courts have properly rejected the government's argument that settlement of the forfeiture action constitutes waiver of any double jeopardy claim. The constitutional prohibition against double jeopardy, which is on par with other constitutional rights, such as the right to counsel and the right to trial by jury, cannot be lightly waived. Courts should require that waiver of double jeopardy rights, like waiver of any constitutional right, be knowing, voluntary, and intelligent. If the parties negotiate a settlement requiring the defendant to waive any subsequent double jeopardy claim, a waiver provision should be included in the settlement agreement. If the settlement agreement does not contain such a waiver, a waiver should not be implied.

198. See *United States v. Ursery*, 59 F.3d 568, 571 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346); *United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994).

199. 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3484 (U.S. Jan. 12, 1996) (No. 95-345, 95-346).

200. *Id.* at 571.

201. *Id.*

202. 14 F.3d 536 (10th Cir. 1994).

203. *Id.* at 539.

204. *Id.*

C. Guilty Plea as Waiver of Double Jeopardy Claim

A corollary to the argument that a defendant waives a double jeopardy claim by entering into a settlement agreement with the government is the argument that the defendant waives a double jeopardy claim by pleading guilty in the criminal case. Although the government could require an explicit waiver of a double jeopardy claim as part of a plea negotiation, if the plea statement is silent as to double jeopardy, such a waiver should not be implied. Just as it is inappropriate to imply a waiver of a constitutional right following settlement, it is improper to imply a waiver of a constitutional right merely because the defendant pleaded guilty in the criminal case.

In *Oakes v. United States*,²⁰⁵ the Government argued that the defendant waived any double jeopardy claim by pleading guilty to the criminal charge.²⁰⁶ Rejecting this argument, the court stated,

Mr. Oakes brings his challenge based solely on the face of the indictment and record in the civil and criminal actions. He does not seek an evidentiary hearing nor is one required. The court, therefore, rejects the Government's argument that Mr. Oakes waived his double jeopardy claim when he pleaded guilty.²⁰⁷

In contrast, in *United States v. Barton*,²⁰⁸ the court rejected the defendant's double jeopardy claim when he entered into a settlement agreement in a civil forfeiture action after pleading guilty to the related criminal violation.²⁰⁹ The court stated,

He was indicted, agreed to plead guilty and was sentenced to imprisonment before the civil proceedings against the real estate and currency were completed Because Barton had already pleaded guilty to the criminal charges, that criminal conviction is not now subject to a double jeopardy attack by virtue of the subsequent civil proceedings.²¹⁰

Although this case might support the notion that entry of a guilty plea waives any subsequent double jeopardy challenge, it is more appropriately viewed as holding that a criminal conviction cannot be challenged on double jeopardy grounds when it *preceded* the entry of the forfeiture order. As mentioned earlier, it is the second punishment that is barred

205. 872 F. Supp. 817 (E.D. Wash. 1994).

206. *Id.* at 820.

207. *Id.* at 823.

208. 46 F.3d 51 (9th Cir. 1995).

209. *Id.* at 51-52.

210. *Id.* at 52.

by the double jeopardy clause, whether that be the criminal prosecution or the forfeiture proceeding.²¹¹ Other courts have rejected the notion that a guilty plea waives a subsequent double jeopardy claim.²¹²

V. REMEDY

It may seem obvious that the remedy for a double jeopardy violation is dismissal or reversal of the second punishment. For example, if a defendant forfeits property to the government and then is sentenced to a term of imprisonment, the prison term must be vacated. Similarly, if the defendant is criminally punished and then the government is awarded title to his property, the property should be returned.

Nonetheless, at least one writer has suggested that where the criminal prosecution is the subsequent punishment, the proper remedy is not dismissal of the criminal charges, but merely vacation of the sentence:

The double jeopardy provision . . . does not bar the government from prosecuting (as opposed to punishing) the defendant, and a trial court should deny a motion to dismiss the charges against the defendant on double jeopardy grounds and allow the criminal action to proceed. If the criminal prosecution results in a verdict or finding of not guilty, no double jeopardy problem arises: the defendant was subjected to only one criminal trial for her conduct; she was not prosecuted a second time for the same offense after an acquittal, after a conviction, or even after the premature termination of a criminal trial; and she was not punished twice for the same offense.

On the other hand, if the government succeeds in its criminal prosecution of the defendant, the Double Jeopardy Clause, as interpreted in *Halper*, clearly bars the imposition of any punishment upon the defendant Nevertheless, this result—despite its shortcomings—will in most cases be preferable to having the charges against the defendant dismissed before trial. Although the government will not be able to impose a term of incarceration or a fine upon the defendant, it will have obtained a criminal conviction of the defendant, as allowed by *Halper*, with all the collateral consequences such a conviction entails.²¹³

211. See *supra* note 48.

212. See, e.g. *United States v. Morgan*, 51 F.3d 1105, 1110-11 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995); *United States v. Hudson*, 14 F.3d 536, 539-40 (10th Cir. 1995); *United States v. Stanwood*, 872 F. Supp. 791, 796 (D. Or. 1994).

213. David S. Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 46 OKLA. L. REV. 587, 614-16 (1993) (footnote omitted).

This contention that the government should proceed with prosecution is erroneous for several reasons. First, the very motivations for such a prosecution, according to Professor Rudstien, are "the collateral consequences such a conviction entails."²¹⁴ These collateral consequences are punitive in themselves and therefore cannot be imposed in a separate proceeding following a punitive forfeiture. Moreover, such an approach ignores the realities of scarce judicial resources. Surely there are too many legitimate targets to allow the government the luxury of pursuing criminal convictions where punishment cannot constitutionally be imposed. Where the forfeiture precedes the criminal conviction, both sentence and conviction must be vacated.²¹⁵

VI. CONCLUSION

As various courts grapple with the forfeiture-double jeopardy issue, divergent lines of authority emerge. Some courts, giving a fair reading to the recent precedents, have overturned forfeiture judgments and reversed and vacated convictions; other courts, unwilling to grant such relief, have created artificial barriers to double jeopardy protection. Because the holdings of various circuits are impossible to reconcile, ultimate resolution of the forfeiture-double jeopardy issue, and all its sub-parts, awaits a final pronouncement by the Supreme Court. Until then, defendants would do well to raise the issue in all possible contexts. To avoid losing hard-fought judgments on appeal, prosecutors should recognize that they will likely only get one shot at each defendant for each offense; they should pursue all the punishment they wish imposed in the same proceeding.

The Double Jeopardy Clause has always prohibited the government from imposing two punishments in separate proceedings for the same offense. Over the last few years, it has become increasingly apparent that taking a person's property as punishment for an offense for which that person has already been criminally punished is a punitive action, motivated by the goals of retribution and deterrence of illegal activity. Although the courts have been reluctant to recognize the constitutional infirmity in parallel civil forfeitures and criminal prosecutions, it is now clear that where the government chooses to ignore the double jeopardy problems engendered by this type of dual assault on defendants in drug cases, it does so at its own peril, and it risks losing the criminal conviction or the forfeited property. As this

214. See *id.* at 616.

215. See, e.g., *Unites States v. McCaslin*, 863 F. Supp. 1299, 1307 (W.D. Wash. 1994).

area of the law continues to develop, no court, regardless of its desire to rule against the defendant, will be able to avoid the conclusion that the Double Jeopardy Clause simply will not permit double punishment by civil forfeiture and criminal prosecution.