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Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game

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FINAL JEOPARDY: MERGING THE CIVIL AND CRIMINAL ROUNDS IN THE PUNISHMENT GAME

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I. INTRODUCTION

As recently as seven years ago, the federal government was able to penalize[1] many alleged criminal offenders through multiple parallel proceedings[2] without fear of violating the Double Jeopardy Clause.[3] In

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* This note is dedicated to my parents for their support, their input, and their prayers.

1. For purposes of the Double Jeopardy Clause, there is a distinction between "punishment" on the one hand and "penalty" or "sanction" on the other. *See* United States v. Halper, 490 U.S. 435, 446, 449-50 (1989) (framing the issue abstractly as "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause" and using the terms "penalty" and "sanction" interchangeably). The clause cannot be violated unless there are at least two separate penalties or sanctions which rise to the level of "punishment." *See id.* at 441.

2. The term "parallel proceedings" is used to describe multiple proceedings, each initiated in response to the same criminal conduct. *See* Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1023 n.5 (1985). No temporal relationship among proceedings is implied by the term, and thus the proceedings can be initiated in any order. *See id.* at 1024 n.5. Moreover, there does not have to be any overlap between the proceedings. *See id. Contra* Magda L. Cruz, *Parallel Civil and Criminal Proceedings, White-*

really any order which suited their goals, prosecutors could separately jail offenders, seize their property, seize and tax any unlawful proceeds, and revoke various government privileges such as licenses[4] and

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Collar Crime: Third Annual Survey of Law, 22 AM. CRIM. L. REV. 613, 613 n.2811 (1985). Parallel proceedings are generally viewed as any combination of proceedings in the criminal, civil, or administrative settings, brought in response to the same conduct. Note, *supra*, at 1023 n.5. For example, parallel proceedings instituted against a drug offender could consist of a prosecution in the criminal setting and a forfeiture action in the civil setting, as well as an administrative action to levy a tax or revoke a license. *See* Note, *supra*, at 1023 n.5 (listing other examples of parallel proceedings); Susan A. Cardoza, *Many Penalties May Be Invalid*, LAW. WKLY. USA, Jan. 30, 1995, at 1, 14. Parallel proceedings have also been referred to as "concurrent proceedings" and "dual proceedings." *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1389 (1991). For a complete discussion of the related practice of successive prosecutions by separate sovereigns, see Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 625 (1995) (advocating a compulsory joinder regime to address the procedural, economical, and constitutional shortcomings of the current practice of successive prosecution).

3. *Compare Halper*, 490 U.S. at 448-49 (holding that the Double Jeopardy Clause prohibits subjecting a defendant who already has been criminally punished to an additional civil sanction for the same conduct to the extent that the civil sanction may be fairly characterized as punishment) *with* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (holding that a defendant's acquittal on criminal gun charges does not, under principles of double jeopardy, preclude government's subsequent forfeiture action) *and* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234-35 (1972) (stating that the forfeiture action following defendant's acquittal did not violate the Double Jeopardy Clause because the defendant faced "neither two criminal trials nor two criminal punishments").

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. It is well settled that the Double Jeopardy Clause applies to penalties involving property, money, and imprisonment in addition to "life or limb." Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1941 n.1 (1994) (citing Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874); *Halper*, 490 U.S. at 448-49). Further, the Double Jeopardy Clause has been expressly incorporated into the Fourteenth Amendment protections regarding actions by the state governments. Benton v. Maryland, 395 U.S. 784, 794 (1969).

The Double Jeopardy Clause prohibits "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Halper*, 490 U.S. at 440. In *Halper*, the Court considered whether a civil fine, when viewed in conjunction with Halper's criminal conviction, implicated the third of these protections. *See id.* According the the Court, the relevant inquiries in determining if a sanction violates this third prohibition are (1) whether the second penalty is being administered in response to the same conduct for which the first punishment was given; (2) whether the second penalty is being pursued in a separate proceeding from the first; and (3) whether both of the penalties are actually punishments at all. *See id.* at 441.

4. *See, e.g.*, United States v. Federal Ins. Co., 805 F.2d 1012, 1017, 1019 (Fed. Cir. 1986) (referring to a customhouse broker's license under 19 U.S.C. § 1641 as a privilege); S. REP. NO. 752, 79th Cong., 1st Sess. 22 (1945) (referring to "license or other privilege"). *But see* Barry v. Barchi, 443 U.S. 55, 70 (1979) (Brennan, J., concurring in part) (noting that

Medicaid.[5] In 1989, however, the Supreme Court severely limited the government's[6] options in *United States v. Halper*.[7] Finding that punishment, for purposes of double jeopardy analysis, need not be limited to the criminal context,[8] the Court opened the floodgates for countless challenges of governmental responses to criminal conduct.[9]

Although *Halper*'s impact was felt immediately in the criminal justice system, the Supreme Court did not retreat from its severe position that a civil sanction could constitute punishment. Instead, in *Austin v. United States*,[10] the Court built on *Halper*'s liberalization of punishment principles and held that punitive civil actions, such as forfeitures, were subject to the proportionality strictures of the Eighth Amendment.[11] Together, these cases ostensibly eliminated the civil/criminal distinction,[12] forcing prosecutors to think twice before allowing jeopardy to attach from a single proceeding of either type unless they were prepared to be bound fully by that proceeding's

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characterization of appellee's horse trainers' license as a privilege was properly rejected by the Court).

5. *See* Cardoza, *supra* note 2, at 14.

6. The focus of this note is on actions brought by the United States, often referred to as the government in this note. However, because the Double Jeopardy Clause applies to the states, *see Benton*, 395 U.S. at 794, much of this note applies with equal force to parallel actions brought by a particular state. *See* Stephen H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (16) and (17)*, 70 NOTRE DAME L. REV. 941, 946 n.17 (1995). Yet, if a state brings one of the parallel proceedings while the federal government brings the other, the Double Jeopardy Clause is probably not implicated. *Id.* (citing Heath v. Alabama, 474 U.S. 82 (1985); Abbate v. United States, 359 U.S. 187 (1959)).

7. 490 U.S. 435, 448-49 (1989) (holding that a defendant may not be subjected to punishment through a civil sanction after already being punished by a criminal prosecution).

8. *See id.* at 447-48 (stating that the notion of punishment cuts across the line between civil and criminal law).

9. *See, e.g.*, United States v. Tilley, 18 F.3d 295 (5th Cir. 1994) (applying *Halper*'s analysis of determining whether a civil fine constitutes a punishment to a case involving a civil forfeiture of illegal proceeds).

10. 113 S. Ct. 2801 (1993).

11. *Id.* at 2812. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Court held that, because the forfeiture at issue constituted a punitive payment to a sovereign for some offense, it was subject to the limitations of the Excessive Fines Clause. *Austin*, 113 S. Ct. at 2812 (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

12. *See Austin*, 113 S. Ct. at 2806 (stating that the question was not whether the forfeiture was civil or criminal, but whether it was punishment); *Halper*, 490 U.S. at 447-48 (stating that "the labels 'criminal' and 'civil' are not of paramount importance" and that the idea of punishment cuts across the division between the civil and the criminal law).

outcome.

The third and most recent blow to prosecutors' absolute discretion in seeking noncriminal penalties in addition to criminal punishments came in the Court's decision in *Department of Revenue v. Kurth Ranch*.[13] Applying the principles developed in *Halper* and *Austin*, the Court struck down an administrative tax on forfeited proceeds, exacted only after criminal conviction, as being punitive in nature for double jeopardy purposes.[14] Thus, where *Halper* and *Austin* dismantled the civil/criminal distinction, *Kurth Ranch* deconstructed the judicial/administrative distinction, theoretically rendering all punitive actions subject to constitutional review.[15]

Lower federal courts have run the gamut in applying the principles of this "trilogy" to defense attacks on all types of parallel punitive proceedings. Two circuits in particular have distinguished themselves in their radically opposed conclusions under the trilogy.[16] Thus, it is likely that the Supreme Court will soon be called upon to address this conflict among the circuits.[17] Ideally, another ruling will provide the lower courts with more explicit guidance regarding the constitutionality of parallel punitive proceedings.[18]

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13. 114 S. Ct. 1937 (1994).

14. *Id.* at 1948.

15. *See, e.g.*, Cardoza, *supra* note 2, at 14 ("You can make the argument any time there's a combination of two proceedings, both of which can be characterized as punishment." (quoting Professor Nancy King of Vanderbilt Law School)).

16. *Compare Tilley*, 18 F.3d at 299-300 (5th Cir.) (applying, in a proceeds forfeiture case, the *Halper* Court analysis of whether a civil fine constitutes a punishment) *with* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216-17 (1994), *opinion amended on denial of reh'g by* 56 F.3d 41 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346) (applying, in a proceeds forfeiture case, the *Austin* Court analysis of whether a property forfeiture constitutes a punishment).

17. As of the publication of this note, there is great hope throughout the criminal justice system that the Court will accept the government's petition for certiorari in *$405,089.23*, which was filed on August 28, 1995. The issues in that case are very squarely presented, and the lower decisions are both articulate and forceful. The Petition represents a compelling opportunity for the Court to make good law on good facts and thorough argument.

Actually, the Supreme Court has already decided a case which presented a closely related issue. On April 17, 1995, the Court heard *Witte v. United States*, in which the defendant argued that he could be tried on a cocaine charge because that offense had already been used to enhance his sentence for a related marijuana offense. 115 S. Ct. 2199 (1995). Unfortunately, the Court declined the opportunity to further build upon the trilogy, finding instead that such enhancement considerations do not constitute punishment, and thus do not implicate the principles of the trilogy. *Id.* at 2206-08. For a complete discussion of the double jeopardy implication of federal sentencing practices, see Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent-Prosecution Dilemma*, 60 BROOK. L. REV. 725 (1994).

18. In the meantime, under the trilogy, criminal defense attorneys are finding limitless theoretical possibilities for attacking multiple governmental responses to alleged criminal

This note focuses specifically on civil forfeiture[19] as a means of punishment pursued in addition to punishment from a parallel criminal proceeding.[20] Part II of this note examines the advantages which prosecutors enjoyed under the system of parallel proceedings prior to the decisions of the trilogy. Part III examines the decisions of the trilogy more closely in an attempt to predict the future of civil forfeiture. Part IV of this note examines the growing conflicts in the lower federal courts, especially in the Fifth and Ninth Circuits. Part V of this note suggests that civil forfeiture will soon have to be discarded as a system for punishment used in addition to the criminal system, and suggests further that criminal forfeiture will have to be expanded to effect the same punishment in the more appropriate criminal setting. Finally, Part VI of this note concludes that until the Court rules definitively on these

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conduct. For example, should the government be allowed to rely on a defendant's criminal conviction in a separate proceeding to exact a tax, revoke a license, or even seize an entire estate? Likewise, should the government be able to manipulate differing burdens of proof and broader rules of discovery in order to accomplish in a civil or administrative forum that which is strictly forbidden in criminal proceedings? *See $405,089.23*, 33 F.3d at 1217 (characterizing the government's use of parallel civil and criminal proceedings as "a coordinated, manipulative prosecution strategy").

19. The civil forfeiture actions discussed in this note are brought against property—not persons. Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916 (1991). Thus, they are actions in rem. *Id.* One commentator has observed that "[d]eeming inanimate property to be a party to a lawsuit allows the government to avoid providing property owners with many of the protections the Constitution affords to individuals charged with crimes." Sandra Guerra, *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 816 (1994); *see also* Piety, *supra*, at 921-24 (detailing constitutional rights held not to apply in civil forfeiture actions). The person who claims an ownership interest in the property—who contests the forfeiture—is known as the "claimant." *See* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 254-55 (1994). The government must show probable cause for forfeiture, but once it does so, the burden of proof shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. *Id.*

The government may seek forfeiture in the criminal, civil, or administrative settings. *See* Cardoza, *supra* note 2, at 1, 14. A criminal forfeiture proceeding, unlike its civil counterpart, is an action in personam. Leach & Malcolm, *supra*, at 263. Criminal forfeiture is disfavored by prosecutors for many reasons. One reason is that the burden of proof is higher in a criminal forfeiture proceeding (beyond a reasonable doubt), and remains on the government throughout the proceeding. *See id.* at 264-65. Forfeiture may be sought alone, or it may be sought in addition to some other penalty. *See id.* at 242. If the government seeks forfeiture only, the Double Jeopardy Clause is not implicated even if the forfeiture constitutes punishment. *See* Cardoza, *supra* note 2, at 14.

20. Although this note focuses only on parallel civil forfeitures, analogous issues exist regarding all multiple punishments administered in separate proceedings for the same offense. *See* Cardoza, *supra* note 2, at 14; *supra* note 15.

issues, prosecutors risk devastating "acquittals"[21] each time they respond to a single criminal act with more than one unified governmental action.

II. THE GLORY DAYS OF PARALLEL PROSECUTIONS: THE POWER OF UNBRIDLED PROSECUTORIAL DISCRETION

Prior to the Court's 1989 *Halper* decision, there was no real issue as to whether civil forfeitures could ever constitute punishment for purposes of double jeopardy analysis.[22] Congress' statutory labeling of a forfeiture proceeding as "civil" was practically unassailable,[23] and thus issues regarding punishment were essentially confined to the criminal setting.[24] Until *Halper*, the test propounded by the Court in *United States v. Ward*[25] virtually cemented the government's ability to impose both criminal and noncriminal penalties in response to a single criminal act.[26]

Under the first prong of the *Ward* test, a court was to determine

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21. Now that many noncriminal penalties are being denied under principles of double jeopardy, something like acquittal has come to exist in noncriminal settings. For example, a forfeiture claimant who already has been criminally convicted may win the forfeiture case on a double jeopardy argument and thereby enjoy the equivalent of an acquittal. *See, e.g., $405,089.23*, 33 F.3d at 1222 (reversing civil forfeiture judgment in favor of the government where the civil forfeiture action followed the criminal conviction of two of the three claimants). Potentially more damaging to the government, at least politically, is the reverse case, where a defendant who has lost the forfeiture and suffered that penalty may then be acquitted in the criminal setting, thus preventing the government from criminally punishing the defendant and getting the criminal "off the street" for that offense. *See, e.g., Tilley*, 18 F.3d at 299-301 (rejecting defendants' double jeopardy argument that prior civil forfeiture of illegal proceeds bars their subsequent criminal prosecution). The prospect of disallowing a criminal punishment because a civil sanction, albeit one with some punitive purpose, has already been imposed evoked a strong dissent by Justice Scalia in *Kurth Ranch*. *See Kurth Ranch*, 114 S. Ct. 1937, 1958-59 (1994) (Scalia, J., dissenting). However, the Department of Justice has recognized the possibility of such acquittal and is attempting to adjust its procedures and policies in order to continue to obtain full punishment of offenders. *Court Strikes Forfeiture as Double Jeopardy*, DOJ ALERT (Prentice Hall Law and Business), Oct. 3, 1994, *available in* Westlaw, TP-ALL Database.

22. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (holding that an acquittal in a criminal proceeding for a firearms offense does not bar a subsequent in rem forfeiture proceeding against those firearms, under principles of double jeopardy).

23. *See id.* at 363-66 (indicating that only the clearest proof suffices to render unconstitutional a statute which Congress has indicated is to operate as a civil penalty).

24. *See id.* at 366.

25. 448 U.S. 242 (1980).

26. *See id.* at 248-49. The issue in *Ward* was whether a civil proceeding to impose a penalty for environmental violations was a "criminal case" for purposes of the Fifth Amendment protection against compulsory self-incrimination. *Id.* at 244.

whether Congress, in engineering the penalizing mechanism, indicated either expressly or impliedly a preference for either a criminal or a civil label.[27] Only if Congress intended to impose a civil penalty would it be necessary to proceed to the second prong.[28] Under the second prong of the test a court was to respect Congress' intention to establish a civil penalty, unless the purpose or effect of the statutory scheme was so punitive as to render that intention moot, which would then mandate treatment of the proceeding as criminal.[29]

The United States Supreme Court last applied these seldom-questioned principles in the case of *United States v. One Assortment of 89 Firearms*.[30] There, the Court examined the constitutionality of a firearms forfeiture proceeding[31] under 18 U.S.C. § 924(d)[32] which followed the acquittal of the firearms' owner in an earlier criminal proceeding.[33] The Court framed the issue as whether the forfeiture proceeding was intended to be, or by its nature necessarily was, "criminal and punitive, or civil and remedial."[34]

Under the first prong of the *Ward* test, the Court in *89 Firearms* concluded that Congress intended a civil sanction for two reasons. First, Congress had specifically set up the firearms forfeiture scheme as in rem,[35] which traditionally indicated a civil proceeding.[36] Second, the

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27. *Id.* at 248. The Court found that Congress had labelled the sanction at issue in *Ward* a civil penalty. *Id.* at 249.

28. *See id.* at 248-49.

29. *See id.* The Court in *Ward* held that the proceeding to impose the civil penalty was not criminal for Fifth Amendment purposes because the controlling statute clearly indicated Congress' intent that the proceeding be civil in nature and because there was insufficient proof that the penalty in question was punitive in purpose or effect. *Id.* at 248-51.

30. 465 U.S. 354, 362 (1984).

31. *See id.* at 362-66.

32. 18 U.S.C. § 924(d) provides for the forfeiture of firearms and ammunition used in the commission of any violation of any criminal law of the United States. 18 U.S.C. § 924(d)(1) (1988). The statute authorizes forfeiture under various other circumstances as well. *See id.*

33. *See 89 Firearms*, 465 U.S. at 355-56. The defendant argued that because he had already been tried and acquitted, a subsequent civil proceeding for the same underlying offense would place him in jeopardy a second time in violation of the Double Jeopardy Clause. *See id.* at 362.

34. *Id.*

35. *See id.* at 363. Congress borrowed procedures for § 924(d) from the Internal Revenue Code of 1954, which provided for an action in the nature of a proceeding in rem. *Id.*

36. *Id.* In rem forfeiture proceedings are pursued against property as opposed to individuals. *See* Leach & Malcolm, *supra* note 19, at 246. One of the theories upon which civil forfeiture has been justified is that the property itself is "guilty" of some offense. *Austin*, 113 S. Ct. at 2808. In the context of civil forfeiture, the "offending" property represents either an instrumentality of the crime, or proceeds of the crime. *See* Leach & Malcolm, *supra* note 19, at 246. In personam forfeiture proceedings, on the other hand, are pursued directly against an

forfeiture scheme was aimed at serving remedial goals.[37] Under the second prong of the *Ward* test, the Court found that even though criminal penalties could be sought for the same actions which predicated a section 924(d) forfeiture, such a forfeiture was not thereby transformed into a criminal penalty.[38] Therefore, because *Ward* directed that "only the clearest proof" of a punitive effect or purpose could override congressional intent,[39] the Court was able to swiftly conclude that the forfeiture in question was not an additional penalty subject to the Double Jeopardy Clause.[40]

Under the *Ward* regime, defense attorneys were extremely pressed to defeat the government's imposition of criminal and noncriminal penalties for a single criminal act on double jeopardy grounds. Prosecutors enjoyed tremendous discretion regarding the decision to pursue either a criminal or a civil sanction, or both, and how to order the proceedings if both sanctions were sought.[41] Beyond simple choice, however, prosecutors enjoyed other considerable, though questionable, advantages.[42]

For example, when civil forfeiture was pursued prior to criminal indictment, prosecutors could engage in extensive discovery,[43] take advantage of diminished self-incrimination protections,[44] and exploit a

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individual as possessor of an interest in the property, rather than against the property. *See id.* at 258, 263. In personam proceedings are characteristic of criminal forfeitures, whereas in rem proceedings are characteristic of civil forfeitures. *89 Firearms*, 465 U.S. at 363.

For an exhaustive discussion of the differences between civil and criminal forfeitures, see Leach & Malcolm, *supra* note 19, at 253-64.

37. *89 Firearms*, 465 U.S. at 364. On this point, the Court noted specifically that § 924(d) was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968 and was later retained without alteration in the Gun Control Act of 1968. *Id.* Examining the legislative history of the gun control legislation, the Court discovered clear evidence of the prophylactic and remedial purpose of § 924(d). *Id.*

38. *Id.* at 365-66.

39. *Ward*, 448 U.S. at 249 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

40. *89 Firearms*, 465 U.S. at 365.

41. For an exhaustive discussion of prosecutorial advantages in seeking civil forfeiture, see Guerra, *supra* note 19, at 821-27.

42. It is difficult to know whether to discuss these advantages in the past or the present tense. Clearly these advantages were enjoyed by prosecutors under *Ward*, prior to *Halper* and the rest of the trilogy, but all of these procedures are currently in a state of flux. Under the trilogy, these advantages are at least suspect, but the Court has not yet gone so far as to reject explicitly these advantages as unconstitutional.

43. Discovery rules in the civil context will generally allow the government access to more information than would be allowed in the criminal setting. *See, e.g.*, Karis A. Hastings, Note, *Entrapment and Denial of the Crime: A Defense of the Inconsistency Rule*, 1986 DUKE L.J. 866, 886-87; Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 574-75 (1994).

44. Leach & Malcolm, *supra* note 19, at 242.

lower burden of proof[45] to significantly facilitate a subsequent criminal conviction.[46] Additionally, prior civil forfeiture could effectively deprive a defendant of the financial means necessary to defend against a subsequent criminal indictment.[47] Conversely, when civil forfeiture followed criminal conviction, prosecutors enjoyed a virtual lay-down on the issue of probable cause in the civil forfeiture action,[48] which shifted the burden to the claimant to "exculpate" the property.[49] Additionally, a claimant who has been imprisoned as a result of a conviction will likely suffer a diminished ability to make a claim against the government's seizure of their property.[50]

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45. *Id.*

46. *See id.* at 242-43. The Fifth Amendment protection against compelled self-incrimination is relaxed in the civil setting so that the factfinder is free to draw negative inferences from the claimant's refusal to testify on his or her own behalf. *Id.* at 242 & n.7 (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)).

47. *See, e.g.*, United States v. Millan, 2 F.3d 17, 18 (2d Cir. 1993) (detailing process whereby claimants had to relinquish their claim to several seized assets to the government in exchange for the government's release of other seized assets, so that the claimants could pay their attorneys in the defense of both the civil and the criminal prosecutions).

48. *See, e.g., $405,089.23*, 33 F.3d at 1214 (stating that the district court held that the convictions of the defendants were sufficient by themselves to establish probable cause).

49. Guerra, *supra* note 19, at 822 (stating that the claimant must prove ownership by a preponderance of the evidence). Two commentators in this area have dubbed this a "guilty-until-proven-innocent" procedure. Leach & Malcolm, *supra* note 19, at 256.

50. For example, one's ability to obtain an attorney to handle the subsequent civil claim may be greatly reduced once one is imprisoned. It is indeed unlikely that an inmate will be able to retain counsel while imprisoned and unemployed. Further, counsel is not provided as of right to a civil forfeiture claimant. *See* United States v. $1,020,378.05 United States Currency, No. 93-55235, 1994 WL 198647, at *3 (9th Cir. 1994).

Even if an inmate decides to proceed pro se, the inmate will logistically require the aid of someone on the outside to handle legwork, or risk serious handicaps in the ability to manage the complex process in a timely fashion. For example, a civil forfeiture claimant has only ten days to file a claim on seized property once process is executed. FED. R. CIV. P. C(6). This deadline will likely be prohibitive to making a successful claim unless the inmate has some assistance from outside the prison. Thus, even though core rights are at stake, an individual in prison likely will be an extremely easy target for a prosecutor seeking to seize forfeitable assets.

Forfeiture expert David B. Smith has warned the Department of Justice that the developing breakdown in the civil/criminal distinction may mean that indigent claimants will soon be entitled to court-appointed counsel in their civil forfeiture actions. *Court Strikes Forfeiture*, *supra* note 21. Currently, according to Smith, most civil forfeiture cases are extremely complicated and government attorneys are highly specialized and skilled in handling them. *Id.* Claimants handling the forfeiture pro se will usually make a procedural error which ends their chances of recovering the property. *Id.* Claimants with private counsel, on the other hand, are very likely to run out of funding for the attorney handling so complex a case. *Id.*

If Smith is correct, either civil forfeiture as a means of punishment in addition to the criminal justice system will die, or a higher burden of proof will be required in civil forfeiture cases and public defenders may be required to appear on behalf of indigent forfeiture claimants.

Beyond these advantages, forfeitures became extremely attractive to law enforcement personnel with the advent of the Comprehensive Crime Control Act of 1984.[51] For the first time, a direct transfer of seized assets to the agencies effecting the seizure could be accomplished,[52] thereby creating a crucial profit incentive for seizing agencies.[53] Thus, the punishment deck was clearly stacked against defendants, as law enforcement agencies and prosecutors enjoyed both the incentive and the authority to force defendants to " 'run the gantlet' " repeatedly for a given criminal act.[54]

III. THE BEGINNING OF THE END: THREE BLOWS TO THE MULTI-ARMED LAW MACHINE

The Supreme Court brought some welcome relief to civil forfeiture claimants[55] with its decision in *United States v. Halper*[56] in 1989. In *Halper*, the Court examined a post-conviction civil penalty of potentially over $130,000 where the defendant had defrauded the government of a total of only $585.[57] Despite the fact that the government incurred an additional $16,000 in costs in prosecuting Halper,[58] the Court was alarmed by the disproportionality of these costs to the statutory penalty

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See id.

51. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 310, 98 Stat. 1837, 2052-53 (codified at 28 U.S.C. § 524(c)(1) (1988 & Supp. V 1993)).

52. Guerra, *supra* note 19, at 825.

53. *Id.* at 825-27. Professor Guerra noted that the profit incentive of forfeitures has been so compelling that forfeiture is often used to the exclusion of criminal prosecutions. *Id.* at 826 (citing William P. Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1325-33 (1992)).

54. *$405,089.23*, 33 F.3d at 1217 (quoting Green v. United States, 355 U.S. 184, 190 (1957)).

55. For the sake of simplicity, the subjects of the forfeiture proceedings addressed in this note are referred to throughout as "claimants." However, the term is intended quite narrowly to include only those claimants who are also the subjects of some additional parallel proceeding, such as criminal or administrative prosecution, or even a second forfeiture.

56. 490 U.S. 435 (1989).

57. *Id.* at 437-38. The government sought the civil penalty under the civil False Claims Act. *Id.* at 438. In general, the Act provided that a person who knowingly made a false record or statement in order to get a fraudulent claim paid or approved violated the Act and was liable to the government for a civil penalty. *Id.* (citing 31 U.S.C. § 3729 (1982 & Supp. II)). That penalty consisted of $2,000, plus an amount equal to two times the amount of damages the government sustained as a result of the violation, plus the costs of the civil action. *Id.* (citing 31 U.S.C. § 3729 (1982 & Supp. II)). As Halper violated this Act 65 times, he was subject to a statutory penalty in excess of $130,000. *Id.*

58. *Id.* at 452.

claimed.[59]

In its analysis of the penalty under the Double Jeopardy Clause, the Court first explicitly rejected the congressional deference test of *Ward*.[60] It then replaced the *Ward* test with a new test that focused on the relationship between the sanction sought and the government's goal of being made whole.[61] The Court further enunciated a new baseline principle: Any civil sanction which served punitive goals of either retribution or deterrence, instead of serving a purely remedial purpose, was punishment.[62]

Applying this new test to the facts in *Halper*, the Court found that the $130,000 penalty being sought bore no rational relation to the approximate $16,000 that Halper's actions had cost the government.[63] The distinct lack of a purely remedial basis for the penalty led the Court to conclude that the penalty constituted a punishment.[64] Accordingly, because Halper had already sustained a criminal penalty for the same conduct,[65] the Court found the latter civil penalty to violate the Double Jeopardy Clause.[66] However, the Court emphasized that its holding was

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59. *See id.* at 449 (finding the sanction "overwhelmingly disproportionate" to the damages caused by the defendant). The district court noted that the fine of $130,000 was more that 220 times the $585 for which Halper actually defrauded the government. United States v. Halper, 664 F. Supp. 852, 855 (S.D.N.Y. 1987), *vacated*, 490 U.S. at 452. That court concluded that the fine was therefore punitive in nature and thus violative of the Double Jeopardy Clause. *Id.* While the Supreme Court agreed with the district court on this issue, the Court actually vacated the judgment so that the government's injuries could be precisely determined. *Halper*, 490 U.S. at 452.

60. *See Halper*, 490 U.S. at 447 (stating that the *Ward* test is appropriate in many instances, but not in the context of the "intrinsically personal" protection afforded by the Double Jeopardy Clause). For a discussion of the test under *Ward*, see *supra* text accompanying notes 27-29.

61. *See Halper*, 490 U.S. at 449-50 (indicating that there must be a rational relationship between the civil penalty and the goal of compensating the government). Two years later, the Fifth Circuit determined that the order of proceedings is irrelevant; principles of double jeopardy apply regardless of whether the civil penalty precedes or follows the criminal proceeding. United States v. Sanchez-Escareno, 950 F.2d 193, 200 (5th Cir. 1991) (citing United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir. 1990)). The Fifth Circuit recently reaffirmed its position that the order of the proceedings is immaterial for purposes of double jeopardy analysis. United States v. Tilley, 18 F.3d 295, 298 n.5 (5th Cir. 1994).

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

63. *Id.* at 452.

64. *Id.* The language used by the Court in its holding: "to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution," *id.* at 449, sweeps in for scrutiny all civil sanctions which bear even a trace of punitive purpose. This holding serves as the linchpin of the trilogy and all decisions rendered under it.

65. *Id.* at 441.

66. *Id.* at 452. The Court remanded the case to allow the government to recover its demonstrated costs. *Id.*

not intended to disallow all multiple punishments for a single crime; rather, prosecutors would still be allowed to seek and obtain multiple punishments, as long as they did so within a single proceeding.[67]

The Court adhered to *Halper*'s expansive definition of punishment in the 1993 case of *Austin v. United States*.[68] In *Austin*, the Court extended the Eighth Amendment's protection against excessive fines to a convicted claimant who stood not only to serve seven years in prison

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67. *Id.* at 450 (citing Missouri v. Hunter, 459 U.S. 359, 368-69 (1983)).

68. 113 S. Ct. 2801 (1993). This is the only case in the trilogy which spoke specifically to civil forfeitures; *Halper* considered a statutory civil penalty for fraud, *see Halper*, 490 U.S. at 441; while *Kurth Ranch* examined an administrative tax levied only on drug offenders, *see Kurth Ranch*, 114 S. Ct. at 1941-43. *Austin*, however, examined a civil forfeiture sought in response to a drug offense. *See Austin*, 113 S. Ct. at 2803. This decision is the most worrisome to the government because it limits the government's use of its main weapon in its war on drugs: 21 U.S.C. § 881(a).

The relevant provisions of § 881(a) are as follows:

> (a) *Subject property.*
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . . .
>
> (4) 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 [inter alia, certain controlled substances, raw materials, and chemicals] . . . .
>
> . . . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .
>
> (7) 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 . . . .

21 U.S.C. § 881(a)(4), (6)-(7) (1988 & Supp. V 1993). Subsections (a)(4) and (a)(7) allow for forfeitures of items used in furtherance of the violation, commonly called "instrumentalities," while subsection (a)(6) allows for forfeitures of "proceeds" of the violation. 21 U.S.C. § 881(a)(4), (6)-(7) (1988 & Supp. V 1993). *Austin*'s holding that forfeitures constituted punishment for purposes of the Eighth Amendment ostensibly applied only to the forfeiture of instrumentalities, and the explicit application of *Austin*'s holding to proceeds forfeitures was not made clear until the Court's holding in *Kurth Ranch*. *Austin*, 113 S. Ct. at 2812; *infra* note 86.

Not surprisingly, nearly all subsequent challenges to civil forfeitures on double jeopardy grounds have involved forfeitures sought under § 881(a) regarding drug offenses. *See, e.g.*, *$405,089.23*, 33 F.3d at 1214; *Tilley*, 18 F.3d at 297. For a prediction of the likely impacts of the trilogy on the war on drugs, see *infra* notes 147-49 and accompanying text.

for his crime, but also to lose his home and business in the subsequent forfeiture action.[69] The Court applied its test from *Halper* and held that the forfeiture was indeed punitive in nature.[70] Thus, where the *Halper* Court used this punishment principle to find a violation of the Double Jeopardy Clause, the *Austin* Court used the same principle to find a civil forfeiture subject to the Eighth Amendment's Excessive Fines Clause.[71]

Because *Austin* involved the Excessive Fines Clause, the *Austin* Court followed the principle, but not the method, of *Halper*. Instead, the *Austin* Court first relied on the history of civil forfeiture and its own precedent to support its conclusion that throughout time forfeiture had been intended to serve, at least in part, the goals of punishment,[72] i.e., retribution and deterrence.[73] The Court next considered whether the specific statutory provisions under which the government sought forfeiture in *Austin* should likewise be understood at least in part as punitive in nature.[74] In its analysis, the Court noted that these provisions provided for an "innocent owner" defense.[75] According to the Court, the innocent owner defense served to focus the provisions on the culpability of the owner, and not the property thus "mak[ing] them look more like punishment, not less."[76] Using the rule of *Halper* that

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69. *Austin*, 113 S. Ct. at 2803, 2812. The claimant in *Austin* had sold drugs on the premises of his body shop business. *See id.* at 2803. In the process of completing the sale, the claimant left the body shop and went to his mobile home to retrieve the drugs. *See id.* Thus, the government sought forfeiture of both the body shop and the mobile home as instrumentalities of the crime. *See id.*

70. *Id.* at 2812.

71. *Id.* at 2806, 2812. For an exhaustive discussion of the Eighth Amendment implications of the *Austin* decision, see M. Lynette Eaddy, Note, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After* Austin v. United States, 45 FLA. L. REV. 709, 719-32 (1993) (proposing that courts employ a combination test which examines both the degree of "guilt" or involvement of the property, and the proportionality of the forfeiture to the offense to determine whether a civil forfeiture is constitutionally excessive).

72. *See Austin*, 113 S. Ct. at 2806-10. The Court noted that it understood that sanctions frequently serve more than one purpose, but explained that it was not required to exclude the possibility that a forfeiture serves remedial purposes in order to subject the forfeiture to the limitations of the Excessive Fines Clause. *Id.* at 2806. In other words, the Court was required to determine that the sanction could only be explained as serving at least in part to punish. *Id.*

73. *Halper*, 490 U.S. at 448 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

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

75. *Id.* at 2810.

76. *Id.* at 2810-11. The Court discussed at length the history of forfeiture since the time of the Eighth Amendment's ratification. *See id.* at 2806-08. The Court pointed to an Act passed by the first Congress wherein forfeiture was listed among other provisions for punishment as evidence that forfeiture was viewed as punishment. *Id.* at 2807-08 (citing Act of July 31, 1789, § 12, 1 Stat. 39). When the Court turned to its own precedent, it found that the understanding of forfeiture as punishment was a common thread in its cases rejecting the "innocence" of the

simultaneous remedial and punitive goals would not defeat a finding of punishment,[77] and finding ample evidence of a purpose which was at least in part punitive, the Court found the forfeiture was subject to the Excessive Fines Clause.[78] Accordingly, the Court remanded the case to the Eighth Circuit to determine whether the forfeiture was in fact constitutionally excessive.[79]

The third and most recent blow to separate criminal and noncriminal sanctions came in *Department of Revenue v. Kurth Ranch* in 1994.[80] There the Supreme Court reviewed under principles of double jeopardy a tax which could only be levied on a defendant after he or she had been arrested for the underlying offense.[81] The Court explained at the

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owner as a common-law defense to forfeiture. *Id.* at 2808 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921); Dobbin's Distillery v. United States, 96 U.S. 395 (1878); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827)). The case of a "truly innocent" owner—an owner who had done all that reasonably could be expected to prevent the unlawful use of the property—was another matter. *See id.* at 2809. Its more recent cases, stated the Court, explicitly reserved the question of whether the property of a truly innocent owner was forfeitable. *Id.* (citing *Calero-Toledo*, 416 U.S. at 689-90; *Goldsmith-Grant Co.*, 254 U.S. at 512).

77. *See id.* at 2812 (citing *Halper*, 490 U.S. at 448).

78. *See id.* The Court reasoned that because of the dramatic fluctuations in the value of the forfeitable property, any relationship between the government's actual costs and the amount of the sanction would be coincidental. *See id.* at 2812 n.14. This fact, coupled with the punitive history of forfeiture statutes, led the Court to abandon *Halper*'s proportionality analysis as inapplicable in the civil forfeiture setting. *See id.*

79. *Austin*, 113 S. Ct. at 2812.

80. 114 S. Ct. 1937 (1994). The defendants in this case were arrested after the police raided the farm on which the defendants grew marijuana. *Id.* at 1942. As a result of the raid, four separate proceedings were instituted. *Id.* In the only criminal proceeding, each defendant entered into a plea agreement and was sentenced accordingly. *Id.* A civil forfeiture action was also filed against the proceeds and instrumentalities of the crime, and the defendants likewise settled this proceeding. *Id.* No double jeopardy argument was raised at this point, although clearly it was a possibility under *Austin*, at least for one defendant. *See id.* at 1942 n.9. The third proceeding was an administrative proceeding at which the defendants protested the levying of a tax on them for the already confiscated and apparently destroyed narcotics. *Id.* at 1942-43. This proceeding was stayed pending the outcome of the fourth proceeding, a bankruptcy proceeding. *Id.* at 1943. It was not until the bankruptcy proceeding that the defendants contested the tax assessment on double jeopardy grounds. *Id.*

81. *Id.* at 1947. Montana's Dangerous Drug Tax Act "imposes a tax 'on the possession and storage of dangerous drugs,' " which tax is to be " 'collected only after any state or federal fines or forfeitures have been satisfied.' " *Id.* at 1941 (quoting MONT. CODE ANN. §§ 15-25-111 (1987)). Under the state Department of Revenue's Rules promulgated pursuant to the Act, taxpayers must file a return within 72 hours of their arrest. *Id.* (citing MONT. ADMIN. R. 42.34.102(1) (1988)). The tax proceeds are to be used to fund youth evaluation and chemical abuse programs, and to enforce the drug laws. *Id.* (citing MONT. CODE ANN. §§ 15-25-121, 15-25-122 (1987)). The Act's preamble indicated that the revenue-raising measure is not meant to

threshold that a tax is not immune from double jeopardy inquiry simply because it is levied administratively outside the criminal forum.[82] Next, the Court noted that the tax's dependence upon the commission of a crime signaled penal intent rather than the pursuit of revenue.[83] Additionally, the Court noted that the tax was levied on the very assets which already had been confiscated incident to the arrest, and which the defendant therefore neither owned nor possessed at the time the tax was levied.[84] Given these characteristics, the Court found that the tax had "an unmistakable punitive character," and accordingly struck the tax as a second punishment in violation of the Double Jeopardy Clause.[85]

Thus, as *Halper* and *Austin* had deconstructed the line between civil and criminal penalties, the Court in *Kurth Ranch* deconstructed the line between criminal and administrative sanctions.[86] This trilogy of

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condone drug use. *Id.* at 1941 n.4 (citing 1987 MONT. LAWS 563). Rather, because of the economic damage caused by the dangerous drug trade, the legislature concluded it was only fair to use part of the money generated by the tax to combat those involved in the distribution of dangerous drugs in Montana. *Id.* (citing 1987 MONT. LAWS 563).

82. *Id.* at 1946. The language of the Dangerous Drug Tax Act, " 'collected only after any . . . fines or forfeitures have been satisfied,' " *id.* at 1941 (quoting MONT. CODE ANN. § 15-25-111(3) (1987)), contemplates the possibility of three separate penalties: a fine, a forfeiture, and this administrative tax. *See id.* The Court's direction that a tax is not immune from double jeopardy scrutiny means that all three of these types of sanctions—criminal, civil, and administrative—will now be scrutinized under the decisions of the trilogy for punitive purposes and may be subject to the proportionality and double jeopardy limitations of the Eighth and Fifth Amendments, respectively.

The Court thus finished what *Halper* began: the foreclosure of deference to governmental labeling of its own procedures. Where *Halper* destroyed the importance of civil and criminal labels, *Kurth Ranch* destroyed the significance of all other governmental labeling of its procedures such that all actions, however labelled, now will be subject to constitutional scrutiny. Thus the Court in *Kurth Ranch* stated definitively: "Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints." *Id.* at 1945.

83. *Id.* at 1947 (citing United States v. Constantine, 296 U.S. 287, 295 (1935); United States v. La Franca, 282 U.S. 568, 571, 575 (1931)).

84. *Id.* at 1948.

85. *Id.* The Court reasoned that the tax, which was imposed only on criminals, departed so completely from normal revenue laws as to become a form of punishment. *Id.* However, in actually striking the tax, the Court specifically discarded the *Halper* consideration of comparing the civil penalty to the government's actual costs. *Id.* It did so because it concluded that a tax does not lend itself to this inquiry the way a civil penalty does. *Id.* Although the Court noted that the tax would have failed under a *Halper* analysis in any event, the Court struck the tax because the Court's exhaustive analysis of the nature of the tax indicated that it only could be understood as being punitive. *See id.* at 1948. Thus, with its *Kurth Ranch* decision, the Court effectively expanded its power to review governmental sanctions arising in any context.

86. Prior to the Court's decision in *Kurth Ranch*, some conservative lower courts understood the principles of *Austin* to apply only to the forfeiture of instrumentalities and thus

decisions, therefore, has the potential effect of destroying the significance of all government labeling of its actions. The days of deference to Congress' categorization[87] have given way to a doctrine involving examination of the underlying purpose of any governmental response to a criminal act.

IV. HOPE FOR SUPREME RESOLUTION: THE CIRCUITS HEAT UP THE CONFLICT

Following the decisions in *Halper* and *Austin*, but preceding the decision in *Kurth Ranch*, the Fifth Circuit was called to inquire into the nature, punitive or remedial, of an illegal proceeds civil forfeiture in *United States v. Tilley*.[88] The court, building upon *Halper*, focused on the relationship between the amount of the civil sanction and the costs to the government *and society* resulting from the wrongful conduct.[89] Specifically, the court noted that on a national level, illegal drug sales generate an estimated $80 to $100 billion per year while the toll on the government and society reaches an estimated $60 to $120 billion per year.[90] Accordingly, the court reasoned that if all drug dealers forfeited all the proceeds of their sales, there would necessarily exist a rational relationship between the amount of the proceeds and the resulting governmental and societal costs.[91] Further, the court concluded that this rational relationship would be true in each individual case.[92] Therefore,

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held that the forfeiture of proceeds was distinguishable and therefore not punitive. *See, e.g.*, United States v. Tilley, 18 F.3d 295, 299-300 (5th Cir. 1994) (stating that *Austin* does not apply to the forfeiture of proceeds because unlike the forfeiture of real estate or other instrumentalities, the forfeiture of proceeds will always bear a direct relation to the harm done and thus will always be purely remedial). However, the Court's opinion in *Kurth Ranch* makes clear that no distinctions of constitutional import remain among the various types of civil forfeiture: all "are readily characterized as sanctions." *See Kurth Ranch*, 114 S. Ct. at 1946; *see also* Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Opposition to Motion for Reconsideration and Suggestion for Rehearing En Banc at 8, 9 n.6, United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994) (No. 93-55947) (arguing that the government's reliance on *Tilley* is misplaced because that court failed to recognize this crucial directive of *Kurth Ranch*).

87. *See supra* notes 22-40 and accompanying text.

88. 18 F.3d 295, 298-300 (5th Cir. 1994). For a discussion of the differences between proceeds forfeitures and instrumentalities forfeitures, see *supra* note 68. Again, *Kurth Ranch* has ostensibly ended the need to distinguish between these types of forfeitures for constitutional analysis. *See supra* note 86.

89. *Tilley*, 18 F.3d at 299-300.

90. *Id.* at 299.

91. *Id.*

92. *Id.* Under the court's reasoning, a drug sale worth $50,000 would inflict roughly $50,000 worth of harm on the government and society. *See id.* This reasoning fundamentally misunderstands *Halper*, and thus *Austin*, because *Halper* spoke exclusively of compensating

under the *Halper* test, such a forfeiture would not constitute a punishment because it would serve the wholly remedial purpose of compensating the government and society for the costs of the illegal conduct.[93] Additionally, the court instructed that the methodology of *Austin* need not control proceeds forfeiture cases because, in contrast to real estate and conveyance forfeitures, the forfeiture of illegal drug sale proceeds will always be roughly proportional to the harm caused by the drug sales in each case.[94]

The court went on to explain that, in any event, forfeiture of ill-gotten gains could never constitute punishment for double jeopardy purposes because the forfeiture "merely places th[e] [forfeiting] party in the lawfully protected status quo that he enjoyed prior to launching his

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governmental costs. *See Halper*, 490 U.S. at 449. Nowhere did the Court in *Halper* or *Austin* concern itself with those societal costs not directly absorbed by the government via law enforcement and prosecution. In fact, the *Austin* Court specifically addressed and rejected this very argument. *Austin*, 113 S. Ct. at 2811. Surely societal costs would defy any attempt at judicial quantification, and this may be precisely why the Court has not yet ventured down this path.

93. *See Tilley*, 18 F.3d at 299.

94. *Id.* at 300. One may certainly wonder whether this big picture approach to the constitutionality of criminal penalties might be significantly dangerous. Regardless, this theory of large-scale proportionality directly contravenes the imperatives from *Halper* that the constitutional protection be understood as intrinsically personal and that violations be identified only by examining the nature of the "actual sanctions imposed on the individual by the machinery of the state." *Halper*, 490 U.S. at 447. Accordingly, the proportionality of the government's losses to the drug world's gains is irrelevant when the machinery of the government is employed against an individual. Surely an offender who somehow had caused more than his or her "share" of the nationwide harm would not be acquitted for the excess.

Where *Austin* dealt with the "instrumentalities" forfeitures of conveyances under § 881(a)(4) and of real property under § 881(a)(7), *see Austin*, 113 S. Ct. at 2803, *Tilley* addressed the forfeiture of proceeds under § 881(a)(6). *See Tilley*, 18 F.3d at 297-300. See *supra* note 68 for a detailed discussion of these provisions. While the *Tilley* court agreed with *Austin* that instrumentalities forfeitures could be wildly disproportionate to the costs of the criminal act, the *Tilley* court distinguished *Austin* on the ground that illicit drug sales proceeds forfeitures were a different beast entirely which, by their very nature, could never be disproportionate to the offense committed. *Tilley*, 18 F.3d at 300. Specifically, the court reasoned that

> [u]nlike the real estate forfeiture . . . that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these proceeds are roughly proportional to the harm inflicted upon government and society by the drug sale. Thus, the logic of *Austin* is inapplicable to § 881(a)(6)—the forfeiture of drug proceeds.

Id. With the Court's subsequent decision in *Kurth Ranch*, however, this is a distinction without a difference, constitutionally. *See supra* note 86.

illegal scheme."[95] To illustrate its position, the court analogized drug sales proceeds to money stolen from a bank;[96] the proceeds of these illegal activities are never legally the wrongdoer's to lose.[97]

Two other circuits, the second and the eleventh, recently rejected double jeopardy challenges as well, not because of the lack of multiple punishments, but because of the absence of multiple proceedings.[98] The Courts of Appeals for the Second Circuit considered and rejected a double jeopardy challenge involving parallel civil forfeiture and criminal actions in *United States v. Millan*.[99] The proceedings in *Millan* had been initiated by the prosecution within five months of each other.[100] Approximately one year after their indictments, the defendants entered into a settlement agreement with the government regarding the forfeiture.[101] The defendants subsequently filed a motion to dismiss a superseding indictment[102] on grounds of double jeopardy, claiming that they already had been punished under the separate forfeiture agreement.[103]

The Second Circuit rejected the defendants' double jeopardy challenge,[104] stating that although the forfeitures may have been punitive in nature, the issue of multiple punishment was moot.[105] Instead, the court explained that the defendants' challenge failed the separate proceedings analysis under the Double Jeopardy Clause because the parallel proceedings in this case constituted a "single, coordinated

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

96. *Id.*

97. *See id.* This logic holds true when the proceeds are readily identifiable as illegally obtained, such as a pile of cash found on the person of a dealer or robber. However, when the proceeds have been intermingled with "clean" money to effect a purchase, the analogy gets unwieldy.

98. *See* United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994); United States v. Millan, 2 F.3d 17, 19 (2d Cir. 1993).

99. 2 F.3d 17, 18 (2d Cir. 1993). The defendants had been charged with participating in a heroin conspiracy. *Id.*

100. *See id.* The criminal conspiracy indictment was handed down on August 14, 1991, and the in rem civil forfeiture suit was filed on December 26, 1991. *Id.* Although a single judge issued all of the warrants for the civil seizures and the criminal arrests, the civil and criminal cases were filed, docketed, and tried separately. *Id.* at 20.

101. *See id.* at 18. On January 20, 1993, the defendants entered into a settlement agreement with the government regarding the civil forfeiture suit, and that suit was accordingly dismissed. *Id.*

102. *Id.* at 19. A superseding indictment was issued only months prior to the settlement agreement. *See id.*

103. *Id.*

104. *Id.* at 18.

105. *Id.* at 19.

prosecution."[106] The Eleventh Circuit has explicitly adopted the "coordinated prosecution" analysis from *Millan*, and has consistently reached the same conclusion on similar facts.[107]

In September of 1994, in the case of *United States v. $405,089.23 U.S. Currency*,[108] the Ninth Circuit responded with great force to the arguments of each of these three other circuits. Here the Ninth Circuit likewise evaluated a criminal prosecution and a parallel civil forfeiture under the Double Jeopardy Clause.[109] However, early in its analysis, the court attacked the "single, coordinated prosecution" principle, noting that in this case the forfeiture judgment followed the defendants' criminal convictions by over a year.[110] Further, the court noted that a different district judge presided over the forfeiture proceeding, even though precisely the same conduct was at issue in both proceedings.[111] On these facts, the court easily concluded that the two prosecutions were separate proceedings subject to inquiry under the Double Jeopardy Clause.[112] In the process of so concluding, the court admonished the Second and Eleventh Circuits for their "single, coordinated prosecution" rule, stating that the position taken by those circuits was contrary to both Supreme Court precedent and common sense.[113]

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106. *Id.* at 19-21. For a full discussion of the pertinent analysis under the Double Jeopardy Clause, see *supra* note 3.

107. *See 18755 N. Bay Rd.*, 13 F.3d at 1499. In this case, the government sought forfeiture of a home in which an illegal gambling operation allegedly was run. *Id.* at 1494. The government filed an indictment against one of the claimants after filing a civil forfeiture action against the claimants' home, an instrumentality of the alleged crime. *Id.* at 1494-95. Shortly after the claimant's indictment, the government filed a motion for summary judgment on the issue of probable cause in the civil forfeiture action. *Id.* at 1495. The motion was denied. *Id.* Once the claimant was convicted on all counts of conducting an illegal gambling operation, the government again moved for summary judgment. *Id.* The government relied on the claimant's criminal conviction to satisfy its probable cause burden in the forfeiture action. *Id.* This time, summary judgment was granted, and the district court ordered forfeiture of the home. *Id.*

The claimant appealed on double jeopardy grounds. *Id.* The Eleventh Circuit rejected this argument, relying on the Second Circuit's "single, coordinated prosecution" ruling from *Millan*. *Id.* at 1499. Accordingly, the court held that the criminal and civil proceedings were simultaneous enough to constitute a single proceeding, and thus escape double jeopardy review. *Id.*

Recently, in United States v. 13143 S.W. 15th Lane, 872 F. Supp. 968 (S.D. Fla. 1994), the District Court for the Southern District of Florida reluctantly followed the "single, coordinated proceeding" precedent of *18755 North Bay Road* because it was bound by stare decisis to do so. *See id.* at 972 & n.6.

108. 33 F.3d 1210 (9th Cir. 1994).

109. *Id.* at 1214.

110. *Id.* at 1216.

111. *Id.*

112. *Id.*

113. *Id.* The court here was referring to the Supreme Court's decision in *Austin*, as well as

The court continued its criticism of these two circuits' position by stating that it failed to see how two separate actions, one civil and one criminal, instituted at different times, tried before different factfinders, and resolved by separate judgments, could ever constitute the same proceeding.[114] The court noted that it was precisely this separateness which gave the prosecution a significant advantage over the defendants: if the prosecution obtained convictions first, then it would likely win the forfeiture action on summary judgment, while if it lost the criminal trial, it could still seek its pound of flesh in the more lenient civil forfeiture setting.[115] The court specifically rejected this approach, sanctioned by the Second and Eleventh Circuits, and commented that "such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to 'run the gantlet' more than once. We are not willing to whitewash th[is] double jeopardy violation . . . by affording constitutional significance to the label of 'single, coordinated prosecution.' "[116]

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the earlier foundational decision of Abbate v. United States, 359 U.S. 187 (1959) and Jeffers v. United States, 432 U.S. 137 (1977). *See $405,089.23*, 33 F.3d at 1215 n.1, 1216-17. The court cited *Abbate* for the proposition that " '[t]he basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts.' " *Id.* at 1215 (quoting *Abbate*, 359 U.S. at 198-99).

Just months before the Ninth Circuit's decision in *$405,089.23 U.S. Currency*, the Seventh Circuit considered whether parallel civil and criminal proceedings pose a double jeopardy problem. *See* United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994). The Seventh Circuit, like the Ninth Circuit, rejected the Second and Eleventh Circuit's position that such parallel proceedings constitute a single action for purposes of double jeopardy. *See id.*

114. *$405,089.23*, 33 F.3d at 1216.

115. *Id.* at 1217.

116. *Id.* (attributing first quotation to Green v. United States, 335 U.S. 184, 190 (1957)). This discussion by the court raises the infrequently litigated issue of precisely when jeopardy attaches in the noncriminal setting. The issue, in other words, is when has a defendant been placed in jeopardy such that a subsequent punitive action would violate the Double Jeopardy Clause? In the criminal setting, jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 38 (1978). However, in a civil forfeiture proceeding, the points at which jeopardy theoretically could attach are numerous. Jeopardy could attach upon initial seizure, upon the owner's filing of a claim in defense of the property, upon the factfinder's first exposure to evidence, upon the signing of a settlement agreement, or upon the rendering of a final judgment. The Seventh Circuit has adopted the time at which "evidence is first presented to the trier of fact in a proceeding seeking to impose a penalty for a crime" as the time when jeopardy attaches. *Torres*, 28 F.3d at 1465. The Seventh Circuit accordingly rejected an argument of jeopardy by an owner who failed even to file a claim in defense of his property. *Id.* The Second and Eleventh Circuits have been concerned in their analysis with whether the government acted abusively in seeking the second penalty due to dissatisfaction with the first penalty. *See Millan*, 2 F.3d at 20; *18755 N. Bay Rd.*, 13 F.3d at 1499.

All of the decisions on this issue suffer from a failure to consider the actual passage of title

After concluding that the forfeiture proceeding being reviewed was in fact a separate proceeding, the court moved on to the next and final inquiry in the standard double jeopardy analysis: Whether the second sanction constituted punishment.[117] In its analysis here, the court was called upon by the government to consider the Fifth Circuit's decision in *Tilley* that illegal drug sale proceeds forfeitures could never constitute punishment.[118] The court specifically rejected *Tilley* and its reasoning because it perceived a failure in *Tilley* to recognize the broad legal standard established in *Austin*.[119] Accordingly, the court invoked the reasoning of *Austin* and rejected the Fifth Circuit's notion that a court could ever summarily determine the nature of a forfeiture action without closely inquiring into the characteristics of the statutory forfeiture scheme as a whole.[120]

Thus the Ninth Circuit stands diametrically opposed to the Fifth Circuit regarding punishment issues, and to the Second and Eleventh Circuits regarding separateness issues. The Ninth Circuit specifically recognized these conflicts[121] and addressed them directly in *$405,089.23*, adhering to what it concluded was controlling Supreme

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in a civil forfeiture situation. Title to property seized under any provision of § 881(a) is vested in the government immediately upon commission of the act giving rise to the forfeiture. 21 U.S.C. § 881(h) (1988 & Supp. V 1993). Obviously, if jeopardy attaches at this precise point in time, no owner of § 881(a) property could ever be separately punished, and the theory could swallow itself. However, once the government becomes aware of the crime and seizes the property to which it has title, the owner is immediately deprived of any semblance of ownership, making attachment of jeopardy at this point a viable theory. This theory finds additional support in the fact that, regardless of the disposition of the forfeiture, settlement or judgment or dismissal, title is not restored in the owner until the government deeds it back. Although no court has yet embraced so expansive a view of jeopardy, surely the owner has felt the "sting of punishment" upon seizure and at every point thereafter. *Halper*, 490 U.S. at 447 n.7. This is yet another crucial issue on which the circuits are divided and on which the Supreme Court may soon be called upon to rule.

117. *See $405,089.23*, 33 F.3d at 1218. For a discussion of the relevant inquiry under the Double Jeopardy Clause, see *supra* note 3. The first aspect of this inquiry, whether the two governmental actions were in response to the same criminal act, was not at issue in this case. *See $405,089.23*, 33 F.3d at 1216.

118. *See $405,089.23*, 33 F.3d at 1220.

119. *Id.*

120. *See id.* The court refused to apply the case-by-case approach of *Halper*, seizing on the second reason given by the *Austin* court why such an approach would be inappropriate in a forfeiture case: " '[F]orfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence.' " *Id.* (quoting *Austin*, 113 S. Ct. at 2812 n.14). The court took this finding at face value for the sweeping proposition that all forfeitures, regardless of type or amount, are inherently punitive and thus subject to constitutional limitations under the Fifth and Eighth Amendments. *Id.* For the view that the Ninth Circuit's position on this issue is the correct one, see McClain, *supra* note 6, at 947-53.

121. *$405,089.23*, 33 F.3d at 1216, 1220.

Court precedent.[122] In dicta at the conclusion of its decision, the Ninth Circuit predicted that the Supreme Court's decision in *Austin* would likely force the government to permanently and globally alter its method of proceeding in many types of cases.[123] Specifically, the court anticipated that the government would have to rely more heavily on criminal forfeiture, or else face the difficult choice of proceeding exclusively in either the criminal or civil settings.[124]

V. THE POST-TRILOGY DILEMMA AND PROPOSED RESOLUTIONS

Since the completion of the trilogy with *Kurth Ranch* in June of 1994, criminal practitioners have been eagerly trying to predict the Court's necessary path if it is to avoid further constitutional questions on the one hand, and the complete collapse of effective criminal prosecution on the other. The trilogy has established that all parallel proceedings are subject to constitutional review if any two of those proceedings harbor a purpose which is in any way punitive. However, the Court has not yet addressed the underlying issue in all of this: which is whether the government ever should be permitted to seek punishment for a crime in any setting other than the criminal setting. The Constitution grants a defendant very specific and unique protections in this setting, which the government avoids when it seeks punishment in other fora.[125] Thus, the Court will face either continuing constitutional attacks on noncriminal punishment, or the radical restructuring of the criminal justice system.

While no one seems to be advocating the demise of forfeiture as a means of punishment, many practitioners agree that forfeiture must be moved entirely into the criminal setting in order to remain effective and

122. *See id.* at 1217-18, 1220-21 (citing Jeffers v. United States, 432 U.S. 137, 147-51 (1977); *Austin*, 113 S. Ct. at 2812).

123. *Id.* at 1222. The Seventh Circuit also advised the government to seek imprisonment, fines, and forfeiture in one proceeding. *Torres*, 28 F.3d at 1464.

124. *$405,089.23*, 33 F.3d at 1222 (citing 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 12.10[2], at 12-131 to 12-132 (1993)). It is extremely noteworthy that, when the Ninth Circuit denied the government's Petition for Rehearing En Banc, seven judges joined in a dissenting opinion. United States v. $405,089.23 U.S. Currency, 56 F.3d 41 (9th Cir. 1995). Although none of these seven judges heard the original appeal, their dissent is nonetheless indicative of the quandry presented when confusion and dissonance exist not just among the circuits, but within them. *See id.* This tension peaked on August 28, 1995, when the government petitioned the Supreme Court for certiorari in this case. United States v. $405,089.23 U.S. Currency, 64 U.S.L.W. 3161 (U.S. Aug. 28. 1995). Attorneys, defendants, prisoners, and judges alike are hopeful that the Court will seize upon the opportunity to relieve this tension and guide the lower courts with a clear directive.

125. *See supra* notes 41-50 and accompanying text.

constitutional.[126] In fact, the Court itself has been subtly advocating the consolidation of punishment proceedings into the criminal forum from the beginning of this line of jurisprudence. For example, in *Halper* the Court clearly explained that its decision was in no way intended to preclude the government from seeking both the full civil penalty and the full range of statutorily authorized criminal penalties, so long as they are sought in the same proceeding.[127] Likewise, the Court in *Kurth Ranch* mandated that the Drug Tax be levied during the original proceeding or not at all.[128]

The Department of Justice (DOJ) has taken notice of these directives.[129] Immediately following the decision in *$405,089.23*, the DOJ reported its observations regarding the case as well as its experts' opinions on the decision's impact.[130] One expert advising the October 3, 1994 DOJ Alert stated that the government's argument that "a forfeiture is not punishment until the amount of the forfeiture exceeds the harm done by the crime . . . might have been the government's undoing."[131] That DOJ Alert also noted that the court in *$405,089.23* ignored the mathematics, and focused ultimately on the Supreme Court's command that defendants not be forced to marshal their defenses more than once for the same crime.[132]

In addition, the Alert disclosed the experts' rather grim conclusions:

> [1.] Hundreds of criminals may seek to set aside their convictions, even those finally adjudicated;
> [2.] The federal government will have to limit its use of civil

126. *See* Leach & Malcolm, *supra* note 19, at 244-45; *Court Strikes Forfeiture*, *supra* note 21.

127. *Halper*, 490 U.S. at 450. While a unified proceeding would be invulnerable to an attack on double jeopardy grounds, *see id.*, it still could be argued that the total punishment exceeded that authorized by the legislature, *see id.* (citing Missouri v. Hunter, 459 U.S. 359, 368-69 (1983)).

128. *Kurth Ranch*, 114 S. Ct. at 1948. Further, at least one lower federal court has understood *Austin* to require that multiple punishments be sought within a single proceeding. *See $405,089.23*, 33 F.3d at 1222. In arriving at this conclusion, the court in *$405,089.23* relied upon long-established Supreme Court precedent. *See id.* at 1215, 1217. In Green v. United States, 355 U.S. 184, 187, 190 (1957), the Court interpreted the Double Jeopardy Clause to forbid the government from forcing a defendant to "run the gantlet" more than once for the same crime. Two years later, in Abbate v. United States, 359 U.S. 187 (1959), Justice Brennan suggested further that "an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *Id.* at 198-99 (Brennan, J., concurring).

129. *Court Strikes Forfeiture*, *supra* note 21.

130. *Id.*

131. *Id.*

132. *Id.*

> forfeiture at least in the 9th Circuit, and resort to criminal forfeiture instead;
> [3.] States, at least in the 9th Circuit, that have no criminal forfeiture will have to enact new laws or prepare to abandon their forfeiture programs; and
> [4.] The Supreme Court is more likely to rule on the issue because there is now a conflict in the circuits.[133]

One expert predicted that prosecutors in all jurisdictions soon will be forced to abandon civil forfeiture entirely and instead achieve their goals in a unified criminal proceeding using criminal forfeiture statutes.[134] Even government attorneys recognized that the decision in *$405,089.23* "change[d] everything."[135]

Two Assistant United States Attorneys also have recognized "potential constitutional problems of double jeopardy"[136] and have actually drafted a proposed amendment to the primary criminal forfeiture statute for non-drug cases, 18 U.S.C. § 982.[137] In the article containing their proposal, Arthur Leach and John Malcolm noted that the criminal forfeiture statute regarding narcotics, 21 U.S.C. § 853, is relatively straightforward,[138] but that the primary criminal forfeiture statute regarding non-drug offenses, 18 U.S.C. § 982, is prohibitively complex and only narrowly applicable.[139] Leach and Malcolm have proposed that these two statutes be merged and expanded to authorize the criminal forfeiture of proceeds stemming from any federally

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133. *Id.*

134. *See id.* at 3. Immediately following the Court's decision in *Austin*, the Assets Forfeiture Office of the Criminal Division of the DOJ began to incorporate these suggestions into policies in its comprehensively revised *Assets Forfeiture Manual. Forfeiture Manual Signals Help for Victims*, DOJ ALERT (Prentice Hall Law and Business), Sept. 6-20, 1993, *available in* Westlaw, TP-ALL Database. The manual compiles all DOJ forfeiture policy, procedure, and theory. *Id.* Volumes one and three of the manual are available to the public through the Freedom of Information Act (FOIA) Office for about $75. *Id.*

Defense attorneys have been advocating the switch to criminal forfeiture as well. Barry Tarlow, *Double Jeopardy Death Knell for Parallel Criminal and Civil Forfeiture Proceedings*, THE CHAMPION, Dec. 1994, at 24 (THE CHAMPION is a monthly publication of the National Association of Criminal Defense Lawyers.). This article suggests that the government will have to seek indictment under the criminal forfeiture statutes and learn how to achieve its goals under the heightened criminal burdens of proof. *Id.*

135. *Court Strikes Forfeiture, supra* note 21.

136. Leach & Malcolm, *supra* note 19, at 245, 285-91.

137. *Id.* at 285-88.

138. *Id.* at 252.

139. *Id.* at 243, 253. Leach and Malcolm have noted that the money laundering statutes, often used in connection with criminal forfeitures in non-drug cases, only add to the complexity and confusion. *Id.* at 243-44, 253.

felonious activity.[140] The crux of this proposed statute is that, not only would it be widely and easily applicable,[141] but it also would provide for the repayment of certain qualified victims.[142] Leach and Malcolm feel that their proposal addresses all of the concerns voiced by the government and by the courts in all of the above cases.[143]

Certainly, a thorough expansion of the criminal forfeiture statutes will have to be legislated soon, barring a reversal by the Supreme Court of the current judicial trend. This expansion obviously will be preferred by prosecutors to the alternative of simply choosing either a civil, criminal, or administrative path, and then being bound by it. But even assuming that the criminal forfeiture procedures can be made to accomplish what was previously done in the civil context, prosecutors still have reason to fear some additional setbacks. For instance, the forfeiture aspect of the prosecution will be subject to the criminal burden of proof beyond a reasonable doubt, as opposed to the more lenient preponderance of the evidence standard in civil proceedings.[144] Further, the liberal discovery rules of civil procedure will give way to the very prodefendant rules of criminal procedure,[145] thus severely curtailing the government's opportunity to conduct discovery as it once did in civil forfeitures. Stranger still for the government is that counsel for indigent defendants will have to be provided for all aspects of this now-unified criminal proceeding.[146] Likewise, protections against self-incrimination and ineffective assistance of counsel will all slow the government's pursuit of a forfeiture in a unified criminal setting.

But is this a bad thing? Defense attorneys have complained for years about the stark lack of safeguards for defendants forced to wage additional battles outside of the criminal courtroom. A unified system of criminal punishment possessing an effective criminal forfeiture statute similar to the one suggested by Leach and Malcolm will address these

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140. *Id.* at 285-86. Leach and Malcolm addressed only proceeds forfeitures in their statute because, at the time of their publication, instrumentalities forfeitures, or "facilitating property forfeitures," were "problematic and contentious." *Id.* at 244. However, roughly six months after that publication, the Supreme Court's holding in *Kurth Ranch* ostensibly destroyed any constitutionally-based distinction among the various types of noncriminal penalties. *See Kurth Ranch*, 114 S. Ct. at 1946; *supra* note 86. Therefore, *Kurth Ranch* arguably eradicated any need to limit a statute such as Leach and Malcolm's to any particular type of civil forfeiture, and the statute may now likely be expanded to replace all civil forfeitures with criminal forfeitures.

141. Leach & Malcolm, *supra* note 19, at 244, 288.

142. *Id.* at 245, 287-89, 291-93. See also *Forfeiture Manual*, *supra* note 134, regarding the DOJ's proposals for victim restitution contained in its revised Asset Forfeiture Manual.

143. Leach & Malcolm, *supra* note 19, at 244-45.

144. *See supra* note 18.

145. *See supra* note 43.

146. *See Court Strikes Forfeiture*, *supra* note 21.

complaints while being more equitable to defendants, prosecutors, and society. Defendants will enjoy procedural safeguards and the invaluable security of knowing that they will not have to marshal their defenses for the same violation a second time. Prosecutors will enjoy a streamlined system where their achievements vis-á-vis defendants will be final and will no longer be vulnerable to the "technicalities" which have lately been paralyzing their attempts at bringing criminals to justice. Finally, society will enjoy a more certain and cost-effective justice system where frustrating technical acquittals will be minimized and where victims actually can be compensated for their losses.

VI. CONCLUSION

The problems presented by the practice of using civil forfeitures to effect punishment of criminal offenders are unique in that they now have prosecutors and defenders alike clamoring for drastic improvement in the overall system of punishment. Prosecutors have enjoyed decades of ease and convenience in their pursuit of multiple punishments through procedures such as civil forfeiture. However, in this post-trilogy flux, both prosecutors and defenders are losing under parallel proceedings.

If the Court or Congress decides to force forfeiture strictly into the criminal setting, and to otherwise unify punishment, then the war on crime in America, and particularly the war on drugs,[147] will necessarily become more efficient and less costly.[148] The unification of proceedings will ostensibly harm the government's Vietnam-style body-count statistics in its "war,"[149] but the reality will be that fewer offenders will be either over- or under-punished as a result of "technicalities," and surely that is a battle worth winning.

147. Note that many of the above cases involve civil and administrative responses to drug offenses. This is because civil forfeiture is currently one of the government's most powerful weapons in its war on drugs. *See Millan*, 2 F.3d at 21 (stating that the court has repeatedly cautioned eager prosecutors that "the constitution [sic] must never be made a casualty of this war").

148. Leach & Malcolm, *supra* note 19, at 244 (arguing that more criminal forfeiture actions would increase judicial efficiency and save governmental resources).

149. Parallel punitive proceedings have the effect of skewing statistics regarding the government's success rate, especially in its war on drugs. Unification of proceedings will necessarily lower these numbers even though the true conviction rate will likely improve due to the corresponding eradication of technical loopholes. For instance, while before the government could point to a conviction, a civil forfeiture, and a tax as three "victories," those will now constitute but one victory, but it is a victory invulnerable to the technical attacks explored throughout this note.