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Protecting Individuals from "Double Jeopardy" in a Post-Hudson Era

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ABSTRACT: Since the end of the twentieth century the government's use of civil forfeiture has risen dramatically. This increase in use can be attributed to the advantages a civil, as opposed to criminal, proceeding gives law enforcement agencies. In a flawed majority opinion, the Supreme Court in Hudson v. United States *effectively eliminated all limits on civil forfeiture sanctions. In response to the potential for governmental abuse that* Hudson *creates, the legislature should step in and amend the sentencing guidelines. In making civil asset forfeiture a mitigating factor in the criminal punishment, the legislature is reaching a good compromise between protecting individuals' rights and the government's use of civil forfeiture as an effective crime fighting tool.*

* J.D. Candidate, University of Iowa College of Law, 2005; B.S., Drake University, 2002. I would like to thank my friends and family for their support and patience through the writing of this Note and my law school career. Also, I would like to thank Professor Stephanos Bibas for introducing me to this topic and his guidance in developing my argument. I dedicate this Note to my parents, for their continual encouragement and instilling in me a life-long appreciation for learning. All errors and omissions, of course, are my own.

I. INTRODUCTION

A manager of a company decides to cut a few corners to make some extra money and submits false Medicare claims to the government for reimbursement. He is eventually caught, convicted for submitting the false claims, fined, and sentenced to a prison term. The manager thinks that, with the conclusion of his criminal trial and sentencing, his ordeal is over; this, however, is not the case. Following the criminal proceeding the government brings another proceeding—a civil forfeiture proceeding—against the manager, ultimately finding him liable for more than $130,000. The manager had erroneously believed that he could only be punished once for his offense.

The Double Jeopardy Clause of the Fifth Amendment protects individuals from multiple punishments for the same offense.[1] Nonetheless, the Supreme Court's decisions in *United States v. Ursery* and *Hudson v. United States* have made it all but impossible for an offender to receive protection from asset forfeiture under the Fifth Amendment. The result is that offenders are being punished twice for the same offense—once in the criminal proceeding and then again in a civil forfeiture proceeding.

Part II of this Note lays out the historical development of the Double Jeopardy Clause and civil asset forfeiture. In particular, it analyzes the Supreme Court's response to claims in civil forfeiture proceedings and the expansion of double jeopardy protection.[2]

Parts III and IV of this Note discuss the Supreme Court's contraction of double jeopardy protection. These parts offer a critical analysis of the Court's decision in *Hudson* and the possible ramifications the decision could have on civil forfeiture. Specifically, this Note asserts that *Hudson* leaves individuals with virtually no protection from the ever-increasing use of civil forfeiture.[3]

After weighing the options, this Note recommends that the legislature take an active role and amend the Federal Sentencing Guidelines to make civil forfeitures a mitigating factor in criminal punishment. Amending the Guidelines would strike a balance between protecting individuals from two harsh sanctions for the same offense and the government's interest in continuing to use civil forfeiture as a weapon to fight crime.[4]

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1. *See infra* note 12 and accompanying text (outlining the protections provided by the Fifth Amendment).

2. *See infra* Parts II.C.2, II.C.3 (discussing *Halper*, *Austin*, and *Kurth Ranch*, and the broadening of double jeopardy protections in civil forfeiture proceedings).

3. *See infra* Part IV (analyzing civil forfeiture post-*Hudson*).

4. *See infra* Part V.B (recommending an amendment to the Federal Sentencing Guidelines as a solution to the problems created by *Hudson*). This Note proposes amending the Guidelines as a solution to the lack of protection from civil forfeiture, however, it should be noted that the legislature has taken other steps to remedy the problem. One such example is

II. BACKGROUND: DOUBLE JEOPARDY AND CIVIL FORFEITURE

A. *THE DOUBLE JEOPARDY CLAUSE*

The idea that no person can be subjected to prosecution and punishment for the same crime twice is a fundamental concept that "can be traced back to Greek and Roman times."[5] By the thirteenth century, this concept had become a universal maxim of the English common law that was later brought to the United States by the early settlers and through Blackstone's Commentaries.[6] Today, the Fifth Amendment of the United States Constitution guarantees that "no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."[7] The Fifth Amendment essentially codified the common law view that no person should be subjected to a second prosecution for the same offense.[8]

Double jeopardy, being an important concept in American jurisprudence, applies to the federal government, and is also applicable to all fifty states. In *Benton v. Maryland,* the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment applied to the states through the Fourteenth Amendment's Due Process Clause.[9] Additionally, the constitutional bar against double jeopardy is included in most state constitutions.[10]

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the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of U.S.C.). Some view CAFRA as a good "beginning for much needed change in American civil asset forfeiture law," while others criticize it as "a fragile and futile agreement that offers little more than cursory appeasement." PETER JOSEPH LOUGHLIN, DOES THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000 BRING A MODICUM OF SANITY TO THE FEDERAL CIVIL FORFEITURE SYSTEM?, *at* http://www.malet.com/does_the_civil_asset_forfeiture_.htm (last visited Jan. 25, 2005) (on file with the Iowa Law Review). The merits of the CAFRA are, however, beyond the scope of this Note.

5. Benton v. Maryland, 395 U.S. 784, 795 (1969); *see* Bartkus v. Illinois, 359 U.S. 121, 151–55 (1959) (Black, J., dissenting) (pointing out that the roots of the double jeopardy principle run deep, and that "[e]ven in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive").

6. *Benton*, 395 U.S. at 795.

7. U.S. CONST. amend. V.

8. *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."). "*Nemo debet bis vexari pro una et eadem causa*" expresses the common-law maxim that "no man shall be twice vexed for one and the same cause" in civil law cases. *Id.* at 168–69. In criminal law, "*Nemo debet bis puniri pro uno delicto*" expresses the maxim that no man can be punished for the same crime more than once. *Id.*

9. 395 U.S. 784, 796 (1969).

10. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES—PROSECUTION AND ADJUDICATION 249 (Aspen Law & Bus. 1999); *see, e.g.*, ALA. CONST. art. I, § 9 ("That no person shall, for the same offense, be twice put in jeopardy of life or limb."); CAL. CONST. art. I, § 15, cl. 5 ("Persons may not be twice put in jeopardy for the same offense . . . ."); HAW. CONST. art. I, § 10 ("[N]or shall any person be subject for the same offense to be twice put in jeopardy . . . ."); KAN. CONST. BILL OF RIGHTS § 10 (2002) ("No person shall . . . be twice put in jeopardy for the

The underlying idea of the Double Jeopardy Clause is to protect the individual by preventing the State, "with all its resources and power, [from making] repeated attempts to convict an individual for an alleged offense."[11] As a result, the courts have found that the Fifth Amendment protects defendants from three separate situations: (1) "a second prosecution for the same offense that occurs after an acquittal"; (2) "a second prosecution for the same offense after a conviction"; and (3) "multiple punishments for the same offense."[12] Similar interests and policy concerns are the basis of these three protections. Specifically, the principles of fairness and finality require that a defendant not be subjected to a second prosecution after having been tried and possibly punished for the same offense.[13] To serve the interest of fairness, double jeopardy prevents courts from imposing greater sentences on defendants than the legislature intended.[14] Double jeopardy also protects defendants from constantly fearing the possibility of prosecution for an old offense,[15] and it protects the integrity of courts' final judgments.[16]

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same offense."); ME. CONST. art. I, § 8 ("No person, for the same offense, shall be twice put in jeopardy of life or limb.").

11. Green v. United States, 355 U.S. 184, 187–88 (1957). To protect individuals from abuses of their power, "[t]he Clause serves as a restraint on the courts and prosecutors." United States v. Mask, 101 F. Supp. 2d 673, 678 (W.D. Tenn. 2000).

12. United States v. Halper, 490 U.S. 435, 440 (1989); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); MILLER & WRIGHT, *supra* note 10, at 250 (listing the protections of the Double Jeopardy Clause); *see also* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994) ("[A]t its most fundamental level [the Double Jeopardy Clause] protects [an] accused against . . . repeated attempts to exact one or more punishments for the same offense.").

It should be noted that there is debate among both courts and scholars alike as to whether the Fifth Amendment's Double Jeopardy Clause protects individuals from multiple *punishments* or instead multiple *prosecutions*. In his dissent in *Department of Revenue of Montana v. Kurth Ranch*, Justice Scalia argued that the phrase "to be put in jeopardy" from the Double Jeopardy Clause does not mean multiple punishments, rather the Clause only serves to prohibit multiple prosecutions. 511 U.S. 767, 798 (1994) (Scalia, J., dissenting). According to Scalia, all the case law prior to *Kurth Ranch* that was premised on a multiple punishment aspect of double jeopardy protection was actually based upon the Due Process Clause. *Id.* at 799. However, in dictum, the Supreme Court has stated in its opinions that the protection provided by the Fifth Amendment covers both multiple punishments and multiple prosecutions. *See, e.g.*, United States v. Halper, 490 U.S. 435 (1989); Ohio v. Johnson, 467 U.S. 493 (1984); Illinois v. Vitale, 447 U.S. 410 (1980); North Carolina v. Pearce, 395 U.S. 711 (1969); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873). Whether the Double Jeopardy Clause protects individuals from both successive punishments *and* prosecution or only successive punishments is still highly debated, but this Note focuses on issues that arise when applying the Clause to civil forfeiture cases.

13. *See Benton*, 395 U.S. at 796 (stating that the State should not be allowed to repeatedly attempt to reconvict or retry a person for the same offense because it would subject him to embarrassment, added expense, and anxiety).

14. Garrett v. United States, 471 U.S. 773, 793 (1985); Missouri v. Hunter, 459 U.S. 359, 365–66 (1983).

15. *See Green*, 355 U.S. at 187–88 ("The underlying idea . . . is that the State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him . . . to live in a continuing state of anxiety and insecurity . . . ."). The Supreme

While the literal language of the Fifth Amendment states that no person shall be twice subjected to "jeopardy of life or limb,"[17] the Supreme Court has indicated that the Double Jeopardy Clause applies to more than just those proceedings in which the most serious penalties (for example, death) are imposed.[18] The prohibition of double jeopardy has been extended to both prison sentences and criminal fines.[19] The Double Jeopardy Clause is meant to apply to proceedings that are "essentially criminal," so the Clause is not applicable to private suits brought by individuals.[20]

The Double Jeopardy Clause comes into play barring a second prosecution only "if jeopardy attached in the original proceeding."[21] Thus, the point where attachment occurs is a critical determination. Jeopardy attaches when a defendant, "put to trial before the trier of the facts," faces the risk of being found guilty.[22] This occurs when a jury is empaneled and sworn in[23] or when the judge begins to hear evidence.[24] If a case is dismissed before the defendant has been put before the respective trier of fact, (for example, a 12(b) motion to dismiss) then jeopardy will not attach and a second proceeding will not be barred.[25] Additionally, exceptions to the general double jeopardy rule exist when the judge properly declares a

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Court has justified the protections of double jeopardy by noting the "psychological security" it affords defendants. JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 156 (1969).

16. *See* Crist v. Bretz, 437 U.S. 28, 33 (1978) (stating that the primary purpose of double jeopardy is to preserve the finality of judgment, and that this purpose is the same as that of the doctrines of res judicata and collateral estoppel).

17. U.S. CONST. amend. V.

18. The opinions in both *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch* suggest that the protections of the Double Jeopardy Clause are expanding. *See infra* Part II.C.3.

19. *See* Jeffers v. United States, 432 U.S. 137, 155 (1977) (finding that fines are treated the same way as prison sentences for purposes of double jeopardy).

20. *See* Breed v. Jones, 421 U.S. 519, 528 (1975) ("[W]e have held that the risk to which the [Double Jeopardy] Clause refers is not present in proceedings that are not 'essentially criminal.'") (citing Helvering v. Mitchell, 303 U.S. 391, 398 (1938)).

21. ANNUAL REVIEW OF CRIMINAL PROCEDURE 413 (Georgetown Law Journal eds., 32nd ed. 2003).

22. *See* Serfass v. United States, 420 U.S. 377, 391–92 (1975) (noting that the guarantees of the Fifth Amendment do not apply until jeopardy attaches).

23. *See* Crist v. Bretz, 437 U.S. 28, 29 (1978) ("[J]eopardy attaches in a jury trial when the jury is empaneled and sworn . . . ."); Downum v. United States, 372 U.S. 734, 737–38 (1963) (holding that jeopardy still had attached when a jury was sworn in, but then discharged).

24. *See Serfass*, 420 U.S. at 388 (citing cases that state when jeopardy attaches in bench trials). When a judge hears evidence at a pretrial hearing before a bench trial on a motion to dismiss and indictment, jeopardy does not attach, because the judge is hearing evidence for the purpose of deciding sufficiency, not for deciding guilt or innocence. United States v. Olson, 751 F.2d. 1126, 1128–29 (9th Cir. 1985).

25. *See Serfass*, 420 U.S. at 389–92 (stating that jeopardy had not attached since the defendant had not been put before the trier of fact).

mistrial,[26] or after a defendant successfully appeals a verdict and a new trial is granted.[27]

B. CIVIL FORFEITURE

Like double jeopardy, asset forfeiture has a long tradition going back to early English law.[28] While there were three kinds of forfeiture under English law,[29] only statutory forfeiture took hold in the United States.[30] Forfeiture statutes were first used to enforce customs and revenues laws.[31] They were primarily applied to ships carrying contraband and goods imported or exported in violation of the customs and revenue laws.[32] Lawmakers justified these forfeiture statutes by applying a legal fiction that the property was "guilty" and therefore liable for all crimes in which the property was involved.[33]

Today, civil forfeiture of assets can be accomplished through an in rem or an in personam proceeding.[34] In rem forfeiture is a proceeding against the property,[35] while an in personam proceeding is against a person.[36]

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26. *See* Richardson v. United States, 468 U.S. 317, 323 (1984) (stating that a retrial was not barred by double jeopardy since there was a proper declaration of a mistrial).

27. *See* Lockhart v. Nelson, 488 U.S. 33, 38 (1988) ("It has long been settled, however, that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal . . . .").

28. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 1–7 (Mark DeWolfe Howe ed., Back Bay Books 1916) (describing forfeiture in early England).

29. The first type of forfeiture was of inanimate objects that had caused the accidental death of one of the King's subjects. Initially, the Deodand, the value of the object, was used to pay for masses performed for the dead person, but it later became a source of revenue for the Crown. *See id.* at 6–35 (describing the English Deodand). The second type of English forfeiture was forfeiture of an estate and was imposed because of a conviction for treason or another felony. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–82 (1974) (noting the history of early forfeiture laws in England). While the first two types of forfeiture were based in the common law, the third was based in statute and dealt with objects (usually ships and their cargo) that were in violation of custom or revenue laws. *See* LAWRENCE A. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING 100, 106 (1973) (outlining forfeitures under in rem forfeiture statutes).

30. *See* Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 191–92 (1996) (discussing early forfeiture history in the United States).

31. *Id.*

32. *Id.*

33. *See id.* at 191 (discussing the legal fiction used in in rem proceedings).

34. *See* LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 22 (1996) (describing in personam and in rem forfeiture proceedings).

35. *Black's Law Dictionary* defines in rem as "against a thing." BLACK'S LAW DICTIONARY 353 (2d pocket ed. 2001). In rem forfeiture laws are aimed at property with "some defined connection to a crime." MILLER & WRIGHT, *supra* note 10, at 340. These laws apply to that property which the defendant used to commit a crime or has acquired as a result of that crime. *Id.*

Normally a civil forfeiture proceeding takes place separately from a criminal proceeding and can transpire before a criminal conviction, after a criminal conviction, or even in the absence of a criminal conviction or charges.[37]

"Forfeiture in American law has evolved from a tool to enforce custom and revenue law to a favored weapon in law enforcement's arsenal . . . ."[38] In the twentieth and twenty-first centuries, legislatures have amended statutes to increase the amount of property that can be forfeited and the crimes to which forfeiture applies.[39] The evolution of legislation in this area of law illustrates the trend of expanding civil forfeiture as an important device for law enforcement agencies.[40] Many federal and state forfeiture laws deal with illicit drugs, money laundering, racketeering, liquor, and gambling.[41] Recently, federal and state governments have expanded forfeiture laws to include things like drunk-driving offenses,[42] license revocations,[43] vehicles involved in livestock theft,[44] illegal fish and wildlife transporting,[45] and many more offenses. The government's ability to seize property is extensive, including the confiscation of a vehicle purchased with legal funds but driven to a meeting where drugs were discussed,[46] a residence purchased with legal funds that received a phone call regarding a drug sale,[47] and legally earned assets intended, but never actually given, in exchange for drugs.[48]

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36. *Black's Law Dictionary* defines in personam as "against a person." BLACK'S LAW DICTIONARY, *supra* note 35, at 352.

37. *See* MILLER & WRIGHT, *supra* note 10, at 354 (reviewing when forfeiture proceedings may take place and the concerns about two separate proceedings with regard to double jeopardy).

38. Klein, *supra* note 30, at 190.

39. *See infra* notes 40–48 and accompanying text (describing the expansion in the scope of civil forfeiture).

40. *See* MILLER & WRIGHT, *supra* note 10, at 343–44 (discussing the evolution of 21 U.S.C. § 881, a primary federal forfeiture statute, which amended the original 1970 version in 1978 and again in 1984, and in the end included real property, proceeds of drug sales, and all monies and securities associated with an illegal activity).

41. *Id.* at 340.

42. There are both license-revocation statutes, for example, CONN. GEN. STAT. ANN. § 14–227b (2003), and vehicle-forfeiture statutes, MINN. STAT. ANN. § 169A.63 (2000), that allow the state to file civilly against an offender.

43. This refers to licenses other than drivers' licenses.

44. ALA. CODE § 2-2-14 (1975).

45. 16 U.S.C. § 3374(a)(2) (2000).

46. *See* United States v. 1990 Toyota 4Runner, 9 F.3d 651, 653–54 (7th Cir. 1993) (allowing forfeiture of an automobile driven to a meeting to arrange a future drug transaction).

47. *See* United States v. 916 Douglas Ave., 903 F.2d 490, 494 (7th Cir. 1990) (finding a house and a criminal offense sufficiently connected because the claimant received a telephone call at home in which he negotiated a drug sale, even though the sale took place elsewhere).

48. *See* United States v. $84,000 U.S. Currency, 717 F.2d 1090, 1100–01 (7th Cir. 1983) (affirming a forfeiture based on claimants' signed statements that they had intended to purchase drugs with the seized currency).

The characteristics of civil forfeiture law, in large part, explain the increase in its application and scope. Asset forfeiture is accomplished through a civil, not criminal, proceeding brought by the state against a defendant.[49] Consequently, prosecutors can rely on a "more favorable standard of proof [(preponderance of the evidence)], extensive discovery, summary judgment and other advantages."[50] Additionally, in civil forfeiture proceedings most of the constitutional safeguards that apply in the criminal setting are not applicable (for example, the right to counsel, and the right to confrontation of witnesses).[51] The lack of safeguards combined with broader discovery rules give prosecutors an advantage that they do not have in the criminal setting, which in the end saves prosecutors both time and money.

Besides the prosecutorial advantages that come with civil forfeiture proceedings, there are also economic advantages for law enforcement. Once property is deemed forfeited, law enforcement agencies or the federal government may either sell or use the property, making it a profitable and attractive device for these governmental bodies.[52] The sale of forfeited property aids in compensating law enforcement agencies for the costs they incur in investigating and prosecuting crimes.[53] Another advantage of the forfeiture process is that the proceeds of sold property help to compensate victims. The process also protects the public from potentially dangerous

49. *See* MILLER & WRIGHT, *supra* note 10, at 338 (noting that asset forfeiture can also take place immediately following criminal convictions, essentially becoming part of the criminal sentencing, but also noting that such cases are rare).

50. *$84,000 U.S. Currency*, 717 F.2d at 338. In criminal proceedings, a prosecutor has the burden of proving each element of a crime beyond a reasonable doubt, however, in a civil proceeding a prosecutor need only prove probable cause to seize property for forfeiture. Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 61–62 (1993). Once the prosecutor has met his/her burden, the defendant must prove by a preponderance of the evidence that the property was not involved in illegal activity, or acquired by the proceeds of an illegal activity. *Id.* at 62. Discovery rules in civil proceedings also give prosecutors a distinct advantage, because they allow "wide-ranging requests for information that the government could not seek from a criminal defendant . . . ." *Id.* at 46.

51. Henning, *supra* note 50, at 45–46.

52. *See* MILLER & WRIGHT, *supra* note 10, at 338 ("Federal statutes and executive policies, along with most state statutes, assign forfeited property directly to the budgets of law enforcement agencies."). As an illustration of the amount of money that agencies receive from asset forfeiture, the Bureau of Justice Statistics reported that in 1999, for drug asset forfeitures alone, local law enforcement agencies collectively received $320 million worth of cash and property, and the sheriffs' offices received $137 million. BUREAU OF JUSTICE STATISTICS STATE AND LOCAL LAW ENFORCEMENT STATISTICS, *at* http://www.ojp.usdoj.gov.bjs/sandlle.htm#drg (last visited Jan. 7, 2005) (on file with the Iowa Law Review).

53. *See* MILLER & WRIGHT, *supra* note 10, at 338 (noting that, in addition to selling forfeited property, law enforcement agencies use forfeited vehicles and other equipment).

goods (e.g. contraband in drug cases) and it eliminates the possibility that property will be used in the future to perpetuate criminal activities.[54]

C. THE SUPREME COURT'S RESPONSE TO DOUBLE JEOPARDY AND CIVIL FORFEITURE

In applying the double jeopardy doctrine to the area of civil forfeiture, courts have analyzed the issue under the third type of protection: protection from multiple punishments. The courts must determine whether or not a civil forfeiture is a punishment, thus triggering the protections of the Double Jeopardy Clause. In 1989, the Supreme Court, for the first time, acknowledged that the Double Jeopardy Clause could apply to civil forfeitures.[55] Four subsequent Supreme Court cases have since shaped the role of double jeopardy in the context of forfeiture.[56] Beginning with *United States v. Halper*[57] in 1989 and ending with the Supreme Court's decision in *Hudson v. United States* in 1997,[58] the protection that the Double Jeopardy Clause provides from civil forfeiture has been brought into focus.

1. Pre-1989 Supreme Court Opinions

Before 1989, the Supreme Court took the stance that civil in rem forfeitures were not subject to the protections of the Fifth Amendment.[59] This opinion of the Court is illustrated in three cases: *Various Items of Personal Property v. United States*,[60] *One Lot Emerald Cut Stones v. United States*,[61] and *United States v. One Assortment of 89 Firearms*.[62]

In *Various Items of Personal Property*, owners of a distillery, warehouse, and denaturing plant objected on double jeopardy grounds to a forfeiture of their property since they had already been convicted of criminal charges arising from the same offense—defrauding the government of taxes on distilled liquor.[63] The Court held that double jeopardy protection does not apply in an in rem forfeiture proceeding since "[i]t is the property which is proceeded against, and, . . . held guilty . . . [therefore] the forfeiture is no

54. Klein, *supra* note 30, at 195.

55. United States v. Halper, 490 U.S. 435, 448 (1989).

56. *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch*, in 1993 and 1994 respectively, extended the *Halper* decision. *See infra* Part II.C.3 (discussing the extension of the *Halper* decision). In 1996, the Supreme Court narrowed the applicability of *Halper* in *United States v. Ursery*. *See infra* Part III.A.1 (discussing *Ursery* and its effect on *Halper*). Finally, in 1997, the Supreme Court abrogated *Halper* in its decision in *Hudson v. United States*. *See infra* Part III.A.2 (discussing the effects of *Hudson* on *Halper*).

57. 490 U.S. 435 (1989).

58. 522 U.S. 93 (1997).

59. *See* Henning, *supra* note 50, at 44 (stating that, prior to *Halper*, double jeopardy was not applied to civil forfeiture proceedings).

60. 282 U.S. 577 (1931).

61. 409 U.S. 232 (1972).

62. 465 U.S. 354 (1984).

63. *Various Items of Personal Property*, 282 U.S. at 578–79.

part of the punishment for the criminal offense."[64] This holding was later reaffirmed in *One Lot Emerald Cut Stones*, where the Court stated "[i]f for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments."[65]

Twelve years later, in *One Assortment of 89 Firearms*, the Court once again reiterated that in rem forfeitures were not prohibited when the defendant had been previously subjected to a criminal proceeding.[66] This time, however, the Court employed a two-part test (also known as the *Ward* test) to determine whether the forfeiture at issue was "criminal and punitive, or civil and remedial."[67] The first step in applying the test required the Court to determine the intent of Congress in enacting the given statute—specifically, whether based on the face of the statute, the sanction it provided was intended to be criminal or civil.[68] In the second step, the Court went on to determine "'whether the statutory scheme [is] so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism."[69] If the statute is found to be punitive under the second prong of the test, the sanction will be considered a criminal punishment and subject to double jeopardy protection.[70] Applying the *Ward* analysis to the case before the Court, the majority concluded that the defendant failed to establish that the sanction provided for in the statute was in effect punitive and a criminal penalty.[71]

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64. *Id.* at 581.

65. *One Lot Emerald Cut Stones*, 409 U.S. at 235. It should be noted that the Court, while affirming *Various Items of Personal Property*, did not cite it in its opinion.

66. *One Assortment of 89 Firearms*, 465 U.S. at 366. The defendant in *One Assortment of 89 Firearms* was challenging an in rem forfeiture of firearms under the Gun Control Act arguing that the Double Jeopardy Clause barred the proceeding due to his prior acquittal on criminal charges. *Id.* at 355–56.

67. *Id.* at 362. For the exact language of the test the Court pronounced in *United States v. Ward*, see *infra* note 108.

68. United States v. Ursery, 518 U.S. 267, 278 (1996) (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984)).

69. *One Assortment of 89 Firearms*, 465 U.S. at 365 (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)). In applying the second prong of the *Ward* test to the facts in *One Assortment of 89 Firearms*, the Court considered a list of factors that they had previously set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Id.* at 365–66 (stating that the *Mendoza-Martinez* opinion enumerated considerations to determine whether a statute is penal or regulatory). In particular, the Court looked at "whether or not the proscribed behavior is already a crime," which would indicate that the statute at issue imposes a criminal, not remedial, penalty. *Id.*

70. *Id.*

71. *Id.*

2. *United States v. Halper*: The Court's Recognition of Double Jeopardy Protections for Civil Forfeitures

The Court in *United States v. Halper*, for the first time, found merit in the argument that civil penalties could violate the Double Jeopardy Clause. The defendant in *Halper* was criminally convicted of filing sixty-five inflated Medicare claims, sentenced to two years in prison, and fined $5,000.[72] Following his criminal conviction, the Government brought a civil suit against Halper under the Civil False Claims Act, 31 U.S.C. §§ 3729–31.[73] The district court concluded that due to Halper's previous criminal punishment, the additional penalty of the remedial provisions of the Act[74] violated the Double Jeopardy Clause.[75]

On appeal, the Supreme Court focused on the multiple punishment aspect of double jeopardy. Justice Blackmun, writing for the majority, stated that a civil penalty "may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment."[76] Of particular concern to the Court was the fact that the statutory fine imposed on Halper was more than 220 times greater than the government's damages. Ultimately, the Court held that the civil penalty was a second punishment and that Halper was protected "from a sanction so disproportionate to the damages caused" by the Double Jeopardy Clause.[77]

3. Extending *Halper*: *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch*

The Supreme Court in *Austin v. United States*[78] analyzed which civil forfeitures constituted punishment in an Excessive Fines Clause[79] context.

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72. United States v. Halper, 490 U.S. 435, 437 (1989). Halper was found guilty of violating the criminal false-claims statute, 18 U.S.C. § 287 (2000). *Id.*

73. *Id.* at 438.

74. The remedial provisions of the False Claims Act provide that a person in violation is "liable to the United States Government for a civil penalty of $2,000" for each separate occurrence of a violation. 31 U.S.C. § 3729 (2000). Halper violated the statute sixty-five times, subjecting him to a statutory penalty of more than $130,000. *Halper*, 490 U.S. at 438.

75. *Halper*, 490 U.S. at 439. The Court stated that "a penalty becomes punishment when . . . it exceeds what 'could reasonably be regarded as the equivalent of compensation for the Government's loss.'" *Id.* (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

76. *Id.* at 442.

77. *Id.* at 450. The Court's *Halper* decision at first glance appears to be a radical departure from its prior cases concerning civil forfeiture. However, the distinguishing factor that may best explain the outcome of *Halper* is the fact that the prior case law pertained to *in rem* forfeiture while the sanction levied against Halper was an *in personam* forfeiture. The sanction mandated by the False Claims Act was a sanction against a person and not merely property; thus, the *Halper* Court may have been more open to the argument that such a civil forfeiture could violate the Fifth Amendment Double Jeopardy Clause.

78. 509 U.S. 602 (1993).

79. U.S. CONST. amend. VIII ("[E]xcessive fines [shall not be] imposed . . . .").

The defendant in *Austin* was convicted and sentenced to seven years in prison for a drug offense.[80] Following the criminal conviction, the government began forfeiture proceedings against the defendant's mobile home and auto body shop.[81]

The Supreme Court stated that the issue was "not . . . whether forfeiture under § 881(a)(4) and (a)(7) is civil or criminal, but whether it is punishment."[82] The majority, referring to its decision in *Halper*, rejected the Government's argument that the statute was remedial. Instead the Court took a broader approach than it applied in *Halper*, and concluded that forfeiture under the statutes constituted punishment and was therefore limited by the Excessive Fines Clause.[83]

In *Department of Revenue of Montana v. Kurth Ranch*,[84] the Supreme Court followed its *Halper* and *Austin* decisions when it found a drug tax to be in violation of the Fifth Amendment. The Court stated that taxes were just like civil forfeitures and subject to "constitutional restraints."[85] The Court found the drug tax to be punitive,[86] concluding that, in order to avoid violating the Double Jeopardy Clause, such a punishment "must be imposed during the first prosecution or not at all."[87]

III. CONTRACTION OF FIFTH AMENDMENT PROTECTION AND THE FUTURE OF CIVIL FORFEITURE

A. *CONTRACTION OF FIFTH AMENDMENT PROTECTION*

After *Halper*, *Austin* and *Kurth Ranch* the scope of protection offered under the Double Jeopardy Clause had expanded to include civil forfeiture

80. *Austin*, 509 U.S. at 604.

81. The proceedings were instituted by the government pursuant to 21 U.S.C. § 881(a)(4) (2000) (forfeiture of "[a]ll conveyances . . . which are used, or are intended for use to transport, . . . or facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances]"), and 21 U.S.C. § 881(a)(7) (forfeiture of "[a]ll real property . . . which is used, or intended to be used, . . . to commit, or [] facilitate the commission of [a sale of a controlled substance] punishable by more than one year's imprisonment").

82. *Austin*, 509 U.S. at 610.

83. *Id.* at 622. "[T]he Austin Court appeared to replace *Halper*'s case-specific approach with a broader, 'categorical' approach for determining the punitive aspects of civil forfeiture statutes." Andrew Vines, United States v. Ursery*: The Supreme Court Refuses to Extend Double Jeopardy Protection to Civil In Rem Forfeiture*, 50 ARK. L. REV. 797, 817–18 (1998).

84. 511 U.S. 767 (1994).

85. *Id.* at 778. "Criminal fines, civil penalties, civil forfeitures, and taxes all . . . generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional restraints." *Id.*

86. The majority followed the reasoning in *Halper* that it is the actual character of the sanctions, and not the label given a sanction that determines whether a statute is punitive in nature. *Id.* at 779–80.

87. *Id.* at 784.

proceedings.[88] Two years after handing down the *Kurth Ranch* decision, however, the Supreme Court would begin to contract the protection offered to individuals in civil forfeiture proceedings under the Fifth Amendment in *United States v. Ursery*. What followed after that was an almost complete elimination of double jeopardy protection in the civil forfeiture context.

1. *United States v. Ursery*: Civil In Rem Forfeitures Do Not Violate the Double Jeopardy Clause

The Supreme Court's *Ursery* decision came as a result of two separate cases: *United States v. $405,089.23 in U.S. Currency*,[89] arising out of the Ninth Circuit, and *United States v. Ursery*,[90] arising out of the Sixth Circuit. In *United States v. $405,089.23 in U.S. Currency*, the Ninth Circuit found that a civil forfeiture action brought by the Government was barred because the civil forfeiture constituted punishment.[91] Likewise, in *United States v. Ursery*, the Sixth Circuit found that a civil forfeiture constituted a punishment for purposes of the Double Jeopardy Clause and a subsequent criminal proceeding was therefore barred.[92]

The Supreme Court granted the Government's petition for a writ of certiorari and joined the two cases for decision. The majority in *United States v. Ursery*[93] held that the civil in rem forfeitures of 21 U.S.C. § 881 and 18 U.S.C. § 981 were not "punishment" for purposes of the Double Jeopardy Clause.[94] In so holding, the Court applied the two-part *Ward* test from *One Assortment of 89 Firearms* to determine whether a forfeiture is "punishment" for double jeopardy purposes. First, the reviewing court should look to the legislature's purpose and whether it intended for the forfeiture to be a punishment as opposed to a remedy.[95] Second, if the legislature intended the forfeiture to serve as a remedy, the court should next ask whether the legislature's intent to establish a civil remedial mechanism is negated because the statutory scheme is so punitive either in purpose or effect.[96]

The Supreme Court distinguished *Halper*, *Austin*, and *Kurth Ranch* from the case at bar by framing those cases as dealing with civil penalties, not forfeitures.[97] The *Ursery* decision, while leaving *Halper*, *Austin*, and *Kurth*

88. *See supra* Parts II.C.2–II.C.3 (discussing *Halper*, *Austin*, and *Kurth Ranch* and the effect they had on double jeopardy and civil forfeiture).

89. 33 F.3d 1210 (9th Cir. 1994).

90. 59 F.3d 568 (6th Cir. 1995).

91. *$405,089.23 U.S. Currency*, 33 F.3d at 1216–22.

92. *Ursery*, 59 F.3d at 573.

93. 518 U.S. 267 (1996).

94. *Id.* at 292–94.

95. *Id.* at 277–78 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984)). For a summary of the exact language of the Court's *Ward* test, see *infra* note 108.

96. *Ursery*, 518 U.S. at 278 (citing *One Assortment of 89 Firearms*, 465 U.S. at 366).

97. The actual difference between civil penalties and forfeitures is hard to discern, but the Court used this as its basis for announcing the rule in *Ursery* without disturbing its previous

Ranch intact, reaffirmed the Court's holding in *Various Items of Personal Property* and determined that in rem civil forfeitures do not violate the Fifth Amendment because they do not constitute punishment for purposes of the Double Jeopardy Clause.[98]

2. *Hudson v. United States*: Abrogating *Halper*

Even though the *Ursery* Court had effectively eliminated any double jeopardy claim with regards to civil in rem forfeiture proceedings, *Halper* still allowed double jeopardy claims to be brought for civil in personam forfeiture.[99] However, eight years after the *Halper* decision was handed down, the Supreme Court once again looked at double jeopardy and civil in personam forfeiture. The Court overruled *Halper* in *Hudson v. United States*.[100]

In *Hudson*, three bank officials from Oklahoma were sanctioned with monetary penalties and occupational debarment for violating several federal banking statutes and regulations.[101] Later, the officials, indicted on criminal charges arising from the same incident, moved to dismiss the charges based on the Double Jeopardy Clause.[102] Their claim was that the previous civil forfeiture proceeding constituted punishment for purposes of double jeopardy and the subsequent criminal proceeding was therefore barred.[103]

The issue before the Supreme Court in *Hudson* was "[w]hether the imposition upon [Hudson] of monetary fines as in personam money penalties . . . together with other sanctions, is 'punishment' for purposes of the Double Jeopardy Clause."[104] Chief Justice Rehnquist, writing for the majority, did not follow *Halper* in inquiring whether civil fines were grossly disproportional to the actual damages proven. Instead, he criticized the *Halper* opinion for "appl[ying] the Double Jeopardy Clause to a sanction

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decisions. The Court limited *Halper* to "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." *Id.* at 279 (quoting United States v. Halper, 490 U.S. 435, 436 (1989)). The Court said that *Austin* considered "whether a civil forfeiture could violate the Excessive Fines Clause of the Eight Amendment." *Id.* at 281 (citing Austin v. United States, 509 U.S. 602, 606–11 (1993)). And *Kurth Ranch* dealt with "whether a state tax imposed . . . was invalid under the Double Jeopardy Clause." *Id.* (citing Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 780–83 (1994)).

98. *See* MILLER & WRIGHT, *supra* note 10, at 354 (stating that the Supreme Court decided in *Ursery* that "in rem forfeiture proceedings . . . do not constitute 'punishment'" and therefore are not a violation of the Double Jeopardy Clause (citing *Ursery*, 518 U.S. at 267)).

99. *Id.* at 354–55.

100. 522 U.S. 93 (1997).

101. *Id.* at 96. Hudson violated 12 U.S.C. §§ 84(a)(1) and 375b when he caused two banks, at which he was an official, to make certain loans such that Hudson received the loans' benefits. *Id.*

102. *Id.* at 97–98.

103. *Cf. id.* at 98 (explaining petitioners' argument and why it was rejected by the Court of Appeals).

104. Brief for Petitioners at i, Hudson v. United States, 522 U.S. 93 (1997) (No. 96-976).

without first determining that it was criminal in nature" by analyzing the statute on its face.[105] The Court found that the *Halper* Court, in its analysis, had deviated from the traditional jeopardy doctrine in two key respects. First, the question of "whether the successive punishment at issue is a 'criminal' punishment" was never addressed in *Halper*.[106] Second, the Court in *Halper* assessed "the character of the actual sanctions imposed" instead of "evaluating the 'statute on its face' to determine whether it provided for what amounted to criminal sanction."[107]

In evaluating the statutes and forfeiture at issue, the *Hudson* Court applied the *Ward* test and analyzed the statutes on their face.[108] The majority held that the Double Jeopardy Clause of the Fifth Amendment did not bar the criminal suit against the bank officials because Congress intended the earlier imposition of fines and occupational debarment to be civil in nature.[109] Additionally, the Court found that there was inadequate evidence to support a finding that the sanctions levied against Hudson were so punitive as to render them criminal and subject to the Double Jeopardy Clause.[110]

B. CRITICIZING THE HUDSON *DECISION*

Following the *Hudson* decision, the application of Fifth Amendment double jeopardy protection in the civil forfeiture context was: (1) in rem forfeiture is not "punishment" and therefore does not violate the Double Jeopardy Clause;[111] and (2) in personam forfeiture proceedings violate the Double Jeopardy Clause only if a petitioner can show that a forfeiture statute is criminal on its face, or that the forfeiture is so punitive so as to rise to the

105. MILLER & WRIGHT, *supra* note 10, at 356. "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." *Hudson*, 522 U.S. at 99. The majority went on to support the *Ward* test as applied in *One Assortment of 89 Firearms*. *Id.* at 99 (citing Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

106. Hudson v. United States, 522 U.S. 93, 101 (1997). The *Hudson* Court criticized *Halper*, because the Court focused solely on the proportionality of the sanction compared to the harm and failed to take into consideration any other factors. *Id.*

107. *Id.* (quoting *Halper*, 490 U.S. at 447). The *Hudson* Court stated that a statute should be analyzed "'on its face' to determine whether it provided for what amounted to a criminal sanction." *Id.* (citing Kennedy v. Mendoza-Martínez, 372 U.S. 144, 169 (1963)).

108. *Id.* at 93–94. The *Ward* test, also used in *One Assortment of 89 Firearms*, requires first, whether the sanction was intended to be criminal or civil based upon the face of the statute; and second, whether the sanction, either in purpose or effect, is so punitive so as to rise to the level of a criminal punishment. United States v. Ward, 448 U.S. 242, 248 (1980).

109. *Hudson*, 522 U.S. at 99.

110. *Id.* at 104.

111. *See* United States v. Ursery, 518 U.S. 267, 274–75 (1996) (stating that civil in rem forfeitures do not constitute "punishment" for double jeopardy purposes). "Since the *Ursery* decision, virtually all state courts have decided that civil in rem forfeiture proceedings categorically do not qualify as 'punishment' under the double jeopardy provisions of state constitutions." MILLER & WRIGHT, *supra* note 10, at 355.

level of punishment.[112] The Supreme Court's *Hudson* opinion is not without its critics. Three of the main criticisms of the *Hudson* decision are: (1) the majority disregarded precedent in quickly disavowing the *Halper* decision; (2) the majority failed to use the most applicable Constitutional test, the *Blockburger* test, in deciding *Hudson*; and (3) the majority opinion set the bar too high for future claimants.[113] This Note focuses on the problems that the *Hudson* decision created with respect to civil forfeiture, and so it will only discuss the criticisms regarding the third critique mentioned above.[114]

Critics of the *Hudson* decision, including four of the nine Justices on the Court at the time, fear that it will give governmental agencies free reign in the civil forfeiture arena.[115] Their major critique of the majority opinion is that it set the standard for double jeopardy protections so high that it is virtually unattainable. The *Hudson* majority pointed out that a claimant in a civil forfeiture proceeding would only receive protection from the Double Jeopardy Clause if he could show with the "clearest proof" that either (1) the legislature intended the sanction to be punitive; or (2) the statute in effect is punitive.[116] Setting the standard for protection at "clearest proof" and

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112. *See* Hudson v. United States, 522 U.S. 93, 98–100 (1997) (applying the *Ward* test and concluding that the OCC money penalties and debarment sanctions were not criminal and therefore not in violation of the Double Jeopardy Clause).

113. In addition to these three criticisms, the majority opinion has also been criticized based on issues with Chief Justice Rehnquist, who wrote the majority opinion in *Hudson*. *See* Troy D. Cahill, Note, *The Supreme Court's Decision in* Hudson v. United States*: One Step Up and Two Steps Back for Multiple Punishment Protection Under the Double Jeopardy Clause*, 33 WAKE FOREST L. REV. 439, 457–62 (1998) (criticizing Chief Justice Rehnquist's opinion based on "[g]overnmental authority vs. [i]ndividual rights," Rehnquist's disregard for precedent, and his double standard in dissenting due to the avoidance of precedent in a 1984 opinion, while implementing that same tactic in *Hudson*).

114. Although this Note only focuses on the third critique of *Hudson*, it is important to briefly summarize the two other major criticisms of the *Hudson*'s majority opinion. The first critique of *Hudson* pertains to the Court's disregard for the idea of stare decisis and the *Halper* decision's precedental value. *Hudson*, 522 U.S. at 108–09 (Stevens, J., concurring). This criticism was pointed out by Justice Stevens in his concurrence to the *Hudson* opinion. *Id.*

The second critique of *Hudson* pertains to the majority's failure to dispose of the issue in *Hudson* by applying the *Blockburger* test. *Id.* at 107. Simply put, the *Blockburger* test provides that there is no double jeopardy violation if two offenses each require "proof of an additional [element] which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Justices Stevens and Souter both voiced their objections to the majority's failure to use *Blockburger*, which would have meant that there was no reason for the majority to reassess the *Halper* holding. *Hudson*, 522 U.S. at 107, 112–14 (Stevens and Souter, JJ., concurring).

115. For articles criticizing the *Hudson* decision, see Lisa Melenyzer, *Double Jeopardy Protection from Civil Sanctions After* Hudson v. United States, 89 J. CRIM. L. & CRIMINOLOGY 1007, 1037–41 (1999) (criticizing *Hudson*), and Cahill, *supra* note 113, at 456–64 (same).

116. *See Hudson*, 522 U.S. at 100–04 ("[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.") (internal quotation marks and citation omitted). "Turning to the second stage of the . . . test, we find that there is little evidence, much less the clearest proof that we require . . . ." *Id.* at 104.

combining that with the majority's attitude in favor of eliminating double jeopardy for civil forfeiture means that it will be very rare that a claimant will be protected.[117]

While the focus of Justice Breyer's concurrence in *Hudson* was on the problems with a "clearest proof" requirement, both Justices Stevens[118] and Souter[119] also voiced concern for such a requirement in their respective concurrences. Justice Breyer gave two reasons for his disagreement with the majority's reasoning: (1) he disagreed with the standard of proof that the majority would require, "clearest proof"; and (2) he disagreed with the majority's stance that a court should evaluate statutes only on their face.[120] As to his first objection, Justice Breyer stated that the standard of proof required by the majority was not consistent with past Court practice and that the requirement of "clearest proof" was misleading, which could easily lead to an improper application in the lower courts.[121] With regard to Justice Breyer's second objection, he was concerned that although a sanction may appear "on its face" to be civil in nature, in special circumstances it could constitute criminal punishment.[122]

IV. CIVIL FORFEITURE POST-*HUDSON*

The concerns expressed by the concurring justices in *Hudson* that double jeopardy protection from civil forfeiture would rarely be recognized by a lower court were well-founded. The virtually unattainable threshold for double jeopardy protection set by *Hudson*[123] means that the Fifth

117. The two problems with *Hudson*'s analysis of a statute are that (1) it looks at whether the statute was intended to be civil even though a statute could be "intended" to be civil but in reality be punitive; and (2) it requires the "clearest proof," which is such a high standard that the majority of claimants will be unable to meet it.

118. *See* Melenyzer, *supra* note 115, at 1034 ("The chief danger, for Justice Stevens, was that the government and lower courts would be 'unduly influenced by the Court's new attitude [in favor of eliminating double jeopardy protection for parallel civil and criminal prosecutions].'").

119. Justice Souter would change the *Hudson* Court's analysis of a civil statute in two ways: (1) "require [the] use of the 'clearest proof' standard of evidence . . . be dependent on context and a function of the strength of the countervailing indications of the civil nature of the sanction"; and (2) "the 'clearest proof' requirement should not be as infrequently achieved in the future as it had been in the past." *Id.* at 1035 (citing Hudson v. United States, 522 U.S. 93, 112–14 (1997)) (Souter, J., concurring).

120. *See Hudson*, 522 U.S. at 115–16 (Breyer, J., concurring) (outlining Justice Breyer's problems with the majority opinion).

121. *See id.* at 115–16 (Breyer, J., concurring) (stating that in *Kurth Ranch* the Court never used the "clearest proof" language, and that this language is "misleading").

122. *Id.* ("It seems to me quite possible that a statute that provides for a punishment that normally is civil in nature could nonetheless amount to a criminal punishment as applied in special circumstances."); Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994). Justice Breyer, as an example of his contention, cited the special circumstances in *Halper* as an instance in which a civil statute in its application imposed a criminal punishment. *Id.*

123. The threshold for double jeopardy protection set by *Hudson* is unattainable for three reasons: (1) the "clearest proof" is a heightened standard of proof; (2) *Hudson* requires that the

Amendment offers negligible protection to individuals from additional penalties that may be assessed in civil forfeiture proceedings. In light of the increasing application of civil forfeiture, individuals are left vulnerable to governmental forfeiture proceedings with no effective recourse to protect their interests and property.

It is the benefits of civil asset forfeiture that will cause it to be increasingly relied upon by the government in the future. Besides an enormous array of civil sanctions, regulatory agencies' discretion to pursue such sanctions, either with or without criminal proceedings, has been increasing.[124] The reason for such increases in the use of civil forfeiture is the many benefits it offers government agencies and prosecutors. Civil forfeiture saves the government time and money due to the lower burden of proof[125] and the lack of constitutional protections[126] in such proceedings. Also, on appeal, federal courts are very deferential in reviewing administrative agency decisions as far as sanctions are concerned.[127] Furthermore, forfeiture is a very effective weapon in curbing crime since it has an economic impact on such criminal activities as illegal drug sales and money laundering.[128] And probably most importantly, law enforcement agencies benefit monetarily from the forfeiture of property.[129]

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court look at the face of the statute and not its effects; and (3) the attitude of the *Hudson* majority has resulted in a tendency of lower courts to label legislation "civil." *See* Melenyzer, *supra* note 115, at 1037–40 (discussing the effect *Hudson* had on double jeopardy protection).

124. *See* Debra Marie Ingraham, *Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject* Healy*?*, 54 WASH. & LEE L. REV. 1183, 1188 (1997) (discussing the use of civil money sanctions by agencies); Melenyzer, *supra* note 115, at 1044 (discussing the SEC's increase in use of seeking civil sanctions).

125. The burden of proof in the civil context is "preponderance of the evidence," and not the "proof beyond a reasonable doubt" that is required in criminal cases. *See supra* note 50 and accompanying text (discussing the burden of proof in the civil and criminal contexts).

126. *See supra* note 51 and accompanying text (discussing some of the constitutional protections that do not extend to civil cases).

127. Melenyzer, *supra* note 115, at 1043–44 ("[A]n agency's choice of sanction will not be overturned by a court of appeals unless the court finds the decision to be 'unwarranted in law or . . . without justification in fact.'").

128. *See* Cahill, *supra* note 113, at 443–45 (discussing the effectiveness of civil remedies since they can impact and end criminal enterprises by attacking their profitability); Vines, *supra* note 83, at 806–07 ("[P]rosecutors . . . favor forfeiture because its overall effect is superior to traditional criminal sanctions such as fines and imprisonment"). Incarceration is an ineffective deterrent in many cases, because it does not affect the economic aspect of lucrative crimes like drugs and money laundering. *Id.* And while fines are aimed at the economic aspect of such crimes, they are ineffective mostly because they cannot be enforced. *Id.*

129. *See* Laura Ayo & Scott Barker, *Cashing in on Forfeiture Laws; Law Enforcement Taking Advantage of State's Seizure Rules*, THE KNOXVILLE NEWS-SENTINEL, Oct. 3, 2004, at A16 (noting that in Knox County, Tennessee alone, law enforcement agencies used civil forfeiture laws to confiscate $1.1 million, and statewide, agencies seize "more than 6,000 vehicles and more than $9 million from people every year"); David Pittman, *Civil Asset Forfeiture Called Assault on Private Property Rights*, THE TUCSON CITIZEN, Jan. 4, 2005, at 1D (quoting the Goldwater Institute's study as arguing that "law enforcement agencies are encouraged to confiscate property because they

With such widespread use of civil forfeiture by the government, it is important to protect individuals from extensive civil sanctions. However, the *Hudson* majority's opinion has resulted in the federal courts giving deference to the legislature and a less rigorous review of civil sanctions.[130] Post-*Hudson*, there is virtually no restraint on the government's ability to bring a civil forfeiture proceeding.[131] In such proceedings, the government is taking an individual's assets and infringing on their individual liberties. The Supreme Court, by refusing to decide whether a statute could be punitive as applied and requiring a "clearest proof" standard, has effectively failed to offer any protection to persons' individual liberties and property interests from a second punishment in the form of civil forfeiture.

By refusing to recognize some type of double jeopardy protection in cases involving civil asset forfeiture the *Hudson* Court failed to appreciate the purpose of the Double Jeopardy Clause—to protect the individual from the government imposing multiple punishments.[132] Included in this purpose is the idea of fairness—that the punishment imposed on an individual has some relation to the offense.[133] In announcing an almost impossibly high threshold that defendants must meet to receive double jeopardy protection, the *Hudson* Court is allowing the extensive use of forfeiture laws to go virtually unchecked, thereby circumventing the Framers' intent in creating the Double Jeopardy Clause.

V. AMENDING THE FEDERAL SENTENCING GUIDELINES AS A POSSIBLE SOLUTION

Given the unattainable threshold the Supreme Court set in *Hudson* and the increase in potential applications of civil forfeiture proceedings, Congress should create some protection for individuals. To fill the constitutional gap in protection that has been created by the *Hudson* decision, this Note proposes that the legislature amend the Federal Sentencing Guidelines (Guidelines) so that courts will take civil sanctions into consideration in the criminal punishments of individuals. In order to understand how amending the Guidelines would work, a brief overview of the Guidelines and how they operate is necessary.

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get to keep the proceeds"); David L. Teibel, *Police Here Oppose Proposal to Repeal Forfeiture Laws*, THE TUCSON CITIZEN, Jan. 6, 2005, at 7A ("[A]gencies too often see the seizures merely as a way to supplement their budgets, sometimes at the expense of fair and impartial justice.").

130. *See* Melenyzer, *supra* note 115, at 1042–44 (discussing the potential for abuse of civil sanctions by administrative agencies).

131. It is only in the rarest of circumstances that double jeopardy will attach to civil sanction. *See* Cahill, *supra* note 113, at 464 (concluding that since the *Hudson* Court failed to take into consideration the character of the actual sanction imposed in its analysis, double jeopardy will rarely if ever be found to apply).

132. *See supra* notes 13–16 and accompanying text (discussing the purpose and concepts underlying double jeopardy).

133. *Id.*

A. OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES

In an effort to reform the federal sentencing process, Congress sought to create a structure that was more predictable, less discretionary, and would ultimately achieve fairness in sentencing.[134] The result was the enactment of The Sentencing Reform Act of 1984 (SRA).[135] The SRA itself does not set forth the Guidelines, rather it created the United States Sentencing Commission (Commission) and directed the Commission to develop and establish sentencing policies.[136] The Commission created a new federal sentencing system—the Federal Sentencing Guidelines—which were approved by Congress and became effective on November 1, 1987.[137]

In determining a defendant's sentence, the Guidelines are based on a two-axis grid called the Sentencing Table.

134. U.S. SENTENCING GUIDELINES MANUAL 2–3 (2002) (setting forth the policy statement of the Guidelines). The Commission lists three primary objectives in its Policy Statement for how it will accomplish its goal of a fair sentencing system: (1) "honesty in sentencing," meaning that a defendant will now be required to serve nearly all of the sentence the court hands down; (2) "uniformity in sentencing" by reducing the disparity in sentences imposed for similar offenses; and (3) "proportionality in sentencing" depending on the severity of the criminal conduct. *Id.*; *see also* Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–92 (discussing the history and purpose of the Guidelines).

135. Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C.).

136. *See* 28 U.S.C. § 991(b)(1) (2000) (outlining the establishment and purposes of the Sentencing Commission).

137. Bowman, *supra* note 134, at 691.

SENTENCING TABLE[138]
(IN MONTHS OF IMPRISONMENT)

OFFENSE LEVEL	CRIMINAL HISTORY CATEGORY (CRIMINAL HISTORY POINTS)					
	I (1 or 2)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or More)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	0–6	2–8	4–10	8–14	12–18	15–21
8	0–6	4–10	6–12	10–16	15–21	18–24
...	...	...	...	...	...	...
42	360–life	360–life	360–life	360–life	360–life	360–life
43	Life	Life	Life	Life	Life	Life

On one axis is a defendant's offender level (or criminal history points),[139] and on the other axis is the defendant's offense level.[140] The offender level is calculated by beginning with a criminal history of zero and then adding points as provided in the Guidelines for past sentences he has received.[141]

The offense level of a defendant is computed by first determining the guideline that best fits the offense (e.g. first degree murder, involuntary manslaughter, aggravated assault, etc.).[142] The guideline will provide a base offense level which ranges from one to forty-three points depending on severity of the offense.[143] This initial number of points is then adjusted up or down based on aggravating or mitigating circumstances.[144]

138. U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A, tbl. (2003).

139. The offender level is based on a defendant's criminal history. *Id.*

140. *Id.* at ch. 2, introductory cmt. The defendant's offense level is based on the offense level for the crime of conviction plus any adjustments based on the facts of the crime itself (for example, if a weapon was used or the quantity of drugs involved). *Id.* at ch. 5, pt. A, tbl.

141. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2002) (setting forth the items for which a defendant may be given criminal history points). For example, a defendant will have three points added for *each* prior sentence that he has received. *Id.* (emphasis added).

142. NICHOLAS N. KITTRIE ET AL., SENTENCING, SANCTIONS, AND CORRECTIONS 260 (2d ed. 2002).

143. *Id.* A score of one represents the least serious offense, while a score of forty-three represents the most serious offense a defendant could commit. *Id.*

144. *Id.* For example, the base offense level for aggravated assault is fifteen. However, this offense level can be increased if a firearm was discharged (five points) or the offense violated a court protection order (two points), etc. THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 201–02 (2004).

Once the offender level (criminal history points) and offense level are determined, then the Sentencing Table is used to find the term of imprisonment for the defendant. The intersection of the offender and offense levels in the table yields a range of prison terms (in months) within which a defendant's sentence must fall.[145] A judge, based on the range of months in the table, then sentences a defendant accordingly.[146]

B. AMENDING THE GUIDELINES

This Note recommends that the legislature take an active role in remedying the lack of protection from disproportionate punishments (criminal and asset forfeiture) that the Supreme Court created with its *Hudson* decision by amending the Federal Sentencing Guidelines.[147] How the legislature would amend the Guidelines will be briefly discussed. Then, this Note will offer an example of a possible amendment that could be made to the Guidelines.

It is the Sentencing Commission's duty to periodically "review and revise" the Guidelines, and it must report to Congress any amendments or modifications to the Guidelines.[148] Then, the Sentencing Commission's recommendations go to Congress for approval.[149] Either the legislature or the Commission could propose an amendment to the Guidelines, to be then approved by Congress, that would affect an individual's sentencing in a criminal proceeding when a civil forfeiture proceeding has also occurred.

The amendment to the Guidelines that this Note proposes would affect the offense level of a defendant's sentencing. Such an amendment would allow for a reduction in the offense level of a defendant depending on the amount of property that was seized in the forfeiture proceeding.[150] Thus, a

145. U.S. SENTENCING GUIDELINES MANUAL § 5A tbl. (2003).

146. A judge may, however, depart from the range of prison terms applicable to a particular defendant if he or she finds aggravating or mitigating factors, but the court must state specific reasons for its departure. 18 U.S.C. § 3553(c) (2000).

147. As an alternative to amending the Federal Sentencing Guidelines, it should be noted that amendments could take place on the state level, with state legislatures proposing amendments to their respective state sentencing guidelines. However, this would not be as effective as amending the Federal Sentencing Guidelines for two reasons. First, leaving it up to the states to amend their respective sentencing guidelines would be a lengthy process and would result in piecemeal reform. Second, amending the Federal Guidelines would produce a single, uniform amendment, which would most likely not be achieved if each individual state was left to fashion its own amendment.

148. 28 U.S.C. § 994(o), (p) (2002). In reviewing the Guidelines to make changes, the Commission can consult with authorities on the Federal criminal justice system, and individual and institutional representatives of the system. *Id.* § 994(o).

149. *Id.* § 994(r).

150. There are basically two types of forfeiture property: (1) ill-gotten proceeds; and (2) legally purchased property that was used in the commission of a crime. *See* Sandra Guerra *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 816, 841 (1994) (noting that "contraband, drug proceeds, and genuine 'instrumentalities' such as

defendant's civil forfeiture sanction would become a mitigating factor in his/her criminal sentencing.

The proposed amendment could look something like the following table:

PROPOSED SENTENCING TABLE[151]	
Amount of Property Seized	Reduction in Offense Level
$50,000–$99,999.99	1 Point
$100,000–$199,999.99	2 Points
$200,000 and above	3 Points

To illustrate the effect the proposed amendment would have on a particular individual, consider a first time offender who has been found guilty of a crime with a base offense level of 18 points. According to the Sentencing Table in the Guidelines the defendant's sentence would be 27–33 months. Under the proposed amendment, if the government had also seized $150,000 in property from the defendant, the seizure would result in a two point reduction in his offense level (from 18 to 16). Hence, the defendant's sentence would now drop to 21–27 months.

C. *PROBLEMS AND SOLUTIONS WITH AMENDING THE GUIDELINES*

Amending the Guidelines will provide protection to offenders from two harsh punishments (the civil forfeiture and the criminal punishment), while still preserving forfeiture as a tool for law enforcement to use. However, this solution to the double jeopardy dilemma post-*Hudson* is not without its own potential problems that could arise in implementing an amendment. The biggest hurdle in amending the Guidelines would be actually getting such an amendment created and approved by Congress. First, since the civil forfeiture would be treated as a mitigating factor that would affect the criminal sentence, the amendment may appear to be soft on criminals.[152] Moreover, Congress may be hesitant to suggest amending the Guidelines

weapons or drug equipment should be civilly forfeitable" but outside these categories, the government is on shaky ground in trying to dispossess persons of their property). It should be highlighted that the only assets to be taken into consideration for purposes of reducing a defendant's offense level are the latter type of forfeitures, and not the former.

151. The numbers used in the chart are to serve merely as a demonstration of how an amendment would work, and are not values that this Note is proposing for an actual amendment itself. Rather, the amounts of forfeited property and points reduced should be set by the Commission after consulting with other authorities and the legislature.

152. *See* Molly Ivin, *U.S. Citizens Are Victims of Those Fighting 'War on Drugs,'* ST. LOUIS POST-DISPATCH, Aug. 24, 1998, at B7 ("Envision the ads in re-election campaigns: 'My opponent sided with the drug dealers and against the police officers of our fair state.'").

because it would ultimately have an impact on funding to law enforcement agencies.[153]

While both of these concerns appear valid at first, an amendment to the Guidelines is neither soft on crime, nor would it affect the funding that law enforcement agencies currently receive from forfeiture proceedings. The total sentence—civil and criminal taken together—that a defendant would receive for his offense under the proposed amendment is proportional to the actual crime committed. Just because an offender is serving less jail time does not mean that the overall punishment is any less. Thus, an amendment cannot be seen as being easy on criminals.

Additionally, having civil forfeiture become a mitigating factor in the criminal sentencing would actually be *more* economically beneficial to the criminal justice system. Law enforcement agencies may still pursue civil forfeiture as a means to deter crime and fund their efforts to fight crime. Plus, lowering a defendant's criminal sentence a few months, by virtue of an amendment to the Guidelines, means that the government has a shorter period of time that they must incarcerate the criminal. This ultimately would save the government money for those months that the defendant's sentence was reduced.[154]

Another potential problem with amending the Guidelines is a logistical one. Because the civil forfeiture would be a mitigating factor in the criminal sentencing, the forfeiture proceeding would always have to occur before the criminal proceeding. When the forfeiture proceeding does not occur first, this problem can be solved in one of two ways. First, the judge could allow for a downward reduction in a defendant's criminal sentence if a civil

153. *See Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing on H.R. 1658 Before the Criminal Justice Oversight Subcomm.*, 106th Cong. 1, (1999) (statement of Gilbert Gallegos, National President of the Fraternal Order of Police) ("[Forfeiture] provides State and local police agencies with much needed resources which are used to provide equipment for officer safety and to supplement the funds available to fight crime."); *see also supra* note 52 and accompanying text (discussing how law enforcement agencies benefit financially from forfeited property).

154. In its most recent report, the U.S. Department of Justice found that state prison operations used approximately 77% of states' allotted correctional costs for 2001. U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf (last visited Jan. 17, 2005) (on file with the Iowa Law Review). In addition, for 2001 alone, states spent $29.5 billion for prisons (a $5.5 billion increase since 1996). *Id.* In decreasing an offender's criminal sentence, the proposed amendment would help lower some of these correctional costs, even if just in a small amount for each offender.

Besides the financial strain that prisons put on states and the federal government, overcrowding of correctional facilities is also a big problem. In its 2000 census of federal and state correctional facilities, the U.S. Bureau of Justice Statistics reported that 134% of federal and 101% of state prisons were occupied. U.S. DEPARTMENT OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/csfcf00.pdf (last visited Jan. 17, 2005) (on file with the Iowa Law Review). The reduction in a defendant's prison term that would result from a prior civil forfeiture would also help with these problems of overcrowding.

forfeiture proceeding is later brought against him. Alternatively, the government could offer the defendant the opportunity to turn over property before the criminal adjudication and without a forfeiture proceeding in exchange for a mitigation of his criminal sentence.[155]

A third problem that could surface after amending the Guidelines would be a disparity in sentencing. Since the proposed amendment would only take into consideration the forfeiture of legally purchased property as a mitigating factor in sentencing, rich defendants would potentially receive lighter sentences than poor defendants.[156] Taken to the extreme, it would appear that a wealthy offender could avoid serving any type of criminal sentence if they forfeited enough property to reduce their offense level to zero. However, under the Federal Sentencing Guidelines, this could never occur. In Chapter 2 of the Guidelines, both reductions and enhancements to offense levels are capped.[157] Therefore, under the proposed amendment, the number of points that a defendant's offense level would be reduced by a forfeiture of property would be limited and the defendant would still have to serve a criminal sentence of some length.

Furthermore, there is not an actual disparity in sentencing when wealthy defendants receive a shorter criminal sentence than poorer defendants who did not have any property forfeited because it is the total punishment (civil and criminal) that needs to be taken into account. What wealthy defendants avoid in the way of a criminal sentence they make up for in the form of property forfeited.[158] There are no inequity problems in this sentencing when all defendants, rich and poor, receive the same amount of punishment for their offense.[159]

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155. If a defendant knows that he would likely lose his property in a forfeiture proceeding anyway, he may be very willing to turn it over without a hearing to (1) avoid any potential costs that could arise with a second court proceeding; and (2) receive the mitigation in the initial sentencing instead of waiting for a later downward adjustment.

156. For example, if Donald Trump was growing marijuana in his house and his residence was subsequently appropriated by law enforcement officials as a result of a civil forfeiture proceeding, he would receive a large reduction in his offense level for his drug charges because of the value of his home. On the other hand, if a poor college student was growing marijuana in his rented apartment, there would be no property to seize via a civil forfeiture proceeding, thus the student would not receive a reduction in his offense level for his drug charges. As these two scenarios illustrate, it would appear as though the amendment to the Guidelines that this Note proposes would result in poor people going to jail longer than rich people.

157. For an example of the Guidelines' cap on increases and decreases in offense levels see U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(b)(3) (2002) (stating that for aggravated assault, "the cumulative adjustments . . . shall not exceed 9 levels").

158. One could go so far as to argue that the forfeiture of property is actually more of a punishment than only serving a criminal sentence. The forfeiture of real property in particular results in social as well as financial costs to a defendant. Guerra, *supra* note 150, at 856 ("When homes of drug offenders are forfeited, their families may be left homeless.").

159. Scholars and commentators have explored the issue of sentence disparity on the basis of economic status in the area of intermediate sanctions. Two scholars in particular have asserted that "using financial penalties interchangeably with incarceration does not pose an

Finally, a fourth issue that could affect amending the Guidelines, has recently emerged in the wake of the Supreme Court's most recent opinion in *United States v. Booker*. The issue that the Supreme Court addressed in *Booker* pertained to the Sixth Amendment right to jury trial as applied to the Federal Sentencing Guidelines.[160] The majority of the Court extended its *Blakely* decision to the Federal Sentencing Guidelines, holding that the Sixth Amendment right applies "whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'"[161]

The Court next had to address whether portions of the Guidelines, if any, would remain in effect in light of the application of the Sixth Amendment.[162] Justice Breyer, writing for the majority in part, stated that the mandatory nature of the Guidelines was incompatible with the constitutional holding of the Court.[163] In order to remedy this incompatibility, the Court concluded that two sections of the Federal Sentencing Act (Act) needed to be severed and excised: (1) the provision of the statute making the Guidelines mandatory, and (2) the provision providing for de novo review on appeal of departures from the Guidelines.[164] More importantly, the Court continued on, noting that by eliminating these sections of the Act, the Guidelines were "effectively advisory" allowing the courts to "tailor the sentence in light of other statutory concerns as well."[165]

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equity problem." *Id.* at 852 (citing NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 176–80 (1990)).

160. United States v. Booker, No. 04-104, 2005 WL 50108, at *5 (2005). In *Booker*, defendants Booker and Fanfan were convicted of possession with intent to distribute crack, and conspiracy to distribute and to possess with intent to distribute cocaine, respectively. *Id.* In both cases, the judges sentenced the defendants to prison terms higher than those set in the Guidelines based on their own findings of fact—specifically, the amount of drugs each defendant had in his possession. *Id.* at *5–6. The Sixth Amendment right to jury was raised by both defendants on appeal claiming that the additional facts that the judge considered in departing from the sentence range in the Guidelines should have been found by a jury under the reasonable doubt (not preponderance of the evidence) standard. *Id.*

161. *Id.* at *7–8, 15 (quoting Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004)). In *Blakely*, the Supreme Court found that the petitioner's Sixth Amendment right to a jury trial was violated when facts used by the judge to depart from the Washington state sentencing guidelines had not been admitted by the petitioner nor found by a jury. *Blakely*, 124 S. Ct. at 2537.

162. *Booker*, at *6. The Court recognized that their initial holding that the right to jury trial applied to the Guidelines was incompatible with the Federal Sentencing Act (the Act), which made the Guidelines mandatory. *Id.* at *18–19. As a result the Court had three options: (1) engraft a constitutional requirement onto the sentencing statutes; (2) eliminate the Guidelines altogether; or (3) sever provisions of the Act which created the incompatibility. *Id.* at *15, 18.

163. *Id.* at *16.

164. *Id.* at *16, 24.

165. *Id.* at *16.

In eliminating the provision of the Act that makes the Guidelines mandatory, the proposed amendment to the Guidelines may not be as effective as this author hopes. After *Booker*, the Guidelines are now merely advisory, so an amendment providing for the mitigation of a criminal sentence when there was a prior forfeiture may be disregarded by a court in sentencing a defendant. Having an amendment specifically providing for mitigation of a criminal sentence in the Guidelines would, nonetheless, create a uniform guideline for courts to look at in making their sentencing decisions. Still, the actual impact that the *Booker* decision will have on the Guidelines and their application to future sentencing remains to be seen.

Despite the potential problems discussed above, amending the Guidelines is a promising solution to the lack of constitutional protection that *Hudson* created. Amending the Guidelines would mean that civil forfeiture would not be completely taken away from the government's arsenal of crime-fighting weapons, but would instead be limited in its scope. The government would still be able to use civil forfeiture to confiscate instrumentalities and proceeds of criminal activity, would still have a lower burden of proof, and would still be able to receive some proceeds from forfeited property or money.

Once amended, the Guidelines would provide violators with protection from receiving two harsh punishments for one offense, while at the same time maintaining the benefits of civil forfeiture for the government. This solution avoids the double jeopardy dilemma and makes it such that violators' punishments are proportional to the actual gravity of their offense.[166]

VI. CONCLUSION

Prior to 1997, when the *Hudson* decision was handed down, the Supreme Court was extending the Double Jeopardy Clause to protect individuals in the civil forfeiture context. However, the majority's *Hudson* opinion virtually eliminated all protection for individuals in forfeiture proceedings. The majority's unattainable threshold for Fifth Amendment protection, combined with the government's increasing use of forfeiture, leaves individuals vulnerable in civil forfeiture proceedings. The *Hudson* Court failed to appreciate the purpose of the Double Jeopardy Clause—to protect individuals from the government imposing multiple punishments—

166. *See* Guerra, *supra* note 150, at 809 (arguing that once the government gets outside of the forfeiture of instrumentalities and proceeds of a crime, Congress and the courts should factor the previous punishment into the sentencing decision in order "to promote rational and proportional sentencing"). In her article, Ms. Guerra concludes that "[r]ather than making piecemeal changes to conform the civil forfeiture process to satisfy the mandates of the Supreme Court, . . . Congress should . . . [create] a comprehensive system of punishment [for] drug sentencing in federal court." *Id.* at 855.

in handing down its opinion. As a result, offenders have no effective recourse when receiving two punishments for one offense.

Since the judiciary has failed to protect individuals from multiple punishments for the same offense, the legislature must step in and create some protections. The legislature needs to take an active role and amend the Federal Sentencing Guidelines. In amending the Guidelines, the legislature would make the sanctions resulting from a civil forfeiture proceeding a mitigating factor in the criminal punishment. This would result in more fairness in punishments such that the total sanctions (criminal and civil combined) imposed on an individual have some relation to the actual offense he committed.

Amending the Sentencing Guidelines strikes the proper balance between protecting individual and governmental interests. The proposed amendment would offer offenders protection from receiving two punishments for one offense. At the same time, these Guidelines would maintain civil forfeiture as an important crime-fighting weapon for the government to use.