March 2014

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), (6) and (7)

Stephen H. McClain

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.nd.edu/ndlr/vol70/iss4/5

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

I. INTRODUCTION

Drug asset civil forfeiture provides the means by which the government can seize property which is deemed to have been used in, or to facilitate, violations of criminal narcotics statutes.1 Three provisions of federal law frequently used by law enforcement agencies to acquire such property are 21 U.S.C. § 881(a)(4), (a)(6) and (a)(7).2 Section 881(a)(4) provides for the forfeiture of "[a]ll 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 property described in paragraph (1) [or] (2)."3 Section 881(a)(7) subjects to forfeiture "[a]ll real property . . . 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."4

---

2 Forfeiture in general has increased in use as a tool to fight crime. Between 1985 and 1991, the number of asset forfeitures grew at an average annual rate of 99 percent. Receipts to the government increased from $27 million in 1985 to $643.6 million in 1991. ANN. REP. OF THE DEP'T OF JUST. ASSET FORFEITURE PROGRAM 15 (1991); see also David A. Kaplan et al., Where the Innocent Lose, NEWSWEEK, Jan. 4, 1993, at 42, 42 ($2.6 billion of property has been seized by the federal government since 1985; 35,295 federal seizures made in 1991, up 18 times in six years).
3 21 U.S.C. § 881(a)(4) (1988). Paragraph (1) of § 881(a) speaks of "controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter." Id. § 881(a)(1). Paragraph (2) includes "[a]ll raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter." Id. § 881(a)(2).
4 The incorporation within § 881(a)(4) of §§ 881(a)(1), (a)(2) and therefore underlying substantive criminal violation(s) becomes important later in determining whether criminal drug law violations are in fact lesser included offenses of § 881. See infra Parts II.B.3, III.B.2. It should be noted that § 881(a)(4) provides a defense for common carriers and owners who are not culpable. Id. § 881(a)(4)(A)-(C).
Section 881(a)(6) is somewhat different than the other two provisions in that it is directed in part at disgorging the proceeds, as opposed to the instrumentalities, of illegal drug activity. The section allows for the forfeiture of "[a]ll 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 . . . used or intended to be used to facilitate any violation of this subchapter." This section is primarily concerned with liquid assets and items of value purchased with liquid assets which are acquired during illegal drug operations.

Because section 881 forfeitures are litigated in civil proceedings, the government must prove that it has probable cause to believe that the property in question is subject to forfeiture. Once this burden is met, the burden then shifts to the claimant to prove by a preponderance of the evidence that the property should not be subject to forfeiture. Civil forfeiture can be pur-
sued before, during or after criminal prosecution. The government often initiates proceedings under section 881 after criminal conviction is secured so that it can use the conviction to support a motion for summary judgment in the civil proceeding. Needless to say, section 881 has become a very powerful tool used by the United States to prosecute drug law violators, a tool that some fear may be susceptible to abuse.

In addition to civil forfeiture, the government is authorized to seek criminal forfeiture via 21 U.S.C. § 853 (1988 & Supp. V 1993). Unlike civil forfeiture, a prerequisite to criminal forfeiture is that the defendant be "convicted of a violation." Id. § 853(a). Criminal forfeiture is a criminal penalty imposed along with sentencing at trial. Because § 853 forfeiture is criminal, it is more difficult to obtain than § 881 forfeiture. The government must prove guilt beyond a reasonable doubt, and the defendant is afforded all of the constitutional guarantees that attach to criminal proceedings. However, because criminal forfeiture and criminal conviction occur in the same proceeding, the Double Jeopardy Clause is not implicated as it is in the context of § 881 forfeitures. This Note is concerned solely with the double jeopardy concerns underlying § 881 civil forfeitures.

The legislative purpose of § 881 was to provide law enforcement agencies with powerful means of getting at drug dealers. The legislative history shows that Congress felt the "illegal traffic in drugs should be attacked with the full power of the Federal Government" and that the "price for participation in this traffic should be prohibitive." H.R. REP. NO. 1444, 91st Cong., 2d Sess., pt. 1, at 9 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4575.


In James Daniel Good, for example, the United States sought forfeiture of the defendant's Hawaiian real estate in an ex parte proceeding four years after the defendant had been criminally sentenced for a drug offense. James Daniel Good, 114 S. Ct. at 497. In 1988, the government's "zero tolerance" policy required officials to confiscate property for even minor offenses. For example, in that year, the U.S. Coast Guard seized the yacht Monkey Business (the yacht which had ferried Gary Hart and Donna Rice to the Bahamas) after officials found one gram of marijuana on board. A few days prior to this seizure, the Coast Guard had confiscated the $2.5 million yacht Ark Royal after finding one-tenth of an ounce of marijuana on the boat. No one was arrested in either case. At about the same time as these seizures, the Coast Guard seized another yacht in Florida after their search yielded a dollar bill with traces of cocaine and a bag with marijuana residue. Pete Yost, "Zero Tolerance" Drug Battle Called Overkill, Chi. Trib. (nat'l ed.), May 16, 1988, § 1, at 9.

For other examples of perceived abuse, including some in which innocent persons were harshly affected by § 881, see Helen M. Kemp, Presumed Guilty: When the War on Drugs Becomes a War on the Constitution, 14 QUINNIPIAC L. REV. 273, 273-77 (1994); Henry J. Reske, A Law Run Wild, A.B.A. J., Oct. 1993, at 24. In fact, 80% of those whose property is forfeited under § 881 are never charged criminally. Id.

Perhaps in response to these concerns, the Supreme Court has recently begun to curb the potential for abuse. In *Austin v. United States*, the Court held that section 881(a)(4) and (a)(7) forfeitures are "subject to the limitations of the Eighth Amendment’s Excessive Fines Clause." This holding necessitated a finding by the Court that the sections constitute punishment for purposes of the Eighth Amendment. Although *Austin* is an Eighth Amendment case, it has double jeopardy implications by establishing that section 881, though civil, punishes and therefore may be limited by the Double Jeopardy Clause. And because the Court has held that civil penalties which amount to punishment can violate the Double Jeopardy Clause of the Fifth Amendment when imposed after a criminal penalty, the holding of *Austin* potentially sweeps farther than its specific wording.

In response to the ruling in *Austin*, the U.S. Courts of Appeals have been left to grapple with several issues, one of which is whether section 881 forfeitures violate the Double Jeopardy Clause when pursued in conjunction with the defendant being tried for the underlying drug offense which gives rise to the forfeiture action. As may be expected, the Courts of Appeals have inconsistently interpreted the Fifth Amendment’s Double Jeopardy Clause as it applies to section 881 civil forfeiture. The purpose of this Note is to propose a resolution to this conflict and provide a framework to determine when parallel civil forfeiture and criminal prosecution violate the Double Jeopardy Clause. This Note rejects the per se approaches that have been advocated by the majority of courts that have decided the issue and argues that whether the Double Jeopardy Clause is violated depends on the particular

suspected drug trafficker proposed a judgment whereby the government would receive everything it sought in the civil proceeding so as to trigger the protections of the Double Jeopardy Clause and preclude criminal proceedings. The government argued against the judgment and for a stay, but the court ruled for the claimant on the ground that there was no longer a justiciable case or controversy.

11 *Id.* at 2812.
12 *Id.* ("We therefore conclude that forfeiture under [§§ 881(a)(4) and (a)(7)] constitutes 'payment to a sovereign as punishment for some offense.'" (quoting Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 265 (1989))).
13 United States v. Halper, 490 U.S. 435 (1989); see infra notes 18-23 and accompanying text.
14 The question is slightly more complicated. Whether or not double jeopardy is offended as well as the remedy to correct a violation may depend on the order of the proceedings. In particular, a criminal conviction following civil forfeiture may require a different remedy from situations where civil forfeiture follows conviction. See infra Part V.
circumstances of the case under consideration. Finally, this Note addresses the issue left open in Austin: does the forfeiture of proceeds under section 881(a)(6) punish for some offense?

Part II of this Note presents the Supreme Court decisions that have provided the foundation for challenges to section 881 on double jeopardy grounds. In United States v. Halper\(^{15}\) the Court held that civil penalties imposed after criminal punishment can indeed constitute a violation of the double jeopardy guarantee. This decision serves as the basis upon which section 881 civil forfeitures implicate the Double Jeopardy Clause's protection against successive punishments. Part II provides further background by discussing the Court's decision in Austin v. United States\(^{16}\) and the limits of the opinion. This Part also briefly introduces the double jeopardy framework that should be and has been used by the courts to resolve the potential double jeopardy conflict.

The various approaches of and disagreements among the United States Courts of Appeals that have considered the issue are presented in Part III. This Part attempts to resolve the conflicts and determine whether the Double Jeopardy Clause is indeed violated when both civil and criminal drug sanctions are sought by answering two questions: (1) whether civil forfeiture and criminal conviction occur in the "same proceeding," and (2) whether section 881 and the substantive criminal statutes are, or punish for, the "same offense." In addition, Part IV attempts to determine whether section 881(a)(6) is punishment and should be treated the same as sections 881(a)(4) and (a)(7) for double jeopardy purposes. This Note argues that criminal and civil sanctions are imposed in "separate proceedings" and therefore present the possibility of unlawfully imposing cumulative punishments. As for the second inquiry, Part III concludes that section 881 forfeiture and criminal conviction sometimes punish the same offense, but not in all cases. When the two punish different offenses, the Double Jeopardy Clause is not implicated. Finally, Part IV argues that forfeiture via section 881(a)(6) is punishment under Austin even though the section covers, inter alia, illegal proceeds and even though Austin covers only sections 881(a)(4) and (a)(7) explicitly.

Next, Part V argues that in those cases where forfeiture is indeed sought for an offense that has already been criminally pun-

\(^{15}\) 490 U.S. 435 (1989).
\(^{16}\) 113 S. Ct. 2801 (1993).
ished, or vice versa, the Double Jeopardy Clause is violated, but the remedy for such a violation should vary depending on the order of the proceedings. If the civil action occurs after conviction, then courts could perform an accounting of the government's actual damages and reduce the amount of forfeiture to a level that would indeed be remedial. If forfeiture occurs before criminal proceedings, then conviction would violate the Double Jeopardy Clause and the proceeding must be dismissed or the conviction vacated. Finally, Part VI concludes that the Double Jeopardy Clause is not violated every time the United States pursues parallel civil and criminal proceedings. If the two actions can be predicated on different criminal offenses or on the actions of different individuals, courts should allow both penalties to be imposed because the Double Jeopardy Clause merely forbids punishing the same individual for the same offense in separate proceedings. The most prudent course for prosecutors to take, however, is to pursue forfeiture criminally under section 853 in the same indictment and trial as the criminal narcotics law conviction.\(^7\)

\(^{17}\) This Note confines its analysis to parallel actions brought by the United States. If the state seeks forfeiture and the federal government conviction, or vice versa, the Double Jeopardy Clause is probably not implicated because of the doctrine of "dual sovereignty," which allows dual punishment of the same offense by different sovereigns. See Heath v. Alabama, 474 U.S. 82 (1985); Abbate v. United States, 359 U.S. 187 (1959).

Although this Note does not directly address dual criminal and civil proceedings both brought by the state, the analysis should be similar because of the similarities between state and federal drug legislation. As with the U.S. Courts of Appeals, the state courts that have considered the issue have arrived at different conclusions. Compare State v. Johnson, 632 So. 2d 817 (La. Ct. App. 1994) (Austin limited to Eighth Amendment) and State v. 1984 Ford F-150 Pickup, No. 82,356, 1995 WL 27668 (Okla. Ct. App. Nov. 22, 1994) (forfeiture primarily remedial) and Ex parte Camara, Nos. 13-94-048-CR, 13-94-050-CR, 1994 WL 669807 (Tex. Ct. App. Dec. 1, 1994) (Austin inapplicable to Double Jeopardy Clause) and Romero v. State, No. 06-94-00002-CV, 1994 WL 601390 (Tex. Ct. App. Nov. 4, 1994) (same) and Johnson v. State, 882 S.W.2d 17 (Tex. Ct. App. 1994) (forfeiture remedial if not disproportionate to damages caused) and State v. Clark, 875 P.2d 613 (Wash. 1994) (forfeiture and criminal actions may not punish for the same offense) with State v. 1979 Cadillac Deville, 632 So. 2d 1221 (La. Ct. App. 1994) (forfeiture violated Double Jeopardy Clause) and Fant v. State, 881 S.W.2d 830 (Tex. Ct. App. 1994) (double jeopardy prohibited prosecution after forfeiture judgment) and State v. 392 South 600 East, 886 P.2d 534 (Utah 1994) (Austin dictates forfeiture is punishment). Those state courts not finding double jeopardy violations rely on Halper and judge forfeitures case by case to determine if they are indeed remedial.

II. THE COURT LAYS THE GROUNDWORK FOR A DOUBLE JEOPARDY CHALLENGE TO § 881

A. The Halper and Austin Decisions

The Supreme Court first recognized that a civil penalty could violate the Double Jeopardy Clause in United States v. Halper. In that case, the defendant had submitted sixty-five false claims to Medicare, thereby violating the criminal false claims statute. After conviction, the United States then sought relief under the Civil False Claims Act, which allowed for a statutory penalty of more than $130,000 because of the number of violations. The Court held that a civil penalty, which in part "serves the twin aims of retribution and deterrence," punishes, and that "under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial." The Court remanded for an opportunity for the government to present the district court with an accounting of actual costs arising from Halper's fraud and to recover for the costs it could demonstrate.

Several years later, the Court decided Austin v. United States. In that case, the government initiated civil forfeiture proceedings under sections 881(a)(4) and (a)(7) to confiscate a body shop and mobile home linked with the defendant's cocaine activity. The defendant had already pled guilty to criminal charges and sought to have the forfeiture action dismissed, arguing that forfeiture would be an unduly harsh punishment and would violate the Ex-
cessive Fines Clause of the Eighth Amendment. The Court held that forfeiture sought under sections 881(a)(4) and (a)(7) is punishment, regardless of the actual costs to the government, because of the lack of any rational relationship between the value of conveyances and real estate to the government's costs of prosecuting the action. Despite the civil nature of forfeiture, the Court noted that the sections punish because they serve in part the policies of retribution and deterrence and remanded the excessiveness issue to the district court.

These two decisions have provided the ammunition for defendants to argue that double jeopardy applies to forfeiture under section 881 if a criminal conviction has already been obtained: "it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." Hence, these decisions set the stage for potential double jeopardy preclusion of section 881 forfeiture. The issue has since divided the U.S. Courts of Appeals.

B. The Double Jeopardy Framework

The Double Jeopardy Clause of the Fifth Amendment provides that "nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb." The Clause is not limited to penalties which literally implicate "life or limb"; it also applies to imprisonment and monetary penalties. This Section examines the protections provided by the Double Jeopardy Clause, and the variations of the protections that are most likely relevant to assessing the constitutionality of section 881 forfeiture.

25 Id. at 2803.
26 Id. at 2812. For a more thorough analysis of the A|ustin decision, see infra notes 189-97 and accompanying text.
27 Id.
29 "While the Clause itself simply states that no person shall 'be subject for the same offense to be put twice in jeopardy of life or limb,' the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981).
30 U.S. Const. amend. V.
1. Double Jeopardy's Multiple Punishment Prong

The "Double Jeopardy Clause protects against 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." Civil forfeiture arguably implicates all three prongs. Whether civil forfeiture amounts to a successive "prosecution," however, is unclear. In Helvering v. Mitchell, Justice Brandeis wrote that the Double Jeopardy Clause "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." The Justice's distinction between "punishing" and attempting to "punish criminally" may mean that a civil penalty can be punishment, but not criminal punishment or prosecution. Even if not the only applicable prong, the multiple punishment prong of the Double Jeopardy Clause seems to be the most likely limit on seeking concurrent criminal and civil penalties for criminal narcotics violations.

The multiple punishment prong applies to two different situations: attempts to impose cumulative punishments in the same proceeding and attempts to impose multiple punishments in successive proceedings. When the government seeks to impose multiple punishments in the same trial, the inquiry is "whether the

---

33 303 U.S. 391 (1938).
34 Id. at 399.
35 See Halper, 490 U.S. at 443 (discussion of Brandeis's omission of the adverb "criminally" from the multiple punishment prohibition).

It should be noted that if civil forfeiture proceedings are not "prosecutions," presumably the government could seek civil forfeiture even though the defendant is acquitted of criminal charges and could seek conviction after a failed or purely remedial forfeiture action. See infra Part V. In other words, if the civil forfeiture proceeding is not a prosecution, the government has more freedom to seek both punishments because double jeopardy's first two prongs would not apply. But see infra text accompanying note 105 (Supreme Court holding that tax proceeding following criminal prosecution equivalent to second prosecution); note 228.

36 For the view that the Double Jeopardy Clause does not preclude multiple punishments in separate proceedings, but only multiple prosecutions, see Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1955-59 (1994) (Scalia, J., dissenting) (Court's advancement of multiple-punishment-in-separate-proceedings theory in Halper based on misreading of precedent; multiple punishment prong merely requires that cumulative punishments in same proceeding be legislatively authorized). This Note accepts Halper's formulation and does not attempt to determine the historical validity of its proclamation.
legislature actually authorized the cumulative punishment."\textsuperscript{37} Because the legislature is vested with the power to define crimes and punishments, the underlying policy in these cases is to insure that the legislature intended cumulative punishments.\textsuperscript{38}

In contrast, when multiple punishments are sought in separate proceedings, "the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding."\textsuperscript{39} Other policy rationales can be advanced for the prohibition, including those policy concerns underlying the prohibition of successive prosecutions such as the interests of finality, immunity from being subjected to ongoing harassment, and fairness by preventing the government from perfecting its case until ultimately successful.\textsuperscript{40}

2. The "Same Offense" Requirement

The Double Jeopardy Clause prohibits punishing twice for the "same offense."\textsuperscript{41} Otherwise, a conviction for burglary could bar a prosecution for murder ten years later. The Court set forth the seminal test for determining whether two offenses are the "same" for double jeopardy purposes in \textit{Blockburger v. United States}:\textsuperscript{42} "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other

\textsuperscript{37} \textit{Halper}, 490 U.S. at 451 n.10. The government can "seek[] and obtain[] both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." \textit{Id.} at 450.


Because this Note contends that civil and criminal proceedings are not the "same proceeding," no attempt is made to determine whether the legislature intended cumulative punishments in this area. It is probably safe to assume, however, that Congress did indeed intend to allow both penalties for drug crimes. \textit{See supra} note 8 (legislative history indicates Congress intended to make drug trade prohibitively costly); \textit{infra} note 195.

\textsuperscript{39} \textit{Halper}, 490 U.S. at 451 n.10.

\textsuperscript{40} For an example of the importance of considering the policy reasons behind the Double Jeopardy Clause, see \textit{Jeffers v. United States}, 492 U.S. 137, 152 (1977) (no violation when defendant elects to have two offenses tried separately because "the policy behind the Double Jeopardy Clause does not require prohibition of the second trial").

\textsuperscript{41} \textit{See supra} note 32 and accompanying text.

\textsuperscript{42} 284 U.S. 299 (1932).
The Court subsequently clarified the test in Brown v. Ohio to protect against the separate prosecutions of greater and lesser included offenses. In Brown the government attempted to prosecute the defendant for auto theft after he had pled guilty to the offense of joyriding. "Joyriding" was essentially defined as operating another's motor vehicle without consent, while "auto theft" was defined as stealing a motor vehicle. Therefore, joyriding was a lesser included offense of auto theft because a stolen vehicle is necessarily operated without the owner's consent. Because all the elements of joyriding are automatically satisfied by proving all the elements of auto theft, each offense does not "require[] proof of a fact which the other does not." In sum, greater and lesser included offenses are the same offense under Blockburger.

3. The "Species of Lesser Included Offense" and Incorporation

Offenses may be described as greater included only if it is necessary to prove all of the elements of the lesser included offense to establish a violation of the greater included. A "species of lesser included offense" exists when the offense is broadly incorporated within another offense and is used to prove a violation of the greater included offense, even though the government could have proven the greater offense without reference to the specific lesser offense at issue. For example, felony murder statutes incorporate all of the violent felonies within their language, but only those violent felonies actually used to support a felony murder conviction are actually lesser included. These "species" are necessarily the "same offense" under Blockburger and may not be pun-

43 Id. at 304.
45 Id. at 162-63.
46 Id.
47 The dispositive inquiry is whether the statutory elements overlap, not whether the same facts or conduct are used to prove the elements. See United States v. Dixon, 113 S. Ct. 2849, 2860 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990) ("same conduct" test)); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975) (noting that Blockburger can be satisfied "notwithstanding a substantial overlap in the proof offered to establish the crimes"); see also United States v. Felix, 112 S. Ct. 1377, 1383-85 (1993).
ished after punishing the greater included offense separately, and vice versa.

The above example derives from *Harris v. Oklahoma*. The defendant in that case was convicted of robbery with firearms after he had been convicted of felony murder. The robbery had been used to establish intent in the trial for felony murder. Because the government had found it necessary to rely on the elements of the robbery offense to predicate the felony murder conviction, the Court held that the subsequent prosecution for the robbery offense was barred by the Double Jeopardy Clause.

Presumably, if the state would have used a different felony as the predicate offense for felony murder in the first trial, the subsequent prosecution for robbery with firearms would not have been barred.

The Court further developed this doctrine in *Illinois v. Vitale*, a case in which the respondent had pled guilty to the charge of “failing to reduce speed to avoid an accident” arising out of events resulting in the deaths of two children. Following the plea, the government charged Vitale with involuntary manslaughter, which required the government to prove that, inter alia, Vitale “recklessly” operated a motor vehicle. Although the government could prove the elements of the “failing to reduce speed” offense to establish recklessness, the Court remanded for a determination of whether the government actually intended to do so. The subsequent prosecution would be permissible if another offense was to be used to establish recklessness. On the other hand, if the government relied on the elements of the “failing to reduce speed” offense to establish involuntary manslaughter, the offense could be viewed as a “species of lesser-included offense,” constituting the “same offense” under *Blockburger*.

A different yet related situation arose in *United States v. Dixon*, where the incorporation of a criminal statute within a civil protection order resulted in the Court invalidating a subsequent attempt to prosecute under that criminal statute. In *Dixon* the defendant was convicted for criminal contempt for violating a

---

50 Id. at 682.
52 Id. at 413 n.4.
53 Id. at 421.
54 Id. at 420.
civil protection order which prohibited the defendant from violating the drug laws. The Court held that the government could not subsequently proceed to prosecute the defendant on the drug law violation because the drug offense was incorporated within the contempt conviction. However, the Court found that the government was not precluded from prosecuting the defendant in a consolidated case for assault with intent to kill even though the defendant had been convicted of criminal contempt for violating an order which incorporated assault within its terms. Because "assault with intent to kill" requires proof of specific intent to kill and "assault" does not, the charge of assault with intent to kill was not fully incorporated within the civil protection order. And because contempt requires knowledge of the order (whereas assault with intent to kill does not), while assault with intent to kill requires specific intent to kill (whereas violation of the protective order does not), the offenses were not the "same offense."58

These results can be viewed as the effects of incorporation. If a group of offenses is incorporated within another offense, any offense out of that group which is actually used to secure a conviction of the greater included offense is a "species of lesser included offense" and the same for double jeopardy purposes. These cases demonstrate that provisions which incorporate within their wording other criminal statutes may, in certain circumstances, become greater included offenses of the latter.

III. Resolution: Is the Double Jeopardy Clause Violated?

The resolution of the double jeopardy issue requires the examination of three distinct issues. First, it must be determined whether section 881 proceedings are "separate" from criminal trials, or whether the government can escape constitutional preclusion by resorting to the legal fiction of a "single, coordinated prosecution." Second, although receiving little attention from the courts, it is important to determine whether section 881 forfeiture is or punishes the same underlying offenses as criminal narcotics statutes. If the two can be characterized as separate offenses, double jeopardy concerns give way to questions of whether collateral estoppel may preclude the relitigation of issues already determined. Finally, independent of the outcome of the first two issues,
section 881(a)(6) forfeiture may escape preclusion if it does not amount to punishment under Austin.

Some of these issues have been considered by the U.S. Courts of Appeals. The Second, Fifth, Seventh, Ninth and Eleventh Circuits have had occasion to consider whether drug asset civil forfeiture implicates the Double Jeopardy Clause. In the Second and Eleventh Circuits, the panels held that double jeopardy is not implicated by parallel civil and criminal proceedings, including civil proceedings which are brought under sections 881(a)(4) and (a)(7). The Fifth Circuit's position is that Austin's analysis does not apply to section 881(a)(6) because the section includes within its coverage the proceeds of illegal drug activity and is therefore not punishment for purposes of double jeopardy analysis.

The Ninth Circuit has explicitly disagreed with its sister courts' interpretation of the Double Jeopardy Clause by finding a violation when criminal and civil sanctions are pursued together. The Seventh Circuit, in dicta, appears to agree with the Ninth.

A. Are Civil and Criminal Proceedings "Single" or "Separate" Proceedings?

1. The Second, Eleventh and Ninth Circuits

The Second Circuit has held that the multiple punishment prong of the Double Jeopardy Clause is not implicated by imposing cumulative civil and criminal sanctions because both sanctions are imposed in what is the functional equivalent of a single proceeding. In United States v. Millan, the court considered a case

59 Prior to Austin, the position of several U.S. Circuit Courts was that civil forfeiture pursuant to § 881 did not constitute punishment. See, e.g., United States v. Borromeo, 995 F.2d 23 (4th Cir. 1993); United States v. Cullen, 979 F.2d 992 (4th Cir. 1992) (forfeiture is primarily remedial); United States v. Price, 914 F.2d 1507, 1512 (D.C. Cir. 1990) (§ 881(a)(6) is remedial); United States v. 40 Moon Hill Rd., 884 F.2d 41, 44 (1st Cir. 1989) (forfeiture is remedial and nonpunitive because "[t]he ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually [involved]."). These decisions, however, employ analysis explicitly rejected by the Supreme Court in Austin v. United States, 113 S. Ct. 2801, 2805 (1993).

60 See infra Part III.A.1.

61 See infra Part IV.A.

62 See infra Parts III.A.1, IV.A.

63 See infra note 92; notes 169-71 and accompanying text.

64 This holding would apparently foreclose any problem with the "subsequent prosecution" prongs of the Double Jeopardy Clause as well since there would be but one
in which the defendants had agreed to forfeit money, real estate and business interests in return for an agreement from the government to release certain assets to the defendants (to cover legal expenses) and to dismiss the civil suit.\textsuperscript{66} The defendants argued that because forfeiture had preceded the criminal trial, the indictment should be dismissed.\textsuperscript{67} Though \textit{Millan} was decided within two months of \textit{Austin}, the court found it unnecessary to decide whether section 881 forfeitures were punishment because the "government has employed a single proceeding to prosecute the [defendants], and, therefore, the proscription of the Double Jeopardy Clause does not apply."\textsuperscript{68} The court held that the civil forfeiture suit was part of "a single, coordinated prosecution,"\textsuperscript{69} relying on the following factors: (1) the warrants authorizing arrest and the warrants authorizing seizure were issued on the same day by the same judge, (2) the warrants were based on the same affidavit, (3) the civil complaint incorporated the criminal indictment, and (4) the defendants were aware that the government was pursuing both remedies.\textsuperscript{70} The court found especially relevant the defendants' awareness of both actions. Noting that one of the policy concerns underlying the Double Jeopardy Clause is that the "government might act abusively by seeking a second punishment when it is dissatisfied with the [first] punishment," the court reasoned the concern was missing in the case where contemporaneous actions made it "clear to all parties that the government intended to pursue all available civil and criminal remedies."\textsuperscript{71}

Because the classification of forfeiture as punishment is irrelevant to the Second Circuit's analysis, \textit{Millan} survives \textit{Austin}. In fact, the District Court for the Southern District of New York has so held. In \textit{United States v. 77 East 3rd Street},\textsuperscript{72} the defendants pled

\footnotesize
\textsuperscript{65} 2 F.3d 17 (2d Cir. 1993), \textit{cert. denied}, 114 S. Ct. 922 (1994).
\textsuperscript{66} \textit{Id.} at 19.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.} at 20.
\textsuperscript{70} \textit{Id.} The court found the fact that the actions were filed separately with different docket numbers irrelevant: "[C]ourts must look past the [federal] procedural requirements [that civil and criminal suits be filed and docketed separately] and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated." \textit{Id.}
\textsuperscript{71} \textit{Id.} at 20-21.
\textsuperscript{72} No. 85 CIV. 3351 (SS), 1994 WL 4288 (S.D.N.Y. Jan. 4, 1994).
guilty to federal drug law violations and then faced civil proceedings, pursuant to section 881(a)(7), which sought to forfeit their residence. The court held that, notwithstanding Austin, the "forfeiture here would not contravene the Double Jeopardy Clause since this action and the prior criminal prosecutions against the [defendants] are part of a single proceeding." The court relied on four factors derived directly from Millan: (1) the warrants for arrest and seizure were based on the same affidavit and issued the same day by the same judge, (2) the civil complaint incorporated the criminal indictment, (3) the criminal indictment mentioned that the property was involved in drug law violations, and (4) the defendants were aware of both proceedings. Although the two actions were not contemporaneous due "in large part" to the government seeking stays until the resolution of the criminal action, the court found the delay irrelevant since the delay was not a "retaliatory action by the Government for insufficient punishment in the criminal action." The court therefore applied the policy analysis of Millan to extend the "single, coordinated prosecution" formulation to include proceedings that take place several years apart. Taking the Second Circuit's cue, the court examined prosecutorial intent and determined that no policy concern was implicated.

Following Austin, the Eleventh Circuit employed the Millan analysis in United States v. 18755 North Bay Road. Prosecutors accused the defendants in North Bay Road of various gambling offenses and seized personal property as well as the defendants' home. After the conviction of the defendants, the government was granted summary judgment in the civil proceeding against the real property. In response to the defendants' contention that the civil forfeiture violated the Double Jeopardy Clause, the court considered Halper and Austin. Noting that "[t]here is no question that the same conduct" provided the basis for both sanctions, the court held that Halper does not "prevent the Government

73 Id. at *3.
74 Id. at *2.
75 Id. at *3.
76 See also United States v. Smith, 874 F. Supp. 347, 350 (N.D. Ala. 1995) (finding "single, coordinated prosecution" after noting that the prosecution was not abusively seeking second punishment because of dissatisfaction with the first).
77 13 F.3d 1493 (11th Cir. 1994).
78 Id. at 1494-95.
80 North Bay Rd., 13 F.3d at 1499.
from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." The court adopted the Millan test: "[W]e find that the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendants]... falls within the contours of a single, coordinated prosecution." North Bay Road undoubtedly would apply to forfeitures sought under section 881. Even if section 881 forfeiture is punishment, assuming the four factors of Millan are met, it is punishment that is sought to be imposed in what can be described as a "single, coordinated prosecution." The court's approval of Millan also indicates the decision would apply in the context of drug asset civil forfeiture. In fact, in United States v. 13143 S.W. 15th Lane,83 a district court in the Eleventh Circuit relied upon North Bay Road to uphold the forfeiture of certain real estate pursuant to section 881(a)(7).

On September 6, 1994, in United States v. $405,089.23 U.S. Currency,84 the Ninth Circuit became the first U.S. Court of Appeals to squarely hold that, as a result of Austin, forfeitures under section 881(a)(6)85 violate the Double Jeopardy Clause when coupled with criminal proceedings. In $405,089.23 U.S. Currency, the government had instituted the civil action five days after the grand jury indicted the defendant.86 The holding of the court resulted from two independent findings,88 the first of which is

81 Id. (quoting United States v. Halper, 490 U.S. 435, 450 (1989)). The court also cited with approval Millan for its discussion of the multiple punishment prong of the Double Jeopardy Clause. Id.

82 Id. The court also examined prosecutorial intent to arrive at its conclusion. The court noted that, as in Millan, "there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action." Id. The court cited Halper for the proposition that the multiple punishment prong of the Double Jeopardy Clause, in the context of a single proceeding, is singularly concerned with whether the legislature authorized all of the punishment to be imposed. Id.

84 33 F.3d 1210 (9th Cir. 1994).
85 The decision would apply equally to bar forfeitures sought under §§ 881(a)(4) and (a)(7) because of Austin's clear holding that those sections constitute punishment.
87 $405,089.23 U.S. Currency, 33 F.3d at 1214.
88 Arguably, the Ninth Circuit's decision depends on three findings: (1) the forfeiture is punishment, (2) for the same offense, (3) in a separate proceeding. Though the "same offense" requirement was virtually ignored in $405,089.23 U.S. Currency, in a subse-
relevant here. The court found that the civil and criminal actions were separate proceedings because "two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments [do not] constitute the same 'proceeding.'" The court explicitly rejected the "single, coordinated prosecution" formulation of Millan and North Bay Road.

The court also disagreed with its sister courts over whether the policy concerns underlying the Double Jeopardy Clause support dual proceedings. The court noted that, by allowing prosecutors to first obtain a conviction in criminal proceedings (beyond a reasonable doubt standard) before seeking civil forfeiture (preponderance of evidence standard), the government obtained a "significant advantage." This analysis stands in contrast to the fairness and prosecutorial intent analysis the courts in Millan and North Bay Road used to support their opposite conclusion.

2. The Better View: Criminal and Civil Proceedings are "Separate Proceedings"

Conceptually, it is hard to imagine what would fall within the definition of "separate proceedings" if parallel criminal and civil proceedings do not. Common sense dictates that "two separate actions, one civil and one criminal . . . resolved by separate judg-

---

90 Although dicta, it appears the Seventh Circuit currently agrees with the Ninth that parallel § 881(a)(6) and criminal proceedings run afoul of the Double Jeopardy Clause. See United States v. Torres, 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994); see also United States v. Michelle's Lounge, 39 F.3d 684, 696 (7th Cir. 1994) (Torres cited for the proposition that "double jeopardy applies to civil forfeiture").
ments[] constitute" separate proceedings. The two actions are governed by different rules of procedure and sometimes must be brought in different jurisdictions. Embracing a test which attempts to distinguish between "single" and "separate" proceedings, yet ignores these fundamental differences, will inevitably produce unjust results for future claimants.

Section 881 itself implies that civil forfeiture is independent of criminal prosecution by providing that the "filing of an indictment or information alleging a [criminal] violation . . . related to a civil forfeiture proceeding . . . shall, upon motion . . . stay the civil forfeiture proceeding." Because of the delays and administrative problems that resulted from maintaining separate civil and criminal actions, Congress eventually provided for criminal forfeiture in 1984. Criminal forfeiture was designed to allow for the simultaneous resolution of all claims against the individual and property because "[t]he problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in

93 $405,089.23 U.S. Currency, 33 F.3d at 1216. "Separate" can be defined as "[i]ndividual; distinct; particular; disconnected . . . imply[ing] division . . . [or] disconnection." BLACK'S LAW DICTIONARY 1364 (6th ed. 1990). "The word [proceeding] may be used synonymously with 'action' or 'suit' to describe the entire course of an action at law or a suit in equity from the issuance of the writ or filing of the complaint until the entry of final judgment . . . ." Id. at 1204; see also id. at 1385 (defining "single" as "[o]nly"). Criminal and civil proceedings are "distinct suits," one initiated by the "filing of a complaint" and the other resulting from the "issuance of" an indictment, that result in more than one "entry of final judgment." See infra note 120 and accompanying text; see also Quinones-Ruiz v. United States, 864 F. Supp. 983, 986 (S.D. Cal. 1994) (forfeiture is proceeding separate from criminal prosecution notwithstanding administrative nature of forfeiture proceeding).


95 "Since civil forfeiture is an in rem proceeding, the forfeiture case must be brought in the judicial district in which the property is located. The property is the defendant in the case . . . ." S. REP. No. 225, 98th Cong., 1st Sess. 193 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3376.


addition to the criminal case, to file a separate civil suit." Congress itself therefore envisioned two separate proceedings to combat narcotics violations. Although Congress's view does not bind the judiciary, this is the common sense view: if two criminal trials for the same illegal narcotics activity are "separate" proceedings, then parallel civil and criminal proceedings, which have less in common with each other, are realistically "separate" and should be barred by the Double Jeopardy Clause if both punish the same offense.

In addition to contravening common sense, viewing parallel civil and criminal proceedings as a single proceeding seems to "contradict[] controlling Supreme Court precedent." In Department of Revenue v. Kurth Ranch, the Court invalidated a tax imposed on the possession of marijuana as violating the Double Jeopardy Clause's prohibition against successive punishments for the same offense. The Court found that the tax, which was pursued in conjunction with a criminal prosecution that included a possession charge, was punitive in nature. Writing for the majority, Justice Stevens wrote that the arrest of the defendants "gave rise to four separate legal proceedings:" (1) a proceeding where "the State filed criminal charges against all six respondents," (2) "a civil forfeiture action seeking recovery of cash and equipment," (3) a "third proceeding involving the assessment of the new tax on dangerous drugs," and (4) a "fourth legal proceeding" initiated by the Kurths for bankruptcy. The Court concluded that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same

---

98 S. REP. NO. 225, 98th Cong., 1st Sess. 196 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3379 (emphasis added). The committee further noted that where the property of the defendant of the "criminal case is located in more than one judicial district, a separate civil forfeiture suit must be filed in each of these districts." Id. at 3380 (emphasis added) (noting that the solution to the problem is to "permit prosecutors the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture").


100 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994).


102 Id. at 1942-43.
proceeding that resulted in his conviction.” The Court, though appearing to rely on the multiple punishment prong of the Double Jeopardy Clause, went further, describing the tax proceeding as “the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time ‘for the same offence.’”

Although Stevens’s statement that civil forfeiture is a “separate legal proceeding” is dicta, the opinion did implicitly hold that the subsequent tax proceeding was separate. The Court declined to view the various proceedings against the Kurths as parts of a “single, coordinated prosecution.” Contrary to Millan’s view that parallel proceedings can be functionally the same proceeding, Kurth Ranch squarely holds that second proceedings which are punitive in nature are functionally the same as “successive prosecutions.”

Halper itself, relied upon in Kurth Ranch, seems to reject the “single, coordinated prosecution” theory of Millan. The government in Halper, after convicting Halper for sixty-five violations of the criminal false claims statute, attempted to obtain a civil penalty under the Civil False Claims Act. Summary judgment was awarded based in part on the criminal conviction. The Court held that “under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution

103 Id. at 1945.
104 See, e.g., id. at 1948 (“[I]t is a second punishment within the contemplation of a constitutional protection that has ‘deep roots in our history and jurisprudence,’ and therefore must be imposed during the first prosecution or not at all.” (quoting United States v. Halper, 490 U.S. 435, 440 (1989))); id. at 1947 n.21 (“Nor does the statute require us to comment on the permissibility of ‘multiple punishments’ imposed in the same proceeding since [the statute] involves separate sanctions imposed in successive proceedings.”).
105 Id. at 1948. In his dissenting opinion, Justice Scalia, foreseeing the problem at hand, questioned whether Kurth Ranch’s holding would forbid the subsequent prosecution of a defendant who had already been subjected to forfeiture for the same violation. Id. at 1959 (Scalia, J., dissenting) (citing United States v. Tilley, 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994)).
107 See Kurth Ranch, 114 S. Ct. at 1944 (stating that in Halper, the government “filed a separate action to recover a $2,000 civil penalty for each . . . violation[.]”; see also id. at 1945 (“A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding.” (citing Halper, 490 U.S. 435))).
108 Halper, 490 U.S. at 437.
109 Id. at 438.
110 Id. at 438, 441 n.4.
may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.\(^{111}\) Implicit in that holding is the Court’s determination that civil and criminal actions are inherently separate. Throughout the opinion, Justice Blackmun distinguishes between the “instant proceeding” and “the prior criminal proceeding.”\(^{112}\) No discussion is given to the possibility of construing the two proceedings as a functional unit. The Court takes the common sense view that civil and criminal actions, with their plethora of differences,\(^{113}\) are inherently “separate proceedings.”\(^{114}\)

An examination of Halper and Kurth Ranch reveals that the Millan court, in an attempt to preserve legislative intent and the continued viability of civil forfeiture, developed an unworkable test that exalts form over substance, thereby “whitewashing the double jeopardy [issue] by affording constitutional significance to the label ‘single, coordinated prosecution.”\(^{115}\) The factors relied upon in Millan are wholly irrelevant to the issue of whether civil and criminal proceedings are separate. The first three—the arrest and forfeiture warrants being issued on the same day, both warrants being based on the same affidavit, and the civil complaint being incorporated within the indictment—are all preproceeding considerations. For instance, if the defendant in Brown would have been prosecuted in separate trials for auto theft and joyriding, a double jeopardy violation would have occurred notwithstanding all of Millan’s conditions being satisfied. The government could issue arrest warrants for both offenses the same day based on the same affidavit and incorporate each offense within each indictment. But if the government then were to proceed to separately try each case on separate indictments in front of different juries, thereby

\(^{111}\) Id. at 448-49.

\(^{112}\) Id. at 441; see also id. at 449 (“‘[P]unishment’ indeed may arise from either criminal or civil proceedings.”); id. at 451 (“[T]he Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action . . . .”).

\(^{113}\) See supra notes 94-95 and accompanying text; infra notes 120-26 and accompanying text.

\(^{114}\) An alternative view is to take the Court’s holding at face value; that is, one cannot be punished civilly after a criminal conviction period. Under this view, it would be irrelevant whether the two proceedings are functionally the same; dual civil and criminal punishment is merely forbidden. Such a reading, however, has no basis in reason. Criminal and civil proceedings must inherently be separate for the Court’s holding to make sense from a double jeopardy standpoint.

\(^{115}\) United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1217 (9th Cir. 1994).
obtaining two separate verdicts, few would argue that double jeopardy was not offended. *Millan's* final factor, the defendant's awareness of the government's intention to obtain two verdicts, would likewise be constitutionally irrelevant as long as the defendant did not consent to separate trials.  

These cases suggest several alternative tests that could be used to distinguish between single and separate proceedings. A single proceeding logically consists of one legal action in which all personal and property claims are heard and decided before the same finder of fact. In other words, the actions imposing punishment occur in the "same proceeding" if, for example, they are "brought in the same indictment and tried at the same time."  

Without deciding the ultimate validity of the "same indictment" test, 118 it is enough for the purposes of this Note that criminal and civil proceedings are *always* separate proceedings. 119 They are simply different in nature: initiated by different procedures, 120 governed

116 See Jeffers v. United States, 482 U.S. 137, 152, 154 (1977) (holding that separate trials of greater and lesser included offenses that would otherwise offend double jeopardy are valid if defendant consents to such treatment).

Another exception where lesser and greater included offenses may be tried separately is where "the facts necessary to the greater were not discovered despite the exercise of due diligence before the first trial." *Id.* at 152.

117 §405,089.23 U.S. Currency, 33 F.3d at 1216.

118 Seeking multiple punishments under the *same indictment* at the same trial is permissible, but perhaps not required by the Double Jeopardy Clause. To say that the government can pass the "same proceeding" test by following the Ninth Circuit's suggestion does not mean that the government *must* pursue all remedies under the same indictment or be precluded.

Technically, the charges would not have to be brought in the same indictment so long as both indictments were charged and prosecuted in the same trial. *Cf. Jeffers*, 492 U.S. at 154 n.23 (indicating that two indictments being tried together requires an examination of legislative intent to determine if cumulative punishment is intended).


120 A forfeiture action is initiated by the filing of a complaint. 21 U.S.C. § 881(b) (1988). An expedited forfeiture action may be initiated by the United States Attorney General in lieu of filing a complaint if certain conditions are met. *Id.* In contrast, criminal actions are initiated by an indictment or information. U.S. CONST. amend. V; FED. R. CRIM. P. 7(a); *see generally* Timothy H. Gillis, *Preliminary Proceedings: Indictments*, 78 GEO.
separately by the Bill of Rights, separately by the Bill of Rights,\textsuperscript{121} overseen by distinct discovery and procedural rules,\textsuperscript{122} resolved by independent factual determinations,\textsuperscript{123} usually heard before different fact-finders,\textsuperscript{124} assigned different docket numbers, resolved by different standards of proof,\textsuperscript{125} and initiated against different parties,\textsuperscript{126} one human and one inanimate. The timing of the two actions, whether simultaneous or nonconcurrent, bears on the ultimate fairness of the result, but does not affect whether the proceedings are distinct any more than trying the defendant in \textit{Harris} for auto theft and joyriding concurrently in separate trials would have.\textsuperscript{127} Any alter-

\textsuperscript{121} For example, the Fourth Amendment's protection against unreasonable searches and seizures has been held to apply to civil forfeiture proceedings, while the Sixth Amendment's Confrontation Clause has been held to not apply. See \textit{Austin v. United States}, 113 S. Ct. 2801, 2804-05 n.4 (1993) (comparing which constitutional protections apply to civil and criminal proceedings and noting that whether a constitutional provision applies generally depends on the wording of the constitutional amendment involved).

\textsuperscript{122} See supra note 94.

\textsuperscript{123} Collateral estoppel may, in certain situations, be applied to preclude differing factual determinations in civil suits that follow acquittals. See \textit{Helvering v. Mitchell}, 303 U.S. 391, 397-98 (1938) (stating that while normally the differing standards of proof preclude the application of collateral estoppel in the civil suit, "where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy"). The very possibility of the application of collateral estoppel proves the proceedings are distinct since the application of the doctrine necessarily depends on there being "separate proceedings."

\textsuperscript{124} If the same judge were fortuitously to be assigned to the civil and the criminal case, a different result would not be forthcoming. The judge would be a separate fact finder, required to make independent factual determinations. See, e.g., \textit{Watkins v. Murray}, 493 U.S. 907, 908 (1989) (Marshall, J., dissenting from denial of certiorari) (referring to defendant's two murder trials as "separate proceedings" although "[t]he same judge presided at both trials").

\textsuperscript{125} See supra notes 6-7 and accompanying text; cf. \textit{Helvering}, 303 U.S. at 397 (noting that civil and criminal cases are "different in nature" because of the "difference in degree of the burden of proof"); \textit{Durosko v. Lewis}, 882 F.2d 357, 359-60 (9th Cir. 1989) (sentencing enhancement proceeding not same for double jeopardy purposes because of different standard of proof applied in proceeding), \textit{cert. denied}, 495 U.S. 907 (1990).


\textsuperscript{127} But see \textit{United States v. $405,089.23 U.S. Currency}, 33 F.3d 1210, 1216 (9th Cir. 1994) (fact that civil and criminal proceedings are "instituted at different times" weighs in favor of determination that the two are separate proceedings); \textit{Oakes v. United States}, 872 F. Supp. 817, 824-25 (E.D. Wash. 1994) (applying \$405,089.23 \textit{U.S. Currency} and citing the fact that forfeiture judgment was not entered until nearly ten months after conviction as weighing in favor of finding double jeopardy violation).
nate interpretation of “separate proceedings” contorts the meaning of the words to a point where no two proceedings could definitively or logically be described as “separate.”

B. Do the Civil Forfeiture and Substantive Narcotics Statutes Punish the “Same Offense”?

Although yet to receive much attention from the courts, a determination that the section 881 “offense” and the substantive criminal offense are the “same offense” is necessary for double jeopardy principles to apply. If they are the same offense, double jeopardy could forbid the resolution of the two in separate proceedings. The appropriate test to apply in this regard is found in Blockburger and its progeny. The test requires an examination of the elements of each offense to determine whether each requires proof of an element the other does not.

On its face, section 881 appears to require proof of elements not required in criminal prosecutions for violations of, for example, sections 841 and 844. Forfeiture under section 881, for in-

---

128 See supra Parts II.B.2-3. But cf. United States v. Rural Route 1, Mound Rd., No. 90 C 4722, 1994 WL 48618, at *3 (N.D. Ill. Feb. 15, 1994) ("Criminal forfeiture is simply an element of punishment upon conviction of the substantive crime and is not a substantive offense itself.").

Route 1, Mound Rd.'s statement, however, deals with criminal forfeiture, which is more easily characterized as mere punishment for the offense already being tried in the proceeding. Cf. Bullington v. Missouri, 451 U.S. 430 (1981) (holding that capital sentencing procedure resembling trial on issue of guilt or innocence violates double jeopardy when following jury verdict fixing punishment at life imprisonment). To say civil forfeiture is merely an element of punishment for the substantive crime begs the questions, "Which crime and is it the same crime as the one that has been prosecuted?" This Section attempts to answer these questions. In sum, the double jeopardy implications should remain the same regardless of whether one views § 881 as an offense itself or as punishing for an offense because the two occur in separate proceedings.

129 For more on whether the order of the proceedings affects the result, see infra Part V.

130 Blockburger v. United States, 284 U.S. 299, 304 (1932); see supra Parts II.B.2-3; United States v. Dixon, 113 S. Ct. 2849, 2856 (1993) ("In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies."). It could be argued that in the context of multiple punishments, legislative intent controls and Blockburger is merely a tool of statutory construction. See Missouri v. Hunter, 459 U.S. 359 (1983). Hunter, however, concerns multiple punishments in one proceeding.

131 21 U.S.C. §§ 841(a), 844(a) (1988). Section 841(a) provides that “it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” Id. § 841(a)(1). Section 844(a) proscribes knowingly or intentionally possessing a
stance, requires proof of the fact that property had a nexus with illegal drug activity. Most of the substantive drug offenses, on the other hand, do not require that conveyances, pieces of real property or proceeds be involved (used, facilitated, etc.) in the illegal drug activity. Therefore, section 881 does require proof of an element that the criminal statutes do not. *Blockburger* and *Brown*, however, require that the criminal statutes demand proof of an element not required of civil forfeiture under section 881. Otherwise, the substantive offense could be argued to be a lesser included offense of section 881, and therefore susceptible to double jeopardy attack.

1. Criminal Statutes Do Not Contain a Mens Rea Element Not Required in § 881

One justification that has been offered for finding that criminal narcotics offenses are not lesser included offense of civil forfeiture is that the criminal statutes require criminal mens rea, while the civil statutes do not. In *United States v. One 1977 Pontiac Grand Prix*, the court held that a “forfeiture proceeding [under § 881(a)(4)] does not require proof of criminal intent.” The court based its decision on *Calero-Toledo v. Pearson Yacht Leasing Co.*, a case in which the Supreme Court upheld the forfeiture of an innocent owner’s yacht. In reaching its decision in that case, the Court found that forfeiture is not based on specific criminal intent, but instead could be understood as a “penalty for carelessness.” The *Pontiac Grand Prix* and other courts have read this decision to mean that the mens rea for civil forfeiture is “negligence,” punishing property owners for not “exercis[ing] greater


135 *Id.* at 49.


137 *Id.* at 681; see also *id.* at 683, 685.
Although appealing at first glance, the mens rea argument fails on several counts.

First, civil forfeiture is "tie[d] . . . directly to the commission of drug offenses." Therefore, in addition to the mens rea requirement for section 881, which may indeed be a standard lower than criminal state of mind, the statute incorporates the elements of the criminal statutes within its provisions. Furthermore, the mens rea requirement in section 881 refers to an attendant circumstance (whether an act or omission has been committed), while the mens rea requirement found in the criminal statutes refers to conduct (manufacturing, possessing, etc.) Simply stated, these mens rea requirements attach to different elements of the statutes. Section 881, therefore, requires that the government prove an additional mens rea requirement: that the claimant knew or consented to the act giving rise to the forfeiture. In sum, this argument helps to prove that section 881 requires the proof of an element in addition to those found in the criminal statutes, but fails to demonstrate that there is an element in the criminal statutes not present in the civil. Because section 881 incorporates the criminal statutes, the government usually must prove a violation of criminal law as a predicate to forfeiture. Along with proving a criminal violation comes all of the elements of the violation, including its mens rea requirements.

2. Criminal Drug Offenses and § 881 "Offenses" Are Not the "Same Offenses" in All Cases

As previously noted, it can be argued that the various substantive drug offenses are lesser included offenses of forfeiture because they are incorporated within the provisions of section 881. In Oakes v. United States, the court dismissed the

138 Id. at 688.

139 Austin v. United States, 113 S. Ct. 2801, 2811 (1993); see supra notes 3-5.

140 The "mens rea" for civil forfeiture is found in the innocent owner's defenses. Under the statute, property is exempt if the acts giving rise to the forfeiture occurred without the owner's "knowledge or consent," 21 U.S.C. § 881(a)(4)(C), (a)(6), (a)(7) (1988), or "willful blindness," id. § 881(a)(4)(C).

141 For more on the distinction between attendant circumstance and conduct, see MODEL PENAL CODE § 2.02 (1982).

142 The word "usually" is used because this does not appear to always be the case. See infra notes 149-54 and accompanying text.

government's argument that sections 881(a)(7) and 841(a)(1) possess separate elements because "the forfeiture statute subsumes all of section 841(a)(1) and, therefore, renders the criminal conviction and the civil forfeiture the 'same offense' as defined by Blockburger." The statute's text supports this argument. Section 881(a)(4) provides for the forfeiture of conveyances that can be linked to contraband "which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter." Section 881(a)(6) provides for the forfeiture of proceeds connected to "violation[s] of this subchapter." Likewise, section 881(a)(7) allows forfeiture of real property having a nexus with "a violation of this subchapter."

A closer examination of section 881, however, reveals that the government need not prove a violation of the controlled substance statutes to obtain forfeiture in every case. First, forfeiture under all three sections is available for property which is "intended" to be used to commit or facilitate a violation of the underlying drug offense. In these cases, the government could obtain forfeiture without proving an actual criminal violation so long as it could prove the property was merely intended to be used to violate or facilitate a violation of the relevant criminal statutes. Sec-


144 872 F. Supp. 817 (E.D. Wash. 1994).
145 Id. at 824 ("Section 881(a)(7) is premised upon a violation of Title 21 . . . [and] therefore, requires a preceding violation of the controlled substance statutes."). The court stated further that "[t]o accept the Government's argument that the sections involve different elements simply because one section of the statute deals with property and the other people, would be to adopt a circular and illusory theory." Id.
146 21 U.S.C. § 881(a)(1) (1988); see also id. § 881(a)(2). Section 881(a)(4) incorporates §§ 881(a)(1)-(2) within its text. See supra note 3.
147 Id. § 881(a)(6) (1988).
148 Id. § 881(a)(7) (1988).
149 For a state case in accord, see State v. Clark, 875 P.2d 613, 618 (Wash. 1994) (leaving open possibility that criminal and civil drug offense penalties may not punish for the "same offense").
150 Id. § 881(a)(4), (6), (7) (1988); see also supra notes 3-5 and accompanying text.
151 Forfeiture for an intended violation, while apparently avoiding double jeopardy problems, may run afool of the fundamental due process notion that punishable crimes must contain both a mens rea and actus reus component and that the government may not punish a lawful act done with criminal intent. JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 53-63 (1991).
ond, the government could pursue forfeiture premised upon different criminal violations than those being charged in the indictment. For example, the defendant could be charged with distributing controlled substances under section 841(a)(1), and the property forfeited because it was used to manufacture the substances under section 856. If the defendant had not been prosecuted for a violation of section 856, the forfeiture could be said to punish for a separate and different offense. Therefore, depending upon the actual facts of a particular set of proceedings, the forfeiture statute may or may not incorporate the relevant criminal violation.

Generally speaking, it is true the Blockburger test should be applied by analyzing the elements of a statute on its face, without regard to the specific facts underlying the proceedings. Applying this logic, it could be argued that violations of the controlled substances laws "cannot be abstracted from the 'element'" of a violation of the forfeiture statute since section 881 "incorporate[s] the entire governing criminal code in the same manner as the Harris felony-murder statute incorporated the several enumerated felonies." Under this view, "the underlying substantive criminal

152 See United States v. Sherrett, No. CR 92-298-JO, 1995 WL 79917, at *7 (D. Or. Feb. 8, 1995); Quinones-Ruiz v. United States, 873 F. Supp. 359, 362 (S.D. Cal. 1995). In Sherrett, the court examined the forfeiture complaint to determine if it was based on the charges subsequently charged in the criminal indictment. The court noted that although the government could have premised forfeiture on an uncharged offense, the forfeiture complaint's broad allegations incorporated all charged offenses as well, and was therefore based upon offenses which the government was subsequently seeking to punish criminally. Sherrett, 1995 WL 79917, at *8.

153 Distributing and manufacturing under § 841(a)(1) could be characterized as separate offenses since the government need not prove the defendant manufactured to prove distribution, nor that the defendant distributed to prove manufacture.

Similarly, because conspiracy to commit an offense is not the "same" as the underlying predicate offense, United States v. Felix, 112 S. Ct. 1377 (1993), property could be forfeited because it was involved in a drug conspiracy while the offender could be prosecuted for the predicate offense, and vice versa.

154 See Hill v. Tennessee, 868 F. Supp. 221 (M.D. Tenn. 1994). In Hill, the state claimed that the plaintiff's vehicle was seized because he had used the car to transport marijuana seeds. The state further claimed that he had been criminally prosecuted for possession or manufacture of living plants, a separate offense. Because the plaintiff denied transporting seeds, the court denied the government's request to dismiss his 42 U.S.C. § 1983 claim challenging the forfeiture. Id. at 225-26. However, the case demonstrates a situation where the relevant criminal statute would not be incorporated within the forfeiture statute.


156 Id. at 2857.
However, support for looking behind the actual wording of the statute to determine which provision is actually being incorporated in a particular case can be found in Supreme Court cases doing just that. In *Harris v. Oklahoma,* for instance, the Court invalidated a subsequent conviction for “robbery with firearms” because that offense had been used as the predicate offense in obtaining a prior conviction for felony murder. However, the Court would have likely upheld a conviction for felony murder predicated on a separate offense because the conviction for the greater crime would not have included the prior conviction for the lesser crime (robbery with firearms). In other words, it is not enough to say that the felony murder statute incorporates all violent felonies and therefore precludes all subsequent convictions for violent felonies arising out of the same facts. Assuming the latter prosecution is not for an offense that is the “same” as the predicate offense that was used to establish felony murder, the latter prosecution would be for a separate offense, not for a “species of lesser-included offense.” Similarly, civil forfeiture, though incorporating the criminal drug code, can be predicated on different offenses from the ones criminally charged. If the predicate offense is indeed separate from the one criminally charged, the mere fact that the statute’s wording incorporates “violation[s] of this subchapter” should not preclude parallel forfeiture and criminal proceedings. For example, if the defendant were to be criminally convicted of manufacturing controlled

157 Id. (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)).
158 See supra notes 51-58 and accompanying text; cf. Garrett v. United States, 471 U.S. 773, 786 (1985) ("[W]e must examine not only the statute which Congress has enacted, but also the charges which form the basis of the Government’s prosecution here.").
159 433 U.S. 682 (1977) (per curiam).
160 Id.; see also notes 49-50 and accompanying text.
161 Dixon overruled the same facts approach. See supra note 155. The approach of looking behind the statute to determine the actual predicate offense is indeed a statutorily based rather than a factually based approach. It is not concerned with whether the same evidence will be introduced, but with whether the government will prove different elements. See Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975); supra note 47.
162 For example, assume that a defendant is convicted of felony murder based on the underlying felony of armed robbery. A subsequent prosecution for a rape that occurred during the robbery would not be barred by the prior felony murder conviction even though the rape could have served as the predicate offense.
164 For support of this view, see supra notes 149-54 and accompanying text.
NOTE—DOUBLE JEOPARDY IMPLICATIONS

substances and that conviction then served as the basis for forfeiture, the criminal conviction could be analogized to a “species of lesser-included offense.” Although it is not necessary to prove manufacturing to obtain forfeiture, it is permissible, and if done, amounts to punishing for the offense of manufacturing twice in separate proceedings. But this result could arguably be avoided.

In a similar vein, the government could predicate the forfeiture on the acts of a party other than the defendant. If the government can prove that the property was involved in the third party’s illegal conduct, the defendant would not be punished twice by the forfeiture because the forfeiture would be based upon a different offense than the one for which the defendant had been convicted; in fact, a party other than the defendant would have been punished by the forfeiture. Forfeiture in such a case would be premised upon the acts of a different individual and would necessarily pass muster under the Double Jeopardy Clause.

Premising forfeiture on the acts of a third party raises a different, yet related, issue of the “same offense” requirement. The Seventh Circuit held in United States v. Torres that jeopardy does not attach when defendants do not make themselves parties to the civil proceeding. In Torres the defendant forfeited $60,000 under section 881(a)(6) prior to being convicted of drug offenses. The court upheld the imprisonment because the defendant had not made himself a party to the civil action, but it intimated that double jeopardy would have been violated if he had been a party. The court recommended that, in the future, the United States should seek forfeiture and imprisonment in one proceeding. Torres represents a variation of the “same offense”

---

167 28 F.3d 1463 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).
169 Torres, 28 F.3d at 1465.
170 Id. at 1464. Though appearing to accept that civil and criminal proceedings are “separate,” the court did not address the possibility that Austin may not apply to § 881(a)(6) or that there may be a “separate offense” problem. The concurring opinion
argument. If the defendant at issue does not become a party to the civil action, arguably no double jeopardy violation occurs because jeopardy does not attach nor is the defendant twice punished.\footnote{171}

In conclusion, it appears that summarily assuming section 881 punishes for the same offenses as, or is a greater included offense\footnote{172} of, the criminal drug statutes is unwise. First, the govern-

did not accept the court's dicta, preferring instead to wait until the issue comes squarely before the court. \textit{Id.} at 1466 (Ripple, J., concurring).

\footnote{171} This logic seems somewhat specious. Although jeopardy does not technically attach in the sense that the defendant was never prosecuted in the civil action, punishment surely occurs if the proceeding results in the defendant being deprived of property in which he or she has a legally recognized property interest. Cynthia Sherrill Wood, \textit{Note, Asset Forfeiture and the Excessive Fines Clause: An Epilogue to Austin v. United States}, 29 \textit{Wake Forest L. Rev.} 1357, 1397 (1994) ("Losing one's property to the government is surely punishment, whether one took the opportunity to intervene or not.").

\textit{Torres} does make a strong case, however, in that it involved proceeds forfeitable under § 881(a)(6). The best indicia of ownership of cash could very well be the fact that the party claims the money in the forfeiture proceeding. In the cases of conveyances and real estate forfeitable under §§ 881 (a)(4) and (a)(7), however, ownership will undoubtedly be evidenced by title documents or deeds. Because the law recognizes these documents as evidencing ownership, taking these property rights should amount to punishment regardless of whether the owner asserts the ownership interest in the civil action. \textit{Cf. United States v. James Daniel Good Real Property}, 114 S. Ct. 492, 498 (1993) (seizure of home deprived claimant of "property interests protected by the Due Process Clause"); \textit{id.} at 501 (The "right to maintain control over [the] home, and to be free from governmental interference, is a private interest of historic and continuing importance."). Failure to appear, although apparently waiving any due process claim (if notice was given), arguably should not operate to waive an ownership claim, and in turn, a future double jeopardy claim. Likewise, drug offenders should not be able to insulate themselves from future criminal sanction merely because they make a claim on property in which they have no real ownership interest. \textit{Torres}, however, has been received well by the courts. In addition to cases cited supra note 168, see People v. Towns, Nos. 2-93-1376, 2-94-0111, 1995 WL 77588 (Ill. Ct. App. Feb. 24, 1995) (opinion as yet unreleased and subject to withdrawal).

\footnote{172} A corollary argument that could be made regarding the "same offense" issue is that § 881 is not a greater included offense of the criminal drug offenses because of the different standards of proof in the civil and criminal proceedings. See Durosko v. Lewis, 882 F.2d 357, 359-60 (9th Cir. 1989) (standard of proof should be considered an element for purposes of \textit{Blockburger}), \textit{cert. denied}, 495 U.S. 907 (1990). A prosecutor who establishes a violation of a greater included offense "necessarily has established" a violation of the lesser included offense. Brown v. Ohio, 432 U.S. 161, 167-68 (1977). But a prosecutor who establishes a valid § 881 claim simply has not established a violation of any criminal statute because any criminal violation would have been proved by a preponderance of the evidence in the civil action and not beyond a reasonable doubt. \textit{Cf. One Lot Emerald Cut Stones v. United States}, 409 U.S. 232, 235 (1972) (Double Jeopardy Clause does not bar forfeiture subsequent to an acquittal because the different standards of proof preclude collateral estoppel).

\textit{Kurth Ranch} and \textit{Halper} are not necessarily inconsistent with this argument. It could be argued that the tax and forfeiture statutes involved in those cases were in fact the \textit{lesser included} offenses. Establishing criminal violations in those cases did "necessarily estab-
ment should be afforded the opportunity to prove that it is predi-
cating the forfeiture claim on a claim "separate" and different
from any charges being criminally prosecuted. If the government
can prove that the defendant committed more than one statutory
offense and that it is prosecuting for one offense and using the
other as the basis of forfeiture, no double jeopardy violation oc-
curs. Obviously, the government's commonly used method of bas-
ing a motion for summary judgment in the civil action upon a
prior criminal conviction would raise serious doubts about whether
the defendant was being punished for the "same offense."

Second, the government should be afforded the opportunity
to prove that forfeiture is predicated upon the actions of a party
who is not the owner of the property or is not a claimant in the
civil proceeding. This would include the opportunity to prove that
the property's forfeiture is being based on the actions of a third
party and that the owner-defendant is not an innocent owner.
Finally, the government should be allowed to offer proof that the
forfeiture is based on the property being "intended" to be used to
violate or facilitate a violation of the criminal statutes. If the gov-
ernment proves intent via a completed offense which is being or
has been criminally prosecuted successfully, that offense may then
be "a species of lesser-included offense," hence barring forfeiture.
However, if the forfeiture is based upon an inchoate, but intend-
ed, violation, forfeiture would be allowable (disregarding any due
process claims) since it would be based upon an incomplete of-
fense for which the defendant would not have been prosecut-
ed.173

In applying these principles, courts may wish to avoid an
"overly technical interpretation of" the Double Jeopardy
Clause,174 recognizing that the "Double Jeopardy Clause is not

lish" a valid civil claim because proving the claim beyond a reasonable doubt at trial
established the same claim by a preponderance of evidence. Cf. United States v. Halper,
490 U.S. 435, 441 n.4 (1989). One could argue that unlike § 881, those statutes did not
require the proof of an element in addition to those required for criminal conviction.

The problem at hand is reversed. It is usually argued that the § 881 civil statute is the
greater included offense, not the lesser. The strength of this admittedly technical ar-
argument, however, is dubious at best since, inter alia, it was not even a consideration of
the Court in Kurth Ranch or Halper.

173 The court would have to reevaluate the government's "intended offense" claim if
the defendant had been criminally convicted of attempt, which is itself an inchoate of-

dense.

judgment in part and dissenting in part).
such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Prosecutors validly utilizing parallel proceedings must therefore draw clear lines between predicate and charged offenses. The chance of success can also be increased by respecting the Double Jeopardy Clause's principles of fairness and finality; prosecutorial overreaching is likely to weigh against a finding of validity. In sum, a per se rule that section 881 forfeiture violates the Double Jeopardy Clause when instituted after criminal conviction is not required by existing law. Although the "separate offense" issue has yet to be fully considered by the courts, it does not deserve to and should not be assumed away in summary fashion.

IV. A FINAL CAVEAT: IS SECTION 881(A)(6) PUNISHMENT?

A. The Fifth and Ninth Circuits

Although yet to take a position on Millan's "single, coordinated prosecution" test, the Fifth Circuit has adopted a unique position concerning section 881(a)(6) forfeitures. The court has relied upon the fact that Austin is limited to forfeitures under sections 881(a)(4) and (a)(7) to find that section 881(a)(6) does not punish for some offense. In United States v. Tilley, the defendants sought the dismissal of a criminal indictment because, they argued, the prior civil forfeiture of $650,000 in proceeds from drug sales had punished them, and any additional criminal penalty would be multiple punishment in a separate proceeding.

Applying Halper, the court held that

[the forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combatting the allure of illegal drugs, caring for the victims . . . , lost productivity, etc.]

Because illegal proceeds are inextricably linked to the amount of drug sold, the court found that there is no danger the amount

175 Brown, 432 U.S. at 169.
176 See supra notes 24-27 and accompanying text.
177 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994).
178 Id. at 296.
179 Id. at 299. The defendants were involved in a large criminal enterprise which possessed millions of dollars of illegal drug proceeds. Id. at 297.
NOTE—DOUBLE JEOPARDY IMPLICATIONS

1995]

forfeited will be disproportionate to the harm inflicted upon society. Therefore, the court found that section 881(a)(6) forfeitures are always remedial and never punitive. In short, according to the court, "the logic of Austin is inapplicable to § 881(a)(6)—the forfeiture of drug proceeds."\(^\text{180}\)

Additionally, the court found no reason for the law to protect property rights in illegal proceeds.\(^\text{181}\) Because there is no right to possess ill-gotten gains, the argument goes, the property is essentially in and of itself contraband. Those affected by section 881(a)(6) forfeitures simply have no right to ownership,\(^\text{182}\) similar to the bank robber who has no right to possess the proceeds acquired by holding up banks.\(^\text{183}\) Under Tilley, it appears that forfeitures under section 881(a)(6) can never violate the Double Jeopardy Clause.

The Ninth Circuit, on the other hand, has held that forfeiture under section 881(a)(6) is always punishment.\(^\text{184}\) Applying the factors set forth in Austin, the court held that section 881(a)(6) forfeiture is punishment per se. In addition, the court found that since section 881(a)(6) provides for the forfeiture of proceeds used or intended for use to facilitate a violation of the drug laws,\(^\text{185}\) the amount forfeited is not inextricably linked to the cost of harm to society and the government. The scope of the section is broad enough to include gains that are not ill-gotten; for example, the section would arguably allow for the forfeiture of legally earned moneys which were intended to be used for the purchase

---

180 \textit{Id.} at 300; cf. SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement of illicit gains from violations of securities laws remedial in nature).

181 \textit{Tilley}, 18 F.3d at 300.

182 See Maldonado v. United States, Nos. 94 CIV. 7120 (LBS), 90 CR. 228 (LBS), 1995 WL 6253, at *2 (S.D.N.Y. Jan. 6, 1995) ("[T]he nature of the seizure of drug proceeds (as distinguished from property that facilitates narcotics trafficking) is such that it does not trigger double jeopardy concerns, especially where ... the amount of drug proceeds seized at the time of the arrest is so disproportionately small in comparison to the scope of the narcotics trafficking." (citing United States v. United States Currency in the Amount of $145,159.00, 18 F.3d 73 (2d Cir.), cert. denied, 115 S. Ct. 72 (1994); \textit{Tilley}, 18 F.3d 295)).

183 See, e.g., Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his . . . .")

184 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1218-22 (9th Cir. 1994). The court explicitly rejected \textit{Tilley}, \textit{id.} at 1220, reading \textit{Austin} as requiring the court to consider the statute as a whole rather than the particular property to be forfeited. \textit{Id.} (citing \textit{Austin} v. United States, 113 S. Ct. 2801, 2812 n.14 (1993)).

185 See generally supra note 5.
of a house to store controlled substances. Because of the court's decision to examine section 881(a)(6) as a whole (as opposed to a particularized finding of in which category of proceeds the money at issue falls), the court held that the forfeiture action was precluded by the Double Jeopardy Clause.

B. The Better View: § 881(a)(6) Forfeiture is Punishment

Before section 881(a)(6) forfeiture can be found to barred by the Double Jeopardy Clause, it is true that there must be an initial determination that it is punishment for double jeopardy purposes. The specific test to determine whether the provisions of section 881 is punishment is set forth in Austin v. United States. The Austin Court held that conveyance and real estate forfeitures under section 881 are punishment per se because they "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." The Court based its decision on the "historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish."
These three factors equally apply to section 881(a)(6), and it should therefore follow that the section does indeed inflict punishment. First, Austin’s historical analysis applies to all types of forfeiture statutes generally: “We conclude . . . that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment.”192 Second, the Court found that the inclusion of an innocent owner’s defense in sections 881(a)(4) and (a)(7) indicates a Congressional intent to punish because the provisions focus solely on culpable parties. Section 881(a)(6) likewise makes a defense available to innocent owners.193 Furthermore, as with sections 881(a)(4) and (a)(7), forfeiture under section 881(a)(6) is tied in a similar manner to commissions of criminal offenses,194 further revealing an intent to punish criminal conduct. Finally, as with the provisions considered in Austin, the legislative history of section 881(a)(6) reveals the punitive nature of the provision. When section 881 was amended in 1978 to include subsection (a)(6), Congress noted that “[d]ue to the penal nature of forfeiture statutes,” property should only be forfeited if there is a “substantial connection between the property and the underlying criminal activity.”195

Importantly, Austin deviated from Halper’s analysis in one respect. Whereas Halper requires a “particularized assessment” of the actual sanction imposed in the individual case to determine if the sanction is punishment,196 Austin found that “it makes sense to focus on §§ 881(a)(4) and (a)(7) as a whole” because “[t]he value of the conveyances and real property forfeitable under [these provisions] . . . can vary so dramatically that any relationship between the Government’s actual costs and the amount of the sanction is merely coincidental.”197 Similarly, the amount of

192 Id. at 2810.
193 See supra note 5.
194 See supra notes 5, 143-48 and accompanying text.
195 Joint House-Senate Explanation of Senate Amendment, Title III—Forfeiture of Proceeds of Illegal Drug Transactions, 124 CONG. REC. 34,571 (1978), reprinted in 1978 U.S.C.C.A.N. 9518, 9522. Although part of the legislative history of § 881(a)(6), this language was quoted by the Austin Court to support its finding that § 881(a)(4) and (a)(7) forfeiture is punishment, showing the Court’s view of the similarity between those provisions and § 881(a)(6). Austin, 113 S. Ct. at 2811.
196 Halper, 490 U.S. at 448.
197 Austin, 113 S. Ct. at 2812 n.14. Kurth Ranch provided additional support for its conclusion that Montana’s marijuana tax was punitive by pointing to the lack of nexus between the State’s formula to compute the tax and the State’s actual damages. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994).
proceeds forfeited via section 881(a)(6) varies dramatically with and has no rational relation to the amount of the government's actual costs. It would seem to follow, therefore, that section 881(a)(6) should be considered as a whole when determining whether it punishes, rather than examining each particular section 881(a)(6) forfeiture and making case-by-case determinations. Because of the ostensible applicability of Austin to section 881(a)(6), when considered as a whole, section 881(a)(6) imposes punishment.

Despite this apparently sound conclusion, the Tilley court and others have a good point; perhaps other factors not involved in sections 881(a)(4) and (a)(7) should dictate different treatment for section 881(a)(6). The argumentation of those who take this position usually proceeds on two fronts: first, because section 881(a)(6) targets illegal proceeds, it is inherently remedial and rationally related to the costs society and the government bear for illegal drug activity; and second, because section 881(a)(6) targets illegal proceeds and drug proceeds are illegal to possess, they are constitutionally forfeitable as ill-gotten gains. The commonsense theme running through both contentions is that disgorging illegally obtained drug proceeds cannot amount to punishment. This Note will independently consider and reject each of these positions.

As a preliminary matter, the underlying premise of both arguments, that section 881(a)(6) forfeits illegal drug proceeds, is flawed. The provision, for instance, is said to be remedial because it provides for the "forfeiture of proceeds of illegal drug sales." This statement, however, is an oversimplification of section 881(a)(6). In addition to things of value given in exchange for controlled substances, the provision provides for the forfeiture of (1) "things of value . . . intended to be furnished by any person in exchange for a controlled substance," and (2) "all moneys . . . used or intended to be used to facilitate any violation of this sub-


200 See supra notes 177-83 and accompanying text.

chapter.”

Valuables which have not yet been used to purchase illegal drugs but which are intended for such a use have not yet attained the status of “proceeds of illegal drug sales.” More clearly, the forfeiture of moneys used or intended to be used to facilitate a violation of the drug laws includes situations analogous to forfeitures under sections 881(a)(4) and (a)(7), with the exception that section 881(a)(6) involves liquid assets. Because the scope of forfeiture under section 881(a)(6) is broader than ill-gotten gains, it cannot be said that the section is always inherently remedial or that the possessor never has a right to possess the property. Because Austin precludes the court from examining the nature of the particular proceeds forfeited and section 881(a)(6) includes “facilitation” proceeds as does sections 881(a)(4) and (a)(7), section 881(a)(6) can only be characterized as serving, in part, to punish and deter. Provisions which are not solely remedial inflict punishment under Austin and Halper, and the Court could very easily find that the section amounts to punishment per se.

Even assuming the underlying premise (that section 881(a)(6) only covers illegal drug proceeds) were true, the two arguments which flow from the premise seem as dubious. Initially, serious doubt exists as to whether it follows that all forfeiture of illegal proceeds is inherently remedial. Tilley found that “the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold.” This much is theoretically sound, but the court goes further: “The more drugs sold, the more proceeds that will be forfeited . . . [and] these proceeds are roughly proportional to the harm inflicted upon the government and society by the drug sale.” Despite this conclusory claim of proportionality, any relationship between the government’s costs in a particular case and the amount forfeited is surely coincidental. Even if larger drug transactions do result in higher “actual costs” for the govern-

---

203 United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1214 (9th Cir. 1994) (“This statutory language is not limited to criminal proceeds—that is, money that has been furnished in exchange for drugs . . . . In addition to narcotics proceeds, the statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.”); United States v. 4204 Thordale Ave., No. 92 C 3744, 1994 WL 687628, at *10 (N.D. Ill. Dec. 7, 1994) (“[F]orfeiture under § 881(a)(6) is not limited to drug profits or proceeds.”); see supra note 5.
204 Tilley, 18 F.3d at 300.
205 Id.
206 Austin, 113 S. Ct. at 2812 n.14.
ment, a rational relation between the two is lacking. For example, the proportional cost difference between prosecuting a $1,000,000 and $1,000 drug transaction is probably not approximately 1,000 to 1. As for costs to society, Austin noted that forfeiture has “absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.”207 In sum, the argument that section 881(a)(6) is inherently remedial because it exclusively targets illegal drug proceeds fails on empirical grounds and ignores Austin’s rejection of such a proposition.

The second position taken by the courts which follow Tilley is that there is no right to possess illegal proceeds, which essentially qualify as contraband.208 Because the property is not lawfully derived, the argument goes, the owner has no property right which the law should protect.209 The bank robber example demonstrates the persuasiveness of this contention.210 As appealing as this argument may appear at first glance, however, it is simply not true that drug offenders have no property rights in illegally obtained proceeds.

Property rights are, as described by Chief Justice Marshall, “the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions.”211 The reason peo-
ple have no property rights in contraband is because a legislative enactment makes it so.\textsuperscript{212} Section 881(a)(6), however, recognizes and gives a legal property right in illegal proceeds to the drug offender. Property rights can be thought of as a "bundle of sticks," and Congress has granted at least one stick to the drug offender by recognizing the right of the offender to alienate the proceeds to an innocent party.\textsuperscript{213} In fact, the property right to alienate granted by section 881(a)(6) is substantial. The transfer does not need to be to a bona fide purchaser; giving the proceeds to an innocent donee will protect the proceeds from forfeiture.\textsuperscript{214} In this regard, the property right to the money is greater than a bank robber, who because of obtaining the property through fraud in the factum (theft), has no right to possess or pass good title (alienate).\textsuperscript{215} Furthermore, the drug offender's rights are even more substantial than one who obtains property through fraud in the inducement: such a person has voidable title and can pass good title, but only to a BFP.\textsuperscript{216} The drug offender, however, can alienate even to a donee, and so possesses a statutorily-given (via section 881(a)(6)) property right that is lawful and different from the rights of a bank robber in stolen money. Therefore, Tilley's conclusory statement that a drug offender has no right to possess illegal drug proceeds is an appealing, but misleading statement of law.

Another problem with applying a property rights theory to section 881(a)(6) is that such a theory may go too far by applying just as well to forfeitures under sections 881(a)(4) and (a)(7), which unquestionably are punishment. The first sentence of section 881(a) provides that "[t]he following shall be subject to for-
feiture . . . and no property right shall exist in them."217 Furthermore, the "forfeiture takes effect immediately upon the commission of the act."218 In other words, under any provision of section 881, the owner arguably has no lawful property right in the thing forfeited. Just as Tilley argues that no right exists to possess illegal drug proceeds, one could argue that section 881 divests persons of property interests deserving of legal protection in conveyances and real estate. Sections 881(a)(4) and (a)(7), however, do exact punishment even though "no property right" exists in the items at the time of forfeiture. Therefore, section 881(a)(6) should be construed to punish even though it takes property which the defendant has no right to possess. The section does take a legal property right, the right to alienate, and that taking punishes for some offense.

An alternative view to support the forfeiture of illegal proceeds is that equitable principles support the forfeiture of property which owes its existence to unlawful activity. As Tilley states at one point, perhaps the forfeiture of the property "does not punish the defendant because it exacts no price in liberty or lawfully derived property."219 Instead of being based on principles of property rights, the equitable justification for forfeiture could be that persons should not be allowed to benefit from their own misconduct. Sections 881(a)(4) and (a)(7) are not affected because those statutes affect conveyances and real estate ostensibly derived from lawful means, but put to use for illegal purposes.220 Notions of justice arguably support the forfeiture of illegally obtained property, whether the property be proceeds of a drug sale or a bank robbery.

The equity evident in returning stolen money to a bank, however, is missing to some degree in the context of illegal drug proceeds. Whereas the property is returned to the rightful owner, the bank, in the robbery example, drug proceeds are transferred to the government, who never owned them to begin with. In fact,

218 92 Buena Vista Ave., 113 S. Ct. at 1136 (quoting United States v. Stowell, 133 U.S. 1, 16 (1890)). Once title is perfected by judicial proceedings, the vesting of title relates back to the commission of the offense. Id.
219 United States v. Tilley, 18 F.3d 295, 300 (5th Cir.) (emphasis added), cert. denied, 115 S. Ct. 574 (1994).
220 Cf. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (stating that an automobile which has been illegally seized may be returned to the defendant because, unlike contraband, possessing a motor vehicle is not intrinsically illegal).
equity protects the bank because of the bank's innocence combined with the bank's legitimate property claim to the money. The government's rights to illegal proceeds, however, is derived from section 881(a)(6) and, as we have seen, that statute also grants a property interest to the offender.

Equitable principles do, however, seem to support the forfeiture of illegal proceeds to some extent in that the law should not allow one to profit from illegal activity. Although seemingly based on a slender reed of equitable principles, courts could hold, as the Fifth Circuit has, that the forfeiture of illegal proceeds is not punishment. Assuming the validity of the position, this Part argues that the court should perform an assessment of which type of section 881(a)(6) proceeds are involved in the case before passing on the punishment issue because of the different types of property covered by the section. Austin's suggestion that section 881 be read as a whole would be subverted to some degree, but such an assessment appears necessary if the court entertains the Tilley view because the government may be seeking the forfeiture of "facilitation" proceeds. If the court finds the proceeds are ill-gotten, the forfeiture would not be punishment. Otherwise, the property is "intent" or "facilitation" property and constitutes punishment in part and implicates the Double Jeopardy Clause.

On balance, this approach is preferable to a per se rule that section 881(a)(6) is not punishment, but it requires taking some liberty with Supreme Court precedent. On balance, the better view seems to be that the Court would rely upon the reasoning of Austin and find section 881(a)(6) is punishment per se, leaving no room for a "particularized assessment."

V. THE MATTER OF REMEDY

Courts that have found that section 881 punishes the same offense as criminal drug statutes in a single proceeding have usually held that the Double Jeopardy Clause requires that the second

---


222 For an explanation of the types of proceeds forfeitable under § 881(a)(6), see supra note 5.

223 This approach is being utilized by at least one federal court, but in the Eighth Amendment context. See United States v. $45,140.00 Currency, 839 F. Supp. 556 (N.D. Ill. 1993).
punishment be vacated. If the Supreme Court were to eventually hold that civil forfeiture via section 881 is the functional equivalent of a second prosecution for the same offense, then it is true that all second proceedings should be dismissed, or their sentences or punishments vacated. On the other hand, if civil proceedings punish but are not criminal prosecutions, then the multiple punishment prong of the Double Jeopardy Clause is solely at issue and a different result is in order. Assuming only the multiple punishment prong is involved, the unique nature of the double jeopardy violation in these situations demands a unique remedy.

Two distinct situations can arise in which a drug offender is punished in successive proceedings. First, a successful forfeiture action can be followed by a conviction, and second, a conviction can be followed by a successful forfeiture action. In the first situation, if the defendant has fully satisfied the punitive forfeiture, any pending criminal prosecution should be dismissed, or if the prosecution is completed, any criminal sentence vacated. Because the sanction resulting from prosecution is criminal punishment,

224 See, e.g. United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).
225 A persuasive argument can be made that civil forfeiture, albeit punishment, is not a criminal prosecution. See supra notes 33-35 and accompanying text. But see Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) (holding subsequent marijuana tax proceeding was functional equivalent of successive prosecution).
226 Absent the applicability of a double jeopardy exception, this would be true even if the first proceeding were unsuccessful, resulting in no forfeiture or acquittal as the case may be. See supra note 32 and accompanying text.
227 For a discussion of the multiple punishment prong of the Double Jeopardy Clause, see supra Part II.B.1.
228 This Part ignores scenarios in which either proceeding is unsuccessful. Assuming the third prong of Pearce is concerned exclusively with whether punishment has occurred and not whether a prosecution has occurred, imposing one punishment in two proceedings (one successful, one not) would not in any event result in “multiple” punishment. See United States v. Halper, 490 U.S. 435, 442 (1989) (citing Helvering v. Mitchell, 309 U.S. 391 (1938)). But see Helvering, 303 U.S. at 398 (“Where the objective of the subsequent action is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or conviction.”).
229 Cf. In re Bradley, 318 U.S. 50 (1943); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). Technically, the criminal proceeding would not necessarily need to be dismissed until it resulted in punishment, at which point, the punishment should be vacated. However, unless conviction can be had without punishment, dismissal seems to be appropriate in that eventual success would be unconstitutional. But see Kurth Ranch, 114 S. Ct. at 1947 n.21 (declining to take position on whether a civil proceeding designed to inflict punishment may bar a subsequent criminal proceeding). It should be noted that the specific holdings of Bradley and Lange have since been limited. See discussion and cases cited infra notes 236-40.
imposing it would violate the Double Jeopardy Clause if indeed the civil action had already punished the offender for the same offense.\(^{230}\)

As for the second scenario, where civil forfeiture follows conviction, the Ninth Circuit has held that the remedy is dismissal of the forfeiture action with prejudice.\(^ {231}\) However tempting the remedy of dismissal is when the second proceeding is civil in nature, it may not be required.\(^ {232}\) In *Halper* the Court stated its rule as follows:

Where a defendant previously has sustained a criminal penalty and the civil penalty sought in a subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.\(^ {233}\)

In the case of section 881(a)(4) and (a)(7) forfeiture (and this Note argues, section 881(a)(6) forfeiture), the trial court has no discretion to determine "if the penalty sought in fact constitutes . . . punishment," but the court could exercise discretion under the second directive of *Halper* and determine the size of


Rudstein suggests that a subsequent conviction is allowable as long as no fine or incarceration is imposed, and is indeed desirable because of the consequences flowing from such a conviction, such as, e.g., the inability of convicted felons to carry firearms. *Id.* at 615-16. Rudstein assumes conviction absent imposing a fine or imprisonment would not inflict "punishment." However, because a "conviction" could perhaps in and of itself amount to punishment for double jeopardy purposes, this Note declines to take the position that these "collateral consequences" are nonpunitive and constitutional under the multiple punishment prong of the Double Jeopardy Clause.

\(^{231}\) United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1222 (9th Cir. 1994).

\(^{232}\) But see *Kurth Ranch*, 114 S. Ct. at 1958 (Scalia, J., dissenting) ("[I]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference."); Rudstein, *supra* note 199, at 601-02 & nn.84-85 (collecting sources). This Note agrees that order cannot possibly make a difference in determining whether a double jeopardy violation has occurred, but that it should matter in determining what the appropriate remedy for that violation should be.

Applying this principle, if the government sought forfeiture under section 881 following conviction, the trial court would perform an accounting of the government's costs and allow remedial damages to be collected. Such an adjustment is in fact consistent with the Supreme Court's current interpretation of the Double Jeopardy Clause. In *Jones v. Thomas*, Missouri had imposed two sentences when state law only permitted one. A Missouri court, upon realizing the error, vacated the shorter sentence, which had been completely served, and credited the time served against the longer sentence. The Court held that the state court's remedy "fully vindicated respondent's double jeopardy rights." Similarly, the remedy proposed herein provides the drug offender with "every benefit double jeopardy affords. By allowing only a remedial award of damages to be forfeited pursuant to section 881, no multiple "punishment" occurs. *Jones* demonstrates that courts have the flexibility to provide differing remedies so long as the potential double jeopardy violation is cured. A remedy which cures

234 Complications would arise if this were attempted in the context of §§ 881(a)(4) and (a)(7). Because tangible property is involved, an adjustment in the amount forfeited is more difficult than when cash is sought to be forfeited. This Note leaves open the question of whether a tangible asset could be forfeited in conjunction with a cash reimbursement to the claimant in order to preserve the remedial nature of the sanction. A portion of the statutorily allowable amount of illegal proceeds forfeited under § 881(a)(6) could however be remitted so as to impose a remedial sanction, similar to the action taken in *Halper*. 

235 Rudstein suggests that even in the case of a conviction following a civil sanction, the government may be able to petition the trial judge from the civil action to reduce the amount awarded to a remedial amount. Rudstein, *supra* note 199, at 606. After the reduction, criminal sanction would be permissible. He concludes, however, that such a procedure is unavailable because of, inter alia, the inability of the government to re-open the civil case. *Id.* at 612.

In the case of a subsequent civil action, the civil case naturally would not have to be "re-opened." An adjustment would merely have to be made in the amount forfeited; in fact, a reduction is demanded by the Double Jeopardy Clause. The Ninth Circuit has effectively held the amount must be reduced to $0, a result seemingly not required by *Halper*.


237 *Id.* at 378-79.

238 *Id.* at 382. The Court relied upon the policies underlying the constitutional guarantee in order to reach its holding. The remedy was "consistent" with double jeopardy principles because once the remedy took effect, the "respondent has had every benefit the Clause affords" in that confinement was based on a "single sentence imposed for" one crime alone. *Id.* at 382 & n.2.

239 See Morris v. Mathews, 475 U.S. 237 (1986) (holding that reducing respondent's jeopardy-barred conviction for aggravated murder to a conviction for murder that was not jeopardy-barred was an adequate remedy for the double jeopardy violation); United States
the potential defect, is a valid and "suitable protection of . . . double jeopardy rights."\textsuperscript{240}

In conclusion, the remedy for a potential violation of the Double Jeopardy Clause resulting from section 881 forfeiture following a criminal conviction should be an accounting, after which the court awards an amount to the government which lies just to the remedial side of the punitive damages line. The amount could be more than actual costs and still be remedial as the Court has recognized that a rough approximation is all that is required.\textsuperscript{241} Undoubtedly, the government will receive less than it was originally seeking,\textsuperscript{242} but recovery should not be completely barred.

VI. CONCLUSION

21 U.S.C. § 881 provides for the forfeiture of property which has been used, or was intended to have been used, to commit or facilitate drug-related crimes. Two issues that currently split the U.S. Courts of Appeals and should eventually be resolved by the Supreme Court in this area are whether drug asset civil forfeiture violates the Double Jeopardy Clause of the Fifth Amendment when it occurs after criminal conviction, and whether the Clause is vio-

\begin{footnotesize}
\textsuperscript{240} DiFrancesco, 449 U.S. 117, 137 (1980) ("The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."); United States v. Rico, 902 F.2d 1065 (2d Cir.) (resentencing did not violate Double Jeopardy Clause), cert. denied, 498 U.S. 943 (1990).
\textsuperscript{241} United States v. Halper, 490 U.S. 435, 446 (1989) ("[T]he Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis."); \textit{id}. at 449 ("[T]his inquiry will not be an exact pursuit . . . . [T]he precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain . . . . [T]he process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice."); \textit{id}. at 450 ("[T]he trial court's judgment in these matters often may amount to no more than an approximation . . . ."). The Court did note that it had not decided prior to \textit{Halper} "what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs." \textit{Id}. at 446. \textit{Halper}, therefore, does not foreclose, and may suggest, the flexible remedy suggested in this Part, especially since the decision explicitly states it does not prevent the government from obtaining a compensatory remedy after conviction. \textit{Id}. at 446, 451-52.
\textsuperscript{242} Which amounts can be included under the rubric of the government's "damages and costs" beyond actual costs is unclear. For a discussion of potential inclusions, see Rudstein, \textit{supra} note 199, at 647-53.
\end{footnotesize}
lated when the forfeiture occurs before the conviction. In order to resolve these issues, the Court will have to determine whether section 881 punishes an individual for the same offense in a separate proceeding. The answers to these questions are currently unclear.

This Note argues that civil and criminal proceedings are inherently separate proceedings and cannot be viewed as the functional equivalent of one proceeding under any circumstances. Whether section 881 forfeiture punishes the same offense as a criminal conviction depends upon the facts of the particular case. It is possible for the government to convict for one offense and seek forfeiture for a separate offense, thereby conforming to the requirements of the Double Jeopardy Clause. Furthermore, the government could base the forfeiture on the criminal offense of a third party or the intended acts of the defendant; as a result, the same individual would not be punished for an offense for which conviction had been obtained. In those situations in which the same offense and individual is involved, double jeopardy is offended, and the appropriate remedy depends upon the order of the proceedings. If the civil action occurs first, the criminal proceeding must be dismissed or sentence vacated. If the second proceeding is civil, the court should perform an accounting and award the government a remedial amount equal to the approximate cost of prosecuting the action.

Finally, the Court needs to address the issue it left open in Austin: Does forfeiture under section 881(a)(6), which includes in part illegal proceeds, punish? This Note argues that the provision does indeed punish because, inter alia, it provides for the forfeiture of legal proceeds used to commit or facilitate drug law violations. The broad scope of the section serves in part to deter and punish and must be viewed as such. The forfeiture of illegal proceeds is punishment in any event because the amount forfeited has no rational relation to the remedial damages incurred by the government in prosecuting the drug violation. Furthermore, the taking of illegal proceeds is the taking of property in which drug offenders have a valid property right; forfeiting the property therefore punishes by taking a legal property interest which is recognized by Congress.

In conclusion, Austin has presented the lower courts with a vast array of problems to deal with until further guidance is provided by the Court. Until such guidance, the safest course for the government to take in most cases is to seek criminal forfeiture in
the same proceeding as criminal conviction. Otherwise, in many cases where both civil and criminal penalties are sought, the Double Jeopardy Clause will inevitably be violated. However, if prosecutors wish to utilize both civil and criminal proceedings, they should clearly and carefully delineate the individuals and statutory offenses involved in each action, and courts should uphold the practice against double jeopardy challenge if the individuals or offenses involved in the two actions are in fact separate and distinct.

*Stephen H. McClain*

*The author would like to thank Professors Jimmy Gurule and Douglas W. Kmiec for helpful discussions and valuable insights into the topic of this Note.*