Taking the Ammunition Away from the "War on Drugs": A Double Jeopardy Bar to 21 U.S.C. 881 after *Austin v. United States*

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COMMENTS

TAKING THE AMMUNITION AWAY FROM THE "WAR ON DRUGS". A DOUBLE JEOPARDY BAR TO 21 U.S.C. § 881 AFTER AUSTIN V UNITED STATES

I. INTRODUCTION

Throughout the 1980's, the United States government waged a full scale war on drugs. Its ammunition was enhanced sentencing for drug dealers and users, mandatory drug testing and restricting the flow of drugs imported into the United States. The H-bomb in the war on drugs is the federal civil drug forfeiture statute, 21 U.S.C. § 881, which may be brought without securing a criminal


2. See Richard Lacayo, A Threat To Freedom?; Civil Liberties Could Be A Casualty Of Bush's War On Drugs, TIME, September 18, 1989, at 28 (claiming that as a result of the war on drugs, 43% of all businesses with 1000 or more employees have drug-testing programs and that President Bush was calling for even more drug-testing in a recent speech).

3. See Louis Kraar, How To Win The War On Drugs, FORTUNE, March 12, 1990, at 70 (giving examples of the war on drugs aim of restricting imports to the United States: invading Panama in part to prosecute Noriega for crimes as a drug trafficker; stationing U.S. Marines as border patrols for the first time; and Bush's anti-drug summit to rally the governments of Colombia, Bolivia, and Peru to fight the powerful cocaine cartels).

4. 21 U.S.C. §881 (1988) provides in relevant part:

a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
conviction and which provides little procedural protection to defendants. Section 881 allows the government to seize an individual’s property based only on the government’s showing of probable cause that there is a connection between the property and the commission of a federal drug violation. The individual then bears the

4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [illegal drugs and equipment used to make or deliver them]

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

7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year’s imprisonment

Controlled substances, their containers and equipment used to manufacture them are forfeitable under §§ 881(a)(1)(3) & (9) respectively.


Forfeiture may proceed summarily or administratively. Id. at 40-41. Summary forfeiture involves seizure without notice or hearing and is reserved for seizing contraband or property with a value of less than $100,000. Id. at 40. In 1987, however, the Assistant Attorney General declared that all real property forfeiture would proceed judicially, regardless of its value. U.S. DEP’T OF JUSTICE, DIRECTIVE ON JUDICIAL FORFEITURE OF REAL PROPERTY (1987), reprinted in TROLAND, supra at app. XIV

Criminal forfeiture, on the other hand, requires a conviction of the defendant for a violation of the drug laws and a showing by the government by a preponderance of the evidence that: 1) the property was “acquired during the time of the violation or within a reasonable time thereafter” and 2) that there is no other likely source for the property other than the violation of the drug laws. 21 U.S.C. § 853(d) (1988). See generally Brian H. Redmond, Annotation: Validity, Construction, And Application Of Criminal Forfeiture Provisions Of Comprehensive Drug Abuse Prevention And Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189 (1992).

6. See 19 U.S.C. § 1615 (1988) (the custom law which provides that the government must first show probable cause and then the burden shifts to the claimant in forfeiture proceedings); see also United States v. Route 2, Box 61-C, 727 F Supp. 1295, 1298 (W.D. Ark. 1990) (stating that the government bears the burden of proof of establishing probable cause that the property was used to facilitate an illegal drug transaction).

The tests for determining probable cause are the same as the tests used to determine
burden of showing, by a preponderance of the evidence, that the property was neither used, nor intended to be used, illegally or that it falls within one of the statutory exceptions. Section 881 was broadened in the 1980's to include the forfeiture of real property and, under the government's zero tolerance policy, was applied to seize large amounts of property for even the smallest violations of the drug laws. The main purpose of civil forfeiture is to deter drug dealers by confiscating their proceeds from drug sales and thereby eliminate any incentive to sell drugs. Without suppliers, the subsequent use of drugs would disappear.

The United States is losing the war on drugs and, in the process, making civil liberties a casualty Congress recently acted to
protect the innocent owner of forfeitable property, yet many violations of civil liberties remain unrestrained. The Supreme Court has stepped in to protect civil rights from being trampled upon by this war with its decisions in four drug forfeiture cases this term. In one of those cases, Austin v. United States, the Supreme Court considered an application of the Excessive Fines Clause of the Eighth Amendment for only the second time in history and held that the Excessive Fines Clause did apply to forfeitures of property under §§ 881(a)(4) and (a)(7).

In applying the Excessive Fines Clause to § 881, the Court used strong language defining § 881 as a statute imposing pun-

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False Logic Misdirects The U.S. War On Drugs, NAT'L. L.J., April 12, 1993, at 13 (remarking on the failure of the war on drugs as evidenced by the continuation of street-corner sales and the stability of the wholesale price of cocaine). But see Needed Course Correction In Drug War; Supreme Court Blows The Whistle On Outrageous Forfeitures of Assets, L.A. TIMES, July 4, 1993, at 4 (asserting that researchers claim the war on drugs has led to a decline in the number of casual marijuana and cocaine users and a change in public attitudes toward drug use).

Examples abound of the government seizing large amounts of property of innocent or small drug users. See, e.g., David A. Kaplan et al., Where the Innocent Lose, NEWSWEEK, January 4, 1993, at 42 (telling the story of the Bergmans in South Dakota who lost their lakefront home as a result of U.S. Marshals finding a friend's marijuana and their daughter's marijuana butt at their home).

13. In 1988 Congress enacted 21 U.S.C. § 881(a)(4)(C), the "innocent owner" defense to civil forfeiture, which provides: "No conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner."

14. See Republic Nat'l Bank v. United States, 113 S. Ct. 554, 562 (1993) (holding that simply moving the res outside the district court's control by transferring the funds to the Treasury does not deprive the federal courts of jurisdiction to hear a claimant's appeal on a forfeiture judgment); United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1134 (1993) (holding that an owner's lack of knowledge that her home was purchased with the proceeds of a drug transaction fell under the innocent owner defense and that defense was not limited to a bona fide purchaser or one who acquired the property interest before the acts giving rise to the forfeiture took place); cf. Austin v. United States, 113 S. Ct. 2801, 2812 (1993) (holding that the Excessive Fines Clause applies to forfeiture of property); Alexander v. United States, 113 S. Ct. 2765, 2776 (1993) (holding that the forfeiture of a business on the basis of selling seven obscene magazines at some of the stores does not violate the free-speech provision of the First Amendment but remanding the case for a determination of whether the seizure violated the Excessive Fines Clause consistent with Austin).


16. Id. at 2812; see also Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 262 (1989) (stating that the Court was for the first time considering an application of the Excessive Fines Clause). The Court in Browning-Ferris held that the Clause did not apply to constrain money damages in a civil suit. Id. at 264.
ishment for an offense.\textsuperscript{17} This case not only empowers state courts to strike down forfeiture under § 881 as excessive under the Eighth Amendment but may also have far-reaching double jeopardy restrictions on the government’s ability to even bring actions under § 881.

This Comment examines § 881, as defined by \textit{Austin}, under the Court’s analysis of the Double Jeopardy Clause and concludes that § 881 would be barred by the Double Jeopardy Clause where a criminal prosecution is also pursued by the government. Part II discusses the \textit{Austin} case. Part III analyzes § 881 under the Court’s interpretation of the Double Jeopardy Clause and concludes that § 881 would be barred by both the successive prosecution and multiple punishment arms of the Double Jeopardy Clause. Part III also advocates extension of the double jeopardy doctrine, based on public policy considerations, to bar § 881 where there has been an acquittal from prosecution under the underlying drug laws.

\textbf{II. BACKGROUND: \textit{AUSTIN} v \textit{U.S.}}

On June 13, 1990, Richard Lyle Austin sold two grams of cocaine to a customer of his auto body shop.\textsuperscript{18} The next day Austin’s auto body shop and mobile home were legally searched and marijuana, cocaine, and large amounts of cash were seized by state law enforcement officers.\textsuperscript{19} Austin pleaded guilty to one count of possessing cocaine with intent to distribute under South Dakota’s drug laws and was sentenced to seven years imprisonment.\textsuperscript{20} Less than one month later, the United States government filed a civil forfeiture action against Austin seeking forfeiture of his mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7).\textsuperscript{21}

Despite Austin’s argument that forfeiture of the properties violated the Eighth Amendment Excessive Fines Clause, the United States District Court entered summary judgment for the United

\textsuperscript{17} \textit{Austin}, 113 S. Ct. at 2812.
\textsuperscript{18} United States v. 508 Depot Street, 964 F.2d 814, 815 (8th Cir. 1992), rev’d \textit{sub nom.}, \textit{Austin} v. United States, 113 S. Ct. 2801 (1993).
\textsuperscript{19} Id. at 815-16. Specifically, a twenty-two caliber revolver, some marijuana, $3,300 cash, a piece of mirror, a small white tube and a razor blade were found in the body shop. \textit{Id.} In the mobile home, an electronic scale, a small baggie of cocaine, a bundle of cocaine, a baggie of marijuana and $660 cash was found. \textit{Id.} at 816.
\textsuperscript{20} \textit{Austin}, 113 S. Ct. at 2803.
\textsuperscript{21} \textit{Id.}, \textit{see supra} note 4 (providing the text of §§ 881 (a)(4) and (7)).
States. The United States Court of Appeals for the Eighth Circuit "reluctantly" agreed with the government and affirmed. The United States Supreme Court reversed the holding of the Court of Appeals and remanded.

The Supreme Court abandoned its traditional focus on whether a statute is criminal or civil in applying the Eighth Amendment Excessive Fines Clause to civil forfeiture. Instead, the Court framed the issue as whether §§ 881(a)(4) and (a)(7) are punishment and thus fall under the confines of the Excessive Fines Clause. The Court first recognized that historically one of the main purposes of forfeiture was to punish the property owner. Looking specifically at §§ 881(a)(4) and (a)(7), the Court next concluded that the legislative intent behind this statute was also punishment. The Government argued that §§ 881(a)(4) and (a)(7) are remedial because they remove the instruments of the drug trade and because they are compensation to the Government for law enforcement and social problems resulting from the drug trade. The Court rejected these arguments and concluded that forfeiture under §§ 881(a)(4) and (a)(7) constitutes "payment to a sovereign as punishment for some offense" and is, therefore, subject to the limitations of the Excessive Fines Clause. The Court deferred to the lower courts to consider the definition of when a fine is constitutionally "excessive."

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22. 508 Depot St., 964 F.2d at 816. The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

23. 508 Depot St., 964 F.2d at 817.


25. See infra notes 77-82 and accompanying text (discussing the traditional civil/criminal distinction when applying constitutional protections to civil forfeiture actions); see also Ingraham v. Wright, 430 U.S. 651, 664 (1976) (concluding that, based on the history of the Eighth Amendment, it was intended to apply to protect those convicted of crimes and therefore did not apply to paddling of children as a means of discipline in public schools).

26. Austin, 113 S. Ct. at 2806.

27. Id. at 2810.

28. Id. at 2811.

29. Id.

30. Id. at 2812 (quoting Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 265 (1989)).

31. Id.
III. ANALYSIS

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life and limb." The Double Jeopardy Clause has traditionally been thought of as encompassing dual armed protections: the successive prosecution arm and the multiple punishments arm. In Helvering v. Mitchell, Justice Brandeis articulated the protections of the Double Jeopardy Clause: "[T]he Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense." While the Double Jeopardy Clause was initially interpreted to apply only in cases where the defendant was literally in jeopardy of losing his or her life, it has since been interpreted to apply to prosecutions and punishments other than those containing a corporal element. Still, the clause may generally be applied only where the prosecutions or punishments are criminal in nature.

The dual arms of the Double Jeopardy Clause protect against two different interests of defendants. The bar against successive prosecution protects the defendant's interest in the finality of the verdict, a protection often said to be at the heart of the Double Jeopardy Clause. The successive prosecution arm of the clause
protects the defendant from having to defend him or herself against repeated attempts at conviction which would "subject[] him [or her] to embarrassment, expense and ordeal and compel[] him [or her] to live in a continuing state of anxiety and insecurity." The bar against successive prosecution also denies the prosecution an opportunity to perfect their case against the defendant until they successfully convict him or her. On the other hand, the bar against multiple punishments protects against unfairness in sentencing. Multiple punishment issues can arise where there are two punishments being imposed in a single prosecution or where there are two punishments being imposed in successive prosecutions.

A. Dual Sovereignty

Because there is potential for both state and federal prosecution under their respective drug laws, this Comment must first address the dual sovereignty exception to the Double Jeopardy Clause. This exception allows for an individual to be prosecuted for the infraction of the laws of both the state and the federal government for the same criminal act. The dual sovereignty exception is based upon the rationale that each citizen of the United States has a right to be free from the imposition of successive trials without being tried by the same sovereign. This notion is supported by the deference the Court gives to Congress' intent to impose two punishments in a single proceeding. See infra notes 139-41 (discussing the Court's holding in Missouri v. Hunter, 459 U.S. 359 (1983)).

40. See Tibbs v. United States, 457 U.S. 31, 41-42 (1982) (asserting that multiple trials create the risk that the government will win eventually by sheer perseverance and by the ability to perfect its case).
41. See Jahncke, supra note 36, at 117 (arguing that the multiple punishment prohibition of the Double Jeopardy Clause is concerned with unfairness in sentencing and not the mere fact of a second prosecution).
42. See Missouri v. Hunter, 459 U.S. 359, 366 (1953) (holding that where cumulative sentences are imposed in a single trial, double jeopardy prevents the sentencing court from proscribing a greater punishment than the legislature intended); United States v. Halper, 490 U.S. 435, 448-49 (1989) (holding that a civil sanction brought following a criminal conviction can be so divorced from any remedial government goal so as to constitute multiple punishment barred by the Double Jeopardy Clause).
43. See United States v. Lanza, 260 U.S. 377, 382 (1922) (holding that prosecution by the state and federal governments for the same act was not barred by the Double Jeopardy Clause). The dual sovereignty exception has also been extended to allow two states to prosecute an individual for the same criminal act. See Heath v. Alabama, 474 U.S. 82, 88 (1985) (holding that the defendant violated the "peace and dignity" of two sovereigns and therefore a guilty plea to hiring men to kidnap his wife in Georgia did not bar prosecution in Alabama where the wife was taken from her home). This Comment focuses only on actions brought under § 881 which is a federal statute, and therefore dual state prosecutions are not in issue.
States is also a citizen of a state and that both exercise sovereignty over him or her. The Court considers prosecution by the federal government following state court prosecution as necessary to avoid undermining federal law enforcement.44

There are, however, two limitations to the application of the dual sovereignty exception to federal prosecution.45 The first is a judicial limitation prohibiting federal and state authorities from manipulating the system for purposes of obtaining a second prosecution.46 The second limitation is a Department of Justice policy which states that a federal prosecution can follow a state prosecution for the same criminal act only when there are compelling reasons and the prosecuting attorney obtains permission from the Assistant Attorney General.47

Neither limitation to the dual sovereignty exception would likely apply to a case brought under § 881, therefore, if the initial prosecution were under state law, there would be no double jeopardy bar to the federal government bringing an action under § 881.48 Only if there were blatant collusion between authorities in an individual case would the Court apply the first limitation.49 Cooperation between state and federal governments would not rise to this level.50 The second limitation has not been held to be a

46. See id. at 1252 (citing numerous cases where this doctrine was established). The defendant bears the burden of proving that a state prosecution is really a vicarious federal prosecution. See, e.g., United States v. Harrison, 918 F.2d 469, 475 (5th Cir. 1990) (placing the burden on the defendant to prove the state prosecution is merely a tool of the federal prosecution and then shifting the burden to the government to show there was no double jeopardy violation).
47. This policy is called the "Petite Policy" and gets its name from the Supreme Court case recognizing its existence, Petite v. United States, 361 U.S. 529, 530-31 (1960); see also EXECUTIVE OFFICE FOR U.S. ATTORNEYS, CRIMINAL DIVISION, UNITED STATES ATTORNEYS' MANUAL § 9-2.142 (1985) (describing the Petite policy).
48. There would also be no bar to the state prosecuting the defendant after the federal government brought suit under § 881. See Cross v. North Carolina, 132 U.S. 131, 139 (1889) (reaffirming the principle that the same act may be considered a criminal offense by two sovereigns with concurrent jurisdiction and punishment by one does not preclude punishment by the other).
49. See Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959) (providing that, where the FBI turned over evidence against the defendant to the state, the state prosecution was not "a sham and a cover" for the federal prosecution and was therefore not barred).
50. See id. at 124 (despite cooperation between federal and state prosecutors, state prosecution after federal acquittal "not a sham and cover for federal prosecution" and
While the government has chosen to follow such a policy, if a federal prosecution has been instituted following a state prosecution for the same act and the policy has not been followed (i.e. there is no compelling reason and the requisite permission has not been granted), the federal suit is not barred by the Double Jeopardy Clause.\textsuperscript{52}

In practice, either the federal or state governments can initiate prosecution of controlled substance cases. The United States Attorneys' Manual provides factors to be considered when determining whether the federal government will proceed with prosecution or whether referral should be made to state or local prosecutors.\textsuperscript{53} After considering these factors, in many cases the federal government retains jurisdiction over prosecution and may be more willing to prosecute when the state forfeiture law does not allow for the broad forfeiture found under § 853 and § 881. As individuals will often be charged under federal drug statutes and then subjected to civil forfeiture, or vice-versa, this Comment's analysis of

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\textsuperscript{51} See United States v. Pungitore, 910 F.2d 1084, 1120 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991) (stating that the Petite policy gives no substantive rights to the defendant to avoid a subsequent federal sentence following a state conviction). Several recent court cases held that the Petite policy is only an internal guideline and therefore it does not give the defendant any substantive rights. See, e.g., United States v. Simpkins, 953 F.2d 443, 445 (8th Cir.), cert. denied, 112 S. Ct. 1988 (1992); United States v. Heidecke, 900 F.2d 1155, 1157 n.2 (7th Cir. 1990); United States v. Gourley, 835 F.2d 249, 251 (10th Cir. 1987), cert. denied, 486 U.S. 1010 (1988).

\textsuperscript{52} See Pungitore, 910 F.2d at 1120 (stating that the Petite policy conferred no substantive rights on the defendant and the defendant could not invoke the policy to avoid a consecutive federal sentence following a state conviction); see also United States v. Rodriguez, 948 F.2d 914, 915 (5th Cir. 1991), cert. denied, 112 S. Ct. 2970 (1992) (holding that only the government may invoke the Petite policy).

\textsuperscript{53} United States Attorneys' Manual, supra note 47, § 9-101.400. Among the factors to be considered when entering into any controlled substance prosecutive determination are:

1) the sufficiency of the evidence, 2) the degree of federal involvement, 3) the effectiveness of state and local prosecutors, 4) the willingness of state or local authorities to prosecute cases investigated primarily by federal agents, 5) the amount of controlled substances, 6) the violator's background, 7) the possibility that prosecution will lead to disclosure of evidence of controlled substance violations committed by other persons, and 8) the district court's backlog of cases.

Id. Note that under the dual sovereignty exception to double jeopardy, the state and federal government could both prosecute under their respective drug laws but, based on the policy of the federal government, this will not happen often. See supra notes 47-52 and accompanying text (describing the government's policy when prosecuting cases already initiated by a state).
double jeopardy implications of § 881 is pertinent.54

B. Successive Prosecution

Application of the successive prosecution arm has traditionally focused on whether the second prosecution is one which punishes "criminally" for the same offense.55 In Mitchell, the Court defined the test of whether a statute was criminal or civil as one of statutory construction and, in doing so, gave complete deference to the "civil" or "criminal" label affixed by Congress.56 Mitchell was acquitted at trial of willful evasion of taxes and then brought into court by the federal government to collect the deficiency in taxes plus an additional penalty equal to fifty percent of the deficiency.57 The Court held that because Congress labeled the second action against Mitchell as "civil", the second prosecution was not prohibited by the Double Jeopardy Clause.58 The Court limited the

54. This Comment does not apply to the numerous cases where prosecution under the drug laws is not sought, because there is no double jeopardy issue in those cases. See 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 1.02 at 1-7 (1992 & Supp. 1993) (stating that civil forfeiture actions are frequently brought against co-conspirators against whom there was not enough evidence to charge for violation of the drug laws); see also Crime and Punishment Balance Needed on Seizures of Ill-Gotten Gains, SAN DIEGO UNION-TRIB., July 8, 1993, at B10, available in LEXIS, News Library, Current File (describing a recent study which found that 80% of the people whose property was forfeited to the government were never charged with a drug crime).

There are numerous violations of the Title 21 drug laws upon which seizure under § 881 can be based. These include: § 841, § 842 (cases of repeat violations of certain more serious regulatory offenses), § 843 (violations concerning fraud and involving counterfeit substances), § 844(a) (second offense of possession), § 845 (special penalties for distribution to people under age 21), §§ 846, 848, 854, 952 (importation of controlled substances), § 953 (exportation of controlled substances), § 955 (possession of Schedule I or II or narcotic drugs on board vessels arriving in or departing the U.S.), § 955(a) (manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels), § 955(c) (attempt or conspiracy to commit a violation of § 955(a)), § 957 (export and import by certain nonregistrants), § 959 (manufacture or distribution for purposes of unlawful importation), § 963 (attempt or conspiracy to commit felony importation offenses of title III of the Comprehensive Drug Abuse Prevention and Control Act). S. REP. NO. 225, 91st Cong., 2d Sess. (1970). For purposes of this Comment, violation of any of these statutes will be referred to as violation of the federal drug laws.

55. See United States v. Halper, 490 U.S. 435, 443 (1989) (suggesting that a "criminal" statute only could be barred under the successive prosecution arm because Brandeis used the word "criminally" when describing the double jeopardy bar to successive prosecutions whereas a civil statute may be barred under the multiple punishment prohibition based on the omission of "criminally" in that description).


57. Id. at 396.

58. Id. at 406. Mitchell also argued that the fifty percent penalty was res judicata as a result of his criminal trial. Id. at 397. The Court dismissed application of res judicata
broad holding of Mitchell in Kennedy v. Mendoza-Martinez. In Mendoza-Martinez, the Court first inquired whether Congress intended to enact a civil statute. If the Court determined that Congress did intend to enact a civil statute, the Court next inquired whether the statute was "penal or regulatory in character" and examined a list of factors relevant to the inquiry.

In United States v. Ward, the Court restated Mendoza-Martinez, stressing the criminal/civil distinction. First, the Court asked whether Congress expressly or impliedly classified the statute as civil or criminal. Only where Congress has indicated that the penalty was intended to be civil would the Court further inquire "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." The Court, however, limited its second inquiry into the effect of the statute by stating that "only the clearest proof" that the purpose and effect of the forfeiture will suffice to override Congress' manifest preference for a civil sanction. The Court further provided that the factors set forth in Mendoza-Martinez would be helpful in determining whether the purpose and effect of a statute is in fact penal yet these factors are not dispositive.

because of the difference in degrees of burdens of proof in a criminal and civil trial. Id. at 168-69 (footnotes omitted).

63. Id. at 248-49. But see Michael Schecter, Fear and Loathing and the Forfeiture Laws, 75 CORNELL L. REV. 1151, 1158 (1990) (arguing that Ward did not directly apply the Mendoza-Martinez test, but, instead reformulated the Mitchell test). The language of the Mendoza-Martinez test is almost identical to that of Ward but for the word "criminal". While the Court in Ward stated that the Mendoza-Martinez factors are "helpful" and "neither exhaustive nor dispositive," Ward, 448 U.S. at 249, in Mendoza-Martinez the Court only claimed that the factors were all "relevant to the inquiry" regarding the penal nature of the statute and "may often point in differing directions." Mendoza-Martinez, 372 U.S. at 169.

64. Ward, 448 U.S. at 248.
65. Id. at 248-49.
66. Id. at 249 (quoting Fleming v. Nestor, 363 U.S. 603, 617 (1960)).
67. Id. (stating that the Mendoza-Martinez factors are "neither exhaustive nor dispos-
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States v. One Assortment of 89 Firearms, the Court applied Ward and Mendoza-Martinez and held that a statute providing for forfeiture of firearms did not rise to the level of a criminal penalty when the conviction followed an acquittal on criminal charges involving firearms.

Once the Court finds that the second statute is, in fact, criminal, the Court will determine whether the second statute is barred by the Double Jeopardy Clause. In Blockburger v. United States, the Supreme Court applied a "same elements" test to determine whether there is a single offense, which would be barred by the Double Jeopardy Clause. The "same elements" test inquires whether each statute requires proof of a fact which the other does not; if not, they are the same offense and barred by the Double Jeopardy Clause. In Blockburger, violations of two sections of the Narcotics Act based on only one sale of morphine were held to be separate offenses and prosecution under both sections therefore was not barred by the Double Jeopardy Clause.

1. Section 881 is Criminal

Arguably, the Supreme Court does not require a statute to be found criminal to apply the Double Jeopardy Clause. In Breed v. Jones, the Court looked beyond the civil label of a juvenile statute and found that double jeopardy may attach in juvenile delinquency proceedings. The Court in Breed stated that "the risk to which the term jeopardy refers is that traditionally associated with 'actions intended to authorize criminal punishment to vindicate public justice.'"

Although the Court in Breed based its decision on the statute's deprivation of individual liberty, ownership of

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69. Id. at 366.
71. Id. at 304.
72. Id.
73. Id. Section 1 of the Narcotics Act forbids sale except in or from the original stamped package and section 2 forbids sale not in pursuance of a written order of the person to whom the drug was sold. Id. at 301.
75. Id. at 529.
76. Id. (quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-49 (1943)).
property arguably represents freedom and thus the government’s seizure of it would also be a deprivation of individual liberty

In addition, the Court has recently loosened its longstanding policy of giving deference to the label of “civil” or “criminal” affixed by Congress and has instead examined the true nature of the statute.\textsuperscript{77} In \textit{Austin}, the Court declined to make a distinction between civil and criminal proceedings in analyzing the Excessive Fines Clause\textsuperscript{78} despite a history of adhering to this distinction when applying other constitutional protections to civil forfeiture proceedings.\textsuperscript{79} In \textit{United States v. Halper},\textsuperscript{80} the Court refused to find the civil labeling of a statute dispositive in its double jeopardy analysis.\textsuperscript{81} The Court has also applied some of the protections afforded to criminal defendants to individuals in civil actions thus blurring the line between a civil and criminal action. The Supreme Court has held that the Fifth Amendment protection against self-incrimination,\textsuperscript{82} the Fourth Amendment’s prohibition against unreasonable searches and seizures,\textsuperscript{83} and the Due Process Clause’s guarantee of speedy trial\textsuperscript{84} apply to civil forfeiture actions. The Court would probably not abandon a criminal/civil distinction altogether given its historical use but the Court may, in the future, be less willing to accept a statute at face value.

Despite the expansion of the \textit{Mitchell} pure statutory construction test, the Court has recently applied \textit{Mitchell} in lieu of \textit{Mendoza-Martinez} or \textit{Ward} thus keeping the \textit{Mitchell} test alive.\textsuperscript{85}


\textsuperscript{78} \textit{Austin v. United States}, 113 S. Ct. 2801, 2806 (1993).

\textsuperscript{79} Id. at 2801 n.4. The Court employed this distinction in holding that the Fourth Amendment prohibiting unreasonable searches and seizures applied to civil forfeiture. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965), and in holding that the Sixth Amendment Confrontation Clause did not. \textit{United States v. Zucker}, 161 U.S. 475, 480-82 (1896). The Court also distinguished between criminal and civil proceedings in holding that the due process requirement of guilt beyond a reasonable double need not be proven in civil forfeiture proceedings. \textit{Lilienthal’s Tobacco v. United States}, 97 U.S. 237 (1878).

\textsuperscript{80} 490 U.S. 435 (1989).

\textsuperscript{81} Id. at 442.


\textsuperscript{83} 116 U.S. at 634.


\textsuperscript{85} \textit{See Halper}, 490 U.S. at 441-43 (describing the test in successive prosecution cases
Under the *Mitchell* line of cases, § 881 would probably be considered civil. On its face, § 881 was arguably not intended by Congress to serve as punishment. Congress' use of the Admiralty and Maritime Claims as process for seizure under § 881 and Congress' placement of § 881 in the administrative penalties and not the criminal penalties section support the claim that § 881 was intended as a civil statute. In *Mitchell*, the Court defines forfeiture of goods or their value as sanctions "which have been recognized as enforceable by civil proceedings since the original revenue law of 1789." Like the statutes at issue in *Mitchell*, Congress intended to impose both criminal and civil remedies for violation of the drug laws through the enactment of § 853 and § 881. In addition, once § 881 has been labeled as civil, it will not lose the quality of a civil action because more than the amount of damages is recovered.

However, despite Congress' intent to classify § 881 as civil, § 881 is distinguishable from the statutes at issue in the *Mitchell* line of cases and therefore the "statutory construction" test should not be applied. Unlike § 881, the statutes determined to be civil in *Mitchell, United States v. Hess* and *Rex Trailer v. United States* all provided for reimbursement and damages for abuse of the government's property rights. In *Rex Trailer*, the government was protecting its right to make contracts, and hold and dispose of property by imposition of liquidated damages to reimburse the fraudulent securing of U.S. property. Indeed, the Court has held

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as a statutory construction test. In distinguishing *Mitchell* from the multiple punishment issue in *Halper*, the Court restated the successive prosecution bar without regard to the broadening of the *Mitchell* test in *Ward*.

87. *See Schecter*, supra note 63, at 1155 (arguing that because Congress placed forfeiture in the administrative penalties title and not the civil penalties title, one can infer that Congress intended it to be a civil statute).
89. *Id. at 404-05* (finding that the sanction in the "Penalties" section of the statute was criminal and the sanction under the "Additions to the Tax" section of the statute was civil).
91. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943) (stating that "[a] remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered.
92. 317 U.S. 537 (1943).
94. *Id. at 151*. The statute at issue in *Rex Trailer* provided for damages to be paid to
that the government may resort to the same remedies as a private person to protect its property rights. In Mitchell and Hess, Congress provided damages to be paid to the government for fraudulent representation of taxable income and collusive bidding on government contracts, respectively. In all three instances, the government sustained a loss for which reimbursement and damages would clearly be appropriate had the government been an individual. The real and personal property forfeitable under § 881, however, are not property of the government and therefore § 881 does not serve to protect the government's rights in its capacity to act as a private person. Furthermore, § 881 does not provide for reimbursement for the government's efforts in obtaining property due it nor does the money collected necessarily even cover the cost of the forfeiture.

Section 881 would more likely be found criminal under the broadened test set out in Ward and applied by the Court in One Assortment of Firearms. An application of the first part of the test, whether Congress expressly or impliedly indicated a preference for a civil or criminal label, mirrors the statutory construction test discussed above and would probably result in a finding that § 881 is civil in nature. However, the purpose and effect of § 881 can clearly be proven to be so punitive as to negate Congress' intention.

the United States for the fraudulent obtaining of a benefit under the Surplus Property Act of 1944. Id. at 148-49.
95. See Cotton v. United States, 52 U.S. (11 How.) 229, 231 (1850) (stating that, as an owner of property, the U.S. has the same right to have that property protected by local laws as other persons).
97. See Hess, 317 U.S. at 550-51 (stating that the law can provide the same measure of damages for the government as for an individual, including punitives); Rex Trailer, 350 U.S. at 151 (maintaining that the government can resort to the same remedies as an individual in the protection of its property rights); Mitchell, 303 U.S. at 401 (affirming that damages for fraudulent reporting of taxes provided indemnity for the governments loss).
98. See U.S. DEP'T OF JUSTICE, ASSET SEIZURES AND FORFEITURES: A JOINT STUDY TEAM’S PERSPECTIVE ON THE PROBLEMS at 7-9, 39-40 (1983) (asserting that vehicle forfeitures, which constitute the bulk of civil forfeitures, are not cost-effective and are not revenue producers); see also SMITH, supra note 54, at § 1.02, 1-5 n.1 (stating that whether most civil forfeitures produce more revenue than they cost is unknown because there are no records kept).
102. Id. at 248-49.
Applying Mendoza-Martinez to § 881 reveals that the purpose and effect of § 881 is, in fact, penal.\textsuperscript{103} Section 881 does involve an affirmative disability or restraint—taking away someone’s property without just compensation.\textsuperscript{104} The second factor in Mendoza-Martinez looks at whether the statute has historically been regarded as punishment.\textsuperscript{105} The First Congress viewed forfeiture as punishment, proven by its placement of forfeiture alongside the other provisions for punishment.\textsuperscript{106} Similarly, the Court has also recognized forfeiture to be punishment.\textsuperscript{107} The addition of the innocent owners defense further shows an intent that § 881 impose punishment on those deserving of it and erodes the notion that the property itself is guilty in a forfeiture action.\textsuperscript{108} Forfeiture of contraband is distinguishable because it is never legally owned and therefore its forfeiture does not deprive the owner of a property interest.\textsuperscript{109}

103. See supra note 61 (listing the factors established by the Court in Mendoza-Martinez to determine when a statute is punishment).


106. The First Congress stated that any person violating the customs laws was required to:

\begin{quote}
Forfeit and pay the sum of four hundred dollars for every offence be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years And all goods, wares, and merchandise [violating the customs laws] shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to like forfeiture and seizure.
\end{quote}

Act of July 31, 1789, §12, 1 Stat. 39 (1789).

107. See Peisch v. Ware, 8 U.S. (4 Cranch) 347, 363-64 (1808) (recognizing forfeiture as punishment and noting that forfeiture requires some measure of fault by the property owner); see also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-87 (1974) (finding that the forfeiture of conveyances furthers the same purpose as the underlying criminal statutes—punishment and deterrence).

108. By excepting innocent owners from forfeiture, the statute reveals a true intent of punishing the person. The in rem fiction of punishing the property no longer can provide a basis for the forfeiture action.

109. See J. Morris Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 MINN. L. REV. 379, 478 (1976) (defining contraband as malum in se property which conceptually cannot deprive the owner of a legal property interest); United States v. Jeffers, 342 U.S. 48, 54 (1951), overruled on other grounds by Rakas v. Illinois, 439 U.S. 128 (1978) (finding that illegally seized contraband was property for purposes of the exclusionary rule but that the defendant was not entitled to have it returned to him); cf. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699
The third factor inquires whether the statute has a mental state requirement or "scienter."\textsuperscript{110} Although § 881 does not explicitly require proof of mens rea, the statute implicitly requires proof that the owner of the property was not innocent.\textsuperscript{111} Furthermore, in \textit{Calero-Toledo v. Pearson Yacht Leasing Co.},\textsuperscript{112} the Court established an innocent owner defense where the owner was "uninvolved in and unaware of" the wrongful activity and where the owner "had done all that reasonably could be expected to prevent the proscribed use of his property."\textsuperscript{113} Section 881 promotes the traditional aims of punishment—retribution and deterrence, the fourth factor of \textit{Mendoza-Martinez}.\textsuperscript{114} The purpose of civil forfeiture is to deter and punish criminal activity.\textsuperscript{115} The behavior to which § 881 applies is already criminal, meeting the fifth factor of \textit{Mendoza-Martinez}, as the underlying behavior of violating the drug laws can be prosecuted as a crime.\textsuperscript{116}

Section 881 probably does serve an alternative purpose aside from punishment and therefore the sixth factor would not lead to a finding that the statute is criminal. Forfeiture of contraband serves the remedial purpose of removing dangerous or illegal items from society.\textsuperscript{117} Forfeiture of property under §§ 881(a)(4) and (a)(7)

\textsuperscript{111.} If the owner can prove that he or she is innocent, then the owner will fall under the innocent owner defense. \textit{See} 21 U.S.C. § 881(a)(4)(C) (1988) (defining innocence for purposes of forfeiture of conveyances as without knowledge, consent or willful blindness of the owner); \textit{see also} 21 U.S.C. § 881(a)(7) (1988) (defining innocent for purposes of forfeiture of real property as without knowledge or consent of the owner); \textit{see also} \textit{Schecter}, supra note 63, at 1161 (proposing that based on the innocent owners defense in \textit{Calero-Toledo}, forfeiture is based on an inability of an owner to prove innocent mens rea). For a discussion of the \textit{Calero-Toledo} defense, \textit{see infra} note 113 and accompanying text.
\textsuperscript{112.} 416 U.S. 663 (1974).
\textsuperscript{113.} \textit{Id.} at 689. This defense was created before the statutory innocent owner defense was enacted. It is not as effective a defense as the statutory innocent owner defense because of the burden on the owner of proving that he or she took preventative measures.
\textsuperscript{114.} \textit{Mendoza-Martinez}, 372 U.S. at 168.
\textsuperscript{115.} \textit{See} \textit{TROLAND}, supra note 5, at 30, 55 (emphasizing to Assistant U.S. Attorneys that the purpose of civil forfeiture is to "deter and punish criminal activity," not to make profit for the government).
\textsuperscript{116.} \textit{See} \textit{Schecter}, supra note 63, at 1162 (stating that the fifth factor of \textit{Mendoza-Martinez} is met because drug possession, the underlying behavior, is a crime).
serves the remedial purpose of eliminating the existence of drugs and drug dealers in this country. On the other hand, the Court stated in Austin that forfeiture of property is "a penalty that ha[rs] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." In addition, forfeiture does not further the remedial goals articulated in the legislative history of § 881. While forfeiture under § 881 may help fund law enforcement, it is not considered a civil remedy because the costs are not being associated with the harm from that particular case. Whether or not § 881 serves some remedial purpose, nearly every criminal statute has an alternative non-penal purpose and thus this factor alone is not determinative.

The last factor of Mendoza-Martinez asks whether § 881 is well tailored to the nonremedial goal of eliminating drugs from society. Whether § 881 is narrowly tailored to furthering this goal can be analyzed on both a societal and an individual level. Societally, the war on drugs is a high priority of the government and any marginal gain in furtherance of that goal would be well-

118. See Darmstadter & Mackoff, supra note 104, at 50 (recognizing that seizure serves to impede drug traffic and therefore bestows a benefit upon society, even though this is incidental and may be viewed more generally as deterrence).


120. See H.R. Rep. 1444, supra note 10, at 4566 (asserting that the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which civil forfeiture is a part, was enacted with the goals of increasing research, penalizing drug dealers, and encouraging users to seek treatment). The remedial goals of increasing research and encouraging users to seek treatment are not furthered by civil forfeiture and thus civil forfeiture was intended as a penalty. See Schecter, supra note 63, at 1155 (arguing that because there is no direct connection between seizure or property and the remedial goals within the legislative history, forfeiture is only a penalty).

121. See James B. Speta, Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment, 89 Mich. L. Rev. 165, 190 (1990) (stating that "[a] civil remedy exists only when the costs of the single act can be associated with a specific harm"); see also 4 Fowler V Harper et al., The Law of Torts § 25.1 (2d ed. 1986) (defining compensation as damages offsetting injury).

122. See Clark, supra note 109, at 436 (arguing that few laws serve only the purpose of retribution or deterrence—even the death penalty serves to prevent crime by getting criminals off the street).

123. See Schecter, supra note 63, at 1162-63 (arguing that, while forfeiture may be narrowly tailored when viewed societally, it is not narrowly tailored when viewed individually under the zero tolerance policy).
tailored. One could argue, however, that the inefficacy of civil forfeiture in eliminating drugs from society reveals that the true purpose of the statute is deterrence. Forfeiture of property under § 881 is overly broad in relation to the remedial goal of seizing contraband. On an individual level, forfeiture is not well tailored to its goal because of the disproportionality between the drug violation and the amount seized. The Court in Austin found that in any individual case, forfeiture under § 881 may not be narrowly tailored to any remedial goal of the government and may thus violate the Excessive Fines Clause.

2. Analysis Under Blockburger

After § 881 has been found by the Court to be criminal, § 881 would fail the “same elements” test articulated by the Court in Blockburger and a second prosecution would thus be barred by the Double Jeopardy Clause. Arguably, because proof of the involvement of property is not an element of the violation of the drug laws, § 881 requires proof of an additional fact and thus the Blockburger test would be satisfied, notwithstanding any overlaps in proof. Moreover, forfeiture under § 881 only requires the government to show probable cause that the drug laws have been violated and then the burden shifts to the claimant to prove his or her innocence. In many cases, the individual is not even prosecuted under the drug laws so that proof beyond a reasonable doubt that a drug law was violated is not required by § 881.

124. See id. at 1162 (arguing that as fighting the war on drugs is a national priority, any furtherance of that important goal would be narrowly tailored).
125. See Clark, supra note 109, at 480 (arguing that depriving an owner of his or her yacht based on a drug violation or even depriving an owner of ever owning or leasing any vehicle would be ineffective in preventing drug use and thus reveals the true purpose of civil forfeiture—deterrence).
126. See supra note 9 and accompanying text (discussing the disproportionality between the drug violations and amount of property seized under the “zero tolerance” policy).
129. See Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975), overruled on other grounds by Brown v. Ohio, 432 U.S. 161 (1977) (“If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.”).
130. See supra note 6 and accompanying text.
131. See supra note 54 (noting that in many cases the individuals against whom civil forfeiture is sought are never criminally charged).
However, a drug law violation required by § 881 can be likened to a "lesser included offense" within § 881 and would constitute the same offense under Blockburger. In Brown v. Ohio, the Court held that "the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." In Brown, joyriding was found to be a lesser included offense of auto theft and thus the same statutory offense under Blockburger because it required no proof beyond which was required for conviction of auto theft. Similarly, a violation of the drug laws does not require proof of elements beyond those required for a violation of § 881. Just as the prosecutor who had established joyriding needed only to prove mens rea to establish auto theft in Brown, the prosecutor who established a violation of the drug laws through a conviction need only establish the property was used or intended to be used in the violation of the drug laws for forfeiture under § 881. Just as the prosecutor in Brown who had established auto theft necessarily established the lesser included offense of joyriding, the prosecutor who establishes probable cause of a violation of § 881 necessarily shows probable cause of a violation of the underlying drug laws.

Unlike in Brown where both offenses required proof beyond a reasonable doubt for conviction, § 881 merely requires probable cause that the property was used illegally in violating the drug laws and the underlying conviction under the drug laws requires proof beyond a reasonable doubt. However, this may not preclude likening a drug law violation to a "lesser included offense" under § 881. Probable cause that a drug violation occurred is inherently proven in any criminal prosecution under the drug laws. If the person is convicted, proof beyond a reasonable doubt that the violation occurred encompasses probable cause that it occurred.

133. Id. at 169.
134. Id. at 168.
135. Id. at 167.
136. Id. at 168.
138. Brown was indicted for joyriding and for auto theft, both of which are crimes, Brown, 432 U.S. at 162-63, conviction for which required proof beyond a reasonable doubt. See, e.g., In re Winship, 367 U.S. 358, 368 (1970) (holding that due process requires that a criminal defendant be proven guilty beyond a reasonable doubt).
139. See supra note 6 and accompanying text (explaining that property can be seized pursuant to § 881 based only a showing of probable cause).
Even if the person is not convicted, the state must have shown probable cause in order to obtain the search warrant which led to the discovery of evidence to proceed with prosecution under the drug laws. If this argument prevails, then, whether the prosecution for the drug law violation goes before or after the forfeiture action under § 881, bringing both actions would be barred by the Double Jeopardy Clause.

C. Multiple Punishment

In Missouri v. Hunter, the Court held that, where a legislature specifically authorizes cumulative punishment under two statutes, there is no double jeopardy bar to imposing cumulative punishment under those statutes in a single trial. The Court further stated that the Blockburger test is not controlling where there is a clear indication of contrary legislative intent.

1. Section 881 Is Not Barred by Hunter

Before proceeding with an analysis under Hunter, the Court must first assess whether both statutes involved are criminal in nature. Assuming that § 881 is found to be criminal, a straight application of Hunter reveals that the legislature clearly authorized the cumulative punishment of drug offenders under § 881. As in Hunter, where the penalty for armed criminal action was intended by the legislature to be in addition to the penalty for the underlying charge, civil forfeiture was intended by the legislature to be another weapon against the war on drugs in addition to criminal prosecution under the drug laws.

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140. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. U.S. CONST. amend. IV
142. Id. at 368-69. In Hunter, the defendant was convicted of armed criminal action and first-degree robbery in a single trial and was sentenced to ten years in prison for the robbery and fifteen years for armed criminal action, to be served concurrently. Id. at 361-62. The defendant claimed that the two sentences violated the Double Jeopardy Clause. Id. at 362.
143. Id. at 368-69.
144. See supra note 37 and accompanying text (stating that the generally Double Jeopardy Clause only applies to criminal proceedings).
145. See Hunter, 459 U.S. at 368.
146. The Comprehensive Drug Abuse Prevention and Control Act of 1970 was later amended to add criminal forfeiture as another method of fighting the war on drugs to be used in conjunction with civil forfeiture. See supra note 90 and accompanying text.
Hunter can be distinguished, however, from an action under § 881. In Hunter, both punishments were brought in one proceeding and, therefore, the only double jeopardy interest of the defendant was in not receiving multiple punishment.\textsuperscript{147} The interests in finality were therefore not present in Hunter but would be present where an action is brought under § 881.\textsuperscript{148} This argument is strengthened by the uncertainty inherent in the area of forfeiture where an individual faces possible prosecution for violation of the drug laws, criminal forfeiture and civil forfeiture.\textsuperscript{149}

\textbf{D. Application of United States v Halper to § 881}

In United States v. Halper,\textsuperscript{150} the Court held that even where a penalty is labeled "civil," the penalty in a particular case "may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment" and thus can be barred by the Double Jeopardy Clause.\textsuperscript{151} The Court defined a civil statute as punishment where it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes."\textsuperscript{152} In Halper, the government prosecuted Halper for sixty-five counts of filing fraudulent Medicare claims in violation of the False Claims Amendments Act of 1986.\textsuperscript{153} Halper was found guilty and received a two-year prison sentence and a $5,000 fine and, subsequently, the government brought suit under the civil False Claims Act subjecting Halper to

\textit{also United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986), (declaring that, by failing to repeal or restrict § 881 when it enacted § 853, Congress revealed an intent to allow use of § 881 where a criminal proceeding is unsuccessful), cert. denied, 480 U.S. 931 (1987); United States v. Schmalfeldt, 657 F. Supp 385 (W.D. Mich. 1987) (holding that criminal forfeiture proceedings are not barred by civil forfeiture proceedings previously initiated by the government and that the concurrent proceedings do not violate the Due Process Clause).}


\textit{148. Unlike in Hunter where the cumulative punishments were imposed in the same proceeding, an action brought under § 881 must be brought in a separate proceeding from the criminal prosecution. Id. at 366.}

\textit{149. See DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS, supra note 6, at 292-93 (illustrating the use of federal statutes in conjunction with one another as circles within one another including the underlying drug violation, conspiracy, continuing criminal enterprise, criminal forfeiture, civil forfeiture and additional legal action against the violator's assets outside the authority of the Controlled Substances Act).}

\textit{150. 490 U.S. 435 (1989).}

\textit{151. Id. at 442. This test resembles the civil versus criminal distinction raised by the Court in prior cases. See supra note 56-69 and accompanying text.}

\textit{152. Halper, 490 U.S. at 448.}

\textit{153. Id. at 437.}
a fine of $130,000. The Court found that Halper’s liability for $130,000 was vastly disproportionate compared to the government’s actual damages and therefore the civil suit violated the multiple punishment arm of the Double Jeopardy Clause.

According to the Court’s broad test in *Halper* and the Court’s definition of §§ 881(a)(4) and (a)(7) as punishment in *Austin*, actions brought under § 881(a)(4) and (a)(7) following a criminal conviction would be barred by the Double Jeopardy Clause. The broad holding in *Halper* requires only a showing that forfeiture cannot be said to solely serve a remedial purpose. This language would arguably bar any civil forfeiture statute as the purpose of civil forfeiture is deterrence and not solely restitution. In *Austin*, the Court explicitly defined §§ 881(a)(4) and (a)(7) as punishment: “‘F’orfeiture of property [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law” While the *Austin* Court assumed that there may be some remedial aspects of §§ 881(a)(4) and (a)(7), the Court concluded that §§ 881(a)(4) and (a)(7) cannot fairly be said to solely serve a remedial purpose and therefore is punishment subject to the confines of the Eighth Amendment Excessive Fines Clause. Although the *Austin* Court did not address the issue of double jeopardy, the Court defined §§ 881(a)(4) and (a)(7) as punishment under the *Halper* test and therefore, §§ 881 (a)(4) and (a)(7) should be barred by the Double Jeopardy Clause following a criminal prosecution.

Although *Halper* involved the government bringing a civil

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154. Id.
155. Id. at 452. Halper’s false claims only amounted to a total of $585 loss to the government. Id. at 437. The District Court approximated the government’s costs at $16,000, including the amount spent investigating and prosecuting Halper’s false claims, and entered summary judgment for the government in that amount. Id. at 439. The Supreme Court remanded to permit the government to demonstrate that the District Court’s assessment of its injuries was incorrect. Id. at 452.
156. Id. at 447.
157. See SMITH, supra note 54, § 12.10, at 12-126-27 (emphasizing the broad holding in *Halper* would bar all forfeiture statutes). In *Halper*, the Court tried to limit its holding by stating that it was announcing “a rule for the rare case,” *Halper*, 490 U.S. at 449, and that it did not consider its ruling “far reaching or disruptive of the Government’s need to combat fraud.” Id. at 450. But the Court’s own statement of its holding emphasizes just how broad the ruling is, as civil forfeiture is not “rationally related to the goal of making the government whole.” Id. at 451.
159. Id.
action following a criminal conviction, the underlying principles of Halper would arguably also apply a double jeopardy bar to prosecution where the civil action was brought first. The Court in Halper did not suggest that its holding was limited to cases where the criminal prosecution is instituted prior to the imposition of the civil penalty. Moreover, the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments are at stake regardless of whether the criminal prosecution precedes or succeeds the civil action. In both scenarios, if the first action is successful there are multiple punishments inflicted upon the individual in violation of the Double Jeopardy Clause. There may still be an argument that the federal government's ability to enforce the law is of paramount importance and would therefore favor the ability of the federal government to prosecute criminally following a civil forfeiture action. The government's ability to enforce the law, however, would not override an individual's constitutional protection.

Halper may still place limits on the application of the Double Jeopardy Clause to § 881. Halper did not foreclose the possibility of the government receiving any of the civil penalty in that case. The Court stated that the government was entitled to compensation for its costs and damages and that this could be accomplished by the trial court's approximation of cost to the government, based on the government's accounting. In Halper, the Court remanded the case to give the government an opportunity to have input in the determination of its costs. Following the Halper model, each time the government brings suit under § 881, the individual would object on double jeopardy grounds and an accounting of the

160. See supra notes 153-54 and accompanying text.
161. If a civil action is brought first, it must be concluded before the criminal prosecution is initiated for there to be a multiple punishments issue. This is because there must be an initial punishment from the civil forfeiture decision to bar a second punishment under the Double Jeopardy Clause. See supra note 42 and accompanying text.
162. Smith, supra note 54, § 12-10, at 12-128 n.11.3 (asserting that "nothing in Halper suggested that its holding was restricted to instances in which criminal proceedings are instituted prior to assessment of the civil sanction").
166. Id. at 452.
government's costs would follow. The individual could then appeal the decision. In addition, lower courts have been unwilling to find that a penalty is punishment for purposes of the Double Jeopardy Clause in individual cases. Where there is no direct injury to the government, courts have found that the government suffered indirect injury from the wrongdoer's actions large enough to justify the forfeiture.

These limitations could be overcome by the Court applying Halper to bar civil forfeiture under § 881 where there is an initial criminal conviction or bar the criminal conviction where an action has been concluded under § 881. Arguably the small amount of remedial damages the government could collect in a forfeiture case under § 881 would not justify the great expenditure to the government of trying the large number of forfeiture cases and would promote backlog in federal courts. As Halper has been ineffective in barring successive prosecution imposing multiple punishment under the Double Jeopardy Clause, the Court should step in to establish the double jeopardy implications to an action brought under § 881.

167. See Nelson T. Abbott, Note, United States v. Halper: Making Double Jeopardy Available in Civil Actions, 6 B.Y.U. J. of Pub. L. 551, 568 (1992) (stating that the lower court decisions after Halper illustrate the reluctance of the courts to find that a penalty is so severe it is punishment for purposes of the double jeopardy bar).

168. See SMITH, supra note 54, § 12.10, at 12-129-30 (commenting that the courts have gotten around Halper by finding that even large amounts of forfeiture were justified by indirect injury to the government); see also United States v. 40 Moon Hill Road, 884 F.2d 41, 44 (1st Cir. 1989) (finding that a recovery in excess of the property value devoted to growing an illegal substance was justified by the large cost that drugs inflict on society as a whole in the form of drug-related crime, drug abuse treatment, investigation and enforcement); Ex parte Rogers, 804 S.W.2d 945 (Tex. Ct. App. 1990) (finding that the forfeiture was rationally related to the government's injury and expenses involved in the large drug distribution involved).

169. See David J. Stone, The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment, 73 B.U. L. Rev. 427, 445 (1993) (stating that even though the government suffers damage from drug law violations, "its inability to allege them with any accuracy may preclude the recovery of anything but a nominal penalty").

170. See id. at 571 (stating that, in fact, no court had yet overturned a civil penalty on Double Jeopardy grounds at the time the Note was written). Two courts have discussed the application of Halper to a civil penalty. Id. In the one case the parties settled before the issue could be examined. See United States v. Mayers, 897 F.2d 1126 (11th Cir.), cert. denied, 498 U.S. 865 (1990). The other case was dismissed on the grounds that the civil suit violated a plea bargain agreement. See United States v. Hall, 730 F. Supp. 646, 655 (M.D. Pa. 1990) (commenting, in dicta, that if the court had not already dismissed the case, it would have required the government to submit an approximation of its losses before deciding if the suit was barred by the Double Jeopardy Clause).
Based on the Court's dicta in *Halper* and strong policy considerations, *Halper* should be extended to bar a suit under § 881 following an unsuccessful prosecution under the drug laws. *Halper* involved a defendant who was convicted and punished in one trial and then retried and repunished under a civil act.¹⁷¹ Where a defendant is first acquitted and then the federal government institutes an action under § 881, there is no multiple punishment issue. In *Halper*, however, the Court cited the successive nature of the proceedings as critical to its analysis and, therefore, implicitly relied on the prohibition against successive prosecution in holding that the Double Jeopardy Clause applied.¹⁷² If multiple punishment was the sole double jeopardy prohibition in issue, the Court would have had to follow the deferential holding in *Hunter*, or, alternatively, the Court could have overruled *Hunter*.¹⁷³ The Court chose to differentiate *Hunter* on the basis that in *Hunter* the multiple punishments were imposed in one proceeding.¹⁷⁴

Furthermore, public policy notions of fairness dictate that *Halper* be extended to bar a suit brought under § 881 where the defendant is acquitted of violating the drug laws. The Court has stated that the Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."¹⁷⁵ The Court's decision in *Halper* rests upon the premise that when the Government already has imposed a criminal penalty in a criminal proceeding and seeks to impose a second penalty in a civil proceeding, "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."¹⁷⁶ If a defendant was acquitted in the prosecution for violation of the drug laws, the government would be given another

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¹⁷¹. *See supra* text accompanying notes 153-54 (explaining *Halper*'s punishments).

¹⁷². *See* United States v. *Halper*, 490 U.S. 435, 451 n.10 (1989) (stating "[t]hat the Government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause"); *see also* Jahncke, *supra* note 36, at 135 (asserting that despite the Court's focus in *Halper* on multiple punishment, the Court treated the case as if *Halper* also had an interest in finality).

¹⁷³. *See supra* notes 141-43 and accompanying text (summarizing the Court's holding in *Hunter*).

¹⁷⁴. *See* *Halper*, 490 U.S. at 450 (stating that "[i]n a single proceeding the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature").


¹⁷⁶. *Halper*, 490 U.S. at 451 n.10 (emphasis added).
opportunity to supply evidence it initially failed to muster and would have an even better chance of succeeding in a civil forfeiture suit based on the lower standard of proof required. The government would also be applying § 881 because it is dissatisfied with the result in the initial prosecution. In fact, it is more likely that § 881 will be brought only where the defendant has been acquitted because, if a conviction has been obtained, criminal forfeiture will most likely be sought. Allowing the government to simply try again when the defendant was acquitted would undermine society’s faith in the criminal justice system and preclude finality. Halper should be extended, based on notions of fairness, to bar the application of § 881 to a defendant acquitted of violating a federal drug law.

IV CONCLUSION

The amount of drug use and abuse in this country is staggering and elimination of drugs from society is certainly an important goal. The war on drugs, however, is not succeeding. Too much time and money are spent on penalizing and deterring drug law violators instead of focusing on education and rehabilitation. Civil forfeiture is a powerful tool being used to punish violators of the federal drug laws in addition to federal prosecution and criminal forfeiture. In the heat of the battle, the government has employed civil forfeiture and transcended every citizen’s right to not be twice put in jeopardy of life and limb.

Supreme Court recognition that § 881 is barred by the Double Jeopardy Clause where federal prosecution has been undertaken, regardless of the outcome, would not hinder the main goal of forfeiture—getting drugs off the streets. Seizure of the actual drugs and drug paraphernalia is not punishment of the individual and thus would not be barred by § 881. In fact, “the seizure of large quantities of illicit drugs has a more significant impact on the drug trafficker’s cost of doing business than asset forfeitures” because the cost of the drugs seized is much greater than the cost of any property seized. In addition, the government will still have full

177. See supra note 6 and accompanying text (providing that the government need only establish probable cause that the property was involved in the violation of the drug laws).
178. See supra note 149 (describing how the civil and criminal forfeiture actions are used in conjunction with one another).
179. Smith, supra note 54, § 1.02, at 1-25.
use of criminal forfeiture provisions where there is a conviction.

A Double Jeopardy bar to § 881 would serve only to protect those individuals whom the Double Jeopardy Clause was designed to protect—individuals who have already been convicted of drugs and punished. More importantly, an extension of Halper would protect individuals who have been acquitted of a drug law violation from undergoing another form of criminal prosecution. The Double Jeopardy Clause was intended to prevent the State from using its resources and power to repeatedly try an individual for an offense and therefore should provide a bar to § 881 where criminal prosecution has already been sought.

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