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COMMENTS

MULTIPLE-PUNISHMENT AND THE DOUBLE JEOPARDY CLAUSE: THE *UNITED STATES v. URSERY* DECISION

“No person shall be subject ... to more than one punishment or one trial for the same offense.”¹

—James Madison

INTRODUCTION

Recently, the Double Jeopardy Clause has become a popular means of challenging the actions of Government, resulting in much debate and confusion with respect to its applicability in certain contexts.² In fact, even the Supreme Court has acknowl-

¹ 1 ANNALS OF CONG. 451-52 (Joseph Gales, Jr. ed., 1789).

² See *United States v. McClinton*, 98 F.3d 1199, 1202 (9th Cir. 1996) (noting that civil penalty could get so large that it would amount to “punishment” for double jeopardy purposes); *United States v. Baird*, 63 F.3d 1213 (3d Cir. 1995) (same), *cert. denied*, 116 S. Ct. 909 (1996); *United States v. \$405,089.23 in United States Currency*, 33 F.3d 1210, 1222 (9th Cir. 1994), *amended on denial of reh'g en banc*, 56 F.3d 41 (9th Cir. 1995) (adopting “solely remedial” *Halper* rule to invalidate civil forfeiture), *rev'd sub nom.*, *United States v. Ursery*, 116 S. Ct. 2135, 2149 (1996) (rejecting “solely remedial” test of *Halper* and applying *89 Firearms* test to conclude no violation of double jeopardy); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir. 1994) (indicating in dicta agreement with Ninth Circuit); *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994) (holding that criminal action coupled with civil action does not violate double jeopardy); *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993) (same).

Ironically, this split among the circuits has likely resulted from the different interpretations attributed to recent Supreme Court cases. See *Witte v. United States*, 115 S. Ct. 2199, 2206 (1995) (holding that consideration of uncharged criminal conduct in sentencing for charged offenses does not constitute punishment and will not preclude subsequent prosecution of those uncharged offenses); Department of Reve-

nue of *Montana v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that tax under Montana's Dangerous Drug Tax Act constituted punishment for purposes of double jeopardy); *United States v. Dixon*, 509 U.S. 688, 712 (1993) (holding that defendant's subsequent prosecutions violated double jeopardy); *Austin v. United States*, 509 U.S. 602, 614-15 (1993) (finding that enforcement of civil forfeiture statute which was partially punitive in nature constituted punishment); *United States v. Halper*, 490 U.S. 435, 448-49 (1989) (holding that defendant who has been punished in criminal prosecution may not be subject to additional civil sanction to extent that second sanction may not fairly be characterized as remedial). An alarming amount of litigation has been sprouting in the state courts regarding these cases. See, e.g., *District Attorney of Kings County v. Iadarola*, 623 N.Y.S.2d 999, 1002 (N.Y. Sup. Ct. 1995) (reporting that 147 state decisions cited *Halper* rule in early 1995), *cert. denied*, 116 S. Ct. 1825 (1996).

Individuals have begun to challenge civil sanctions in novel areas as a result of this split. For example, challenges on double jeopardy grounds have surfaced in the context of drivers licenses, professional licensing, and business regulation. See *People v. Marmon*, 903 P.2d 651, 655 (Colo. 1995) (attorney discipline); *State v. Zerkel*, 900 P.2d 744, 757 (Alaska Ct. App. 1995) (arguing double jeopardy violation in context of drivers license revocation); *Tench v. Commonwealth*, 462 S.E.2d 922, 925 (Va. Ct. App. 1995) (finding suspension and revocation of driver license did not constitute punishment under Double Jeopardy Clause); *Whittaker v. Dail*, 567 N.E.2d 816, 817-18 (Ind. Ct. App. 1991) (invoking double jeopardy argument when defendant convicted criminally and then sued in private lawsuit for damages), *rev'd on other grounds*, 584 N.E.2d 1084 (1992); *Kvitka v. Board of Registration in Med.*, 551 N.E.2d 915, 918 (Mass. 1990) (vacating fine imposed by medical licensing board following criminal conviction for dispensing illegal drugs).

This, in turn, has sparked debate among commentators regarding the validity of such novel claims. See generally Anthony G. Hall, *The Effect of Double Jeopardy on Asset Forfeiture*, 32 IDAHO L. REV. 527 (1996) (concluding that civil forfeiture statutes generally have unique role in recovering criminal proceeds as well as many other remedial purposes, and should not be subject to Double Jeopardy Clause constraints); Stephanie Ann Miyoshi, Note, *Is the DUI Double-Jeopardy Defense D.O.A.*, 29 LOY. L.A. L. REV. 1273 (1996) (arguing that confiscation of driver's license in connection with DUI stop is not punishment and therefore should not preclude subsequent criminal proceedings against offender); Carlos F. Ramirez, Note, *Administrative License Suspensions, Criminal Prosecutions and the Double Jeopardy Clause*, 23 FORDHAM URB. L.J. 895 (1996) (same).

Another explanation for the resurgence of double jeopardy claims is the perception that civil forfeiture imposes overly harsh penalties. For an excellent discussion of this phenomenon, see LEONARD W. LEVY, A LICENSE TO STEAL: FORFEITURE OF PROPERTY, 1-81 (1996); see also Mary M. Chéh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (noting that increasing use of civil forfeiture as method of law enforcement will present challenges to legal system premised upon distinction between civil and criminal matters); Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep*, 39 ST. LOUIS U. L.J. 1235, 1247 (1995) (arguing that all civil forfeiture, regardless of severity or purpose, must be treated as punishment for purposes of double jeopardy jurisprudence); Jon E. Gordon, Note, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744, 768-75 (1995) (suggesting that in order to avoid excessive forfeitures, some limits should be placed upon prosecutor's power to seize property); Tamara R. Piety, Comment, *Scorched Earth: How the Ex-*

edged the difficulty that double jeopardy issues present, referring to the Clause as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."³ Lately, particular interest has arisen regarding the question of multiple-punishment and double jeopardy.⁴ Specifically, one issue which has arisen is whether a drug prosecution and civil forfeiture action instituted by the Government against an individual in connection with the same underlying offense violates the Double Jeopardy Clause.⁵

This Comment seeks to navigate this so-called "Sargasso Sea" of double jeopardy jurisprudence and to answer the ques-

pansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process, 45 U. MIAMI L. REV. 911, 963-77 (1991) (noting that civil forfeiture is outmoded in modern society and that it often leads to imposition of punishment on blameless individuals who are left without recourse to constitutional violations); Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL TRIB., June 14, 1992, at A1 (suggesting civil forfeiture may be used as weapon of prejudice against minorities); Bullock, *Filling the Coffers with Civil Forfeitures*, LEGAL TIMES, Nov. 1, 1993, at 32 (arguing that civil forfeiture is abused on both state and federal level, often infringing upon individual constitutional rights).

³ *Albernaz v. United States*, 450 U.S. 333, 343 (1981); see also Barbara A. Mack, *Double Jeopardy—Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime*, 19 SEATTLE U. L. REV. 217, 251 (1996) (criticizing Supreme Court decisions as being "inconsistent, confusing, and result-orientated"); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 413 (1993) (describing Double Jeopardy Clause as "numbingly complex"); Note, *Twice In Jeopardy*, 75 YALE L.J. 262, 264 (1965) (referring to law of double jeopardy as "fictions and rationalizations" that are "characteristic signs of doctrinal senility").

⁴ See *supra* note 2; *infra* part I (discussing recent Supreme Court decision). See generally Angela Anderson, *Asset Forfeiture as Double Jeopardy*, 32 IDAHO L. REV. 545 (1996); James A. Bell, IV & Todd Richman, *Double Jeopardy*, 84 GEO. L.J. 1076 (1996); Mack, *supra* note 3; Stephanie H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets under 21 U.S.C. § 881(a)(4), (6) and (7)*, 70 NOTRE DAME L. REV. 941 (1995); Andrew L. Subin, *The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation*, 19 SEATTLE U. L. REV. 253 (1996).

⁵ See, e.g., *United States v. Sardone*, 94 F.3d 1233, 1235 (9th Cir. 1996) (finding Double Jeopardy Clause was not violated when civil forfeiture action and criminal prosecution proceedings were initiated against defendant for underlying drug charges); *United States v. Gonzalez*, 76 F.3d 1339, 1343 (5th Cir. 1996) (finding civil forfeiture of real estate for transporting drugs always constitutes punishment and renders subsequent criminal prosecution in violation of Double Jeopardy Clause); *United States v. Salinas*, 65 F.3d 551, 553 (6th Cir. 1995) (holding civil forfeiture of drug proceeds is not punishment for purposes of Double Jeopardy Clause and would not bar subsequent criminal prosecution); *Torres*, 28 F.3d at 1465 (same); *Millan*, 2 F.3d at 20 (noting that civil forfeiture action was part of single coordinated prosecution of defendants and, therefore, settlement did not constitute bar to future criminal proceedings for same underlying drug offenses).

tion of whether such dual proceedings are permissible under the Double Jeopardy Clause. This Comment will focus on the recent Supreme Court decision of *Ursery v. United States*⁶ in which the Court held that such dual proceedings do not violate double jeopardy because civil forfeiture actions do not "punish" a defendant.⁷ In analyzing this opinion, Part I(a) recounts the procedural history and facts of the case, while Part I(b) explains how the Court arrived at its decision. Part II argues, through emphasis of the Court's prior decisions in *United States v. Halper*⁸ and *Austin v. United States*,⁹ that the *Ursery* Court erred in its application of the appropriate standard of review. Part III suggests that the *Halper* proportionality test should have been applied in *Ursery*, and all civil forfeiture cases in general, because it more effectively balances the benefits of civil forfeiture against the constitutional prohibition of double jeopardy. This Comment concludes that the Supreme Court has erred in failing to recognize that the Double Jeopardy Clause protects against certain civil forfeitures.

I. *URSERY v. UNITED STATES*

A. *Procedural History and Facts*

Ursery involved two separate appeals which were consolidated on review by the Supreme Court.¹⁰ The first case involved the discovery, by Michigan police, of marijuana plants growing on defendant Guy Ursery's property.¹¹ The United States commenced a civil forfeiture action against defendant's house, pursuant to 21 U.S.C. § 881(a)(7),¹² alleging that it had been used to facilitate the processing and distribution of marijuana.¹³ Shortly before the settlement of the civil forfeiture action, criminal

⁶ 116 S. Ct. 2135 (1996).

⁷ *Id.* at 2149.

⁸ 490 U.S. 435 (1989).

⁹ 509 U.S. 602 (1993).

¹⁰ *Ursery*, 116 S. Ct. at 2138; see *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995); *United States v. \$405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994).

¹¹ *Ursery*, 116 S. Ct. at 2138.

¹² Section 881(a)(7) of Title 21 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...." 21 U.S.C.A. § 881(a)(7) (West 1996).

¹³ *Ursery*, 116 S. Ct. at 2139.

charges were filed against Ursery.¹⁴ Thereafter, the United States prosecuted and a jury convicted the defendant of various drug violations.¹⁵ The Sixth Circuit Court of Appeals reversed Ursery's criminal conviction, holding that in light of the civil forfeiture settlement, the criminal conviction violated the Double Jeopardy Clause because it imposed a second "punishment."¹⁶

The second case involved defendants Wesley Arlt and James Wren, who were convicted on an assortment of drug and money laundering charges.¹⁷ Prior to the commencement of the criminal trial, the United States filed a civil *in rem* complaint against various property owned by Arlt and Wren, including \$ 405,089.23 in cash, pursuant to civil forfeiture statutes 18 U.S.C. § 981(a)(1)(A)¹⁸ and 21 U.S.C. § 881(a)(6).¹⁹ Upon agreement of the parties, the civil action was stayed until the conclusion of the criminal prosecution.²⁰ Both defendants were subsequently convicted of the criminal charges. More than one year after their criminal prosecution, the Government was granted summary judgment on the civil forfeiture proceeding.²¹ On appeal, the Ninth Circuit Court of Appeals reversed, holding that the civil forfeiture constituted a second "punishment" and therefore violated the Double Jeopardy Clause.²²

The Supreme Court granted the Government's petition for certiorari in each of the two cases, reversing both decisions by an 8-1 vote.²³

¹⁴ *Id.*

¹⁵ *Id.* Specifically, defendant was indicted, convicted, and sentenced to 63 months in prison for growing marijuana. *Id.*

¹⁶ *Ursery*, 116 S. Ct. at 2138.

¹⁷ *Id.*

¹⁸ Section 981(a)(1)(A) provides for the forfeiture of property "involved in" money laundering violations. 18 U.S.C. § 981(a)(1)(A) (1994).

¹⁹ *Ursery*, 116 S. Ct. at 2138. Section 881(a)(6) provides 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...." 21 U.S.C.A. § 881(a)(6) (West 1996). This provision is designed to disgorge three types of proceeds: (1) proceeds acquired from the selling of narcotics; (2) proceeds intended to be used to buy narcotics; and (3) proceeds used or intended to be used to facilitate violations of the drug laws. *See McClain, supra* note 4, at 942 n.5.

²⁰ *Ursery*, 116 S. Ct. at 2139.

²¹ *Id.*

²² *United States v. \$405,089.23 in United States Currency*, 33 F.3d 1210, 1222 (9th Cir. 1994); *see also Ursery*, 116 S. Ct. at 1239.

²³ *Ursery*, 116 S. Ct. at 2139.

B. Reasoning of the Majority

In the majority opinion, written by Chief Justice Rehnquist, the Court held that the criminal prosecution and the *in rem* civil forfeiture action did not violate the Double Jeopardy Clause because the civil forfeiture statutes in question did not impose "punishment" on the defendants.²⁴ In reaching this conclusion, the majority relied on a two-fold argument. First, that Congress historically authorized the Government to bring both a criminal action and a civil forfeiture action based on the same event;²⁵ and second, that precedent affirmed this understanding.²⁶

The Chief Justice began the opinion by stating that "[s]ince the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events."²⁷ To support this proposition, the Court cited the 1931 case of *Various Items of Personal Property v. United States*,²⁸ which was "[o]ne of the first cases to consider the relationship between the Double Jeopardy Clause and civil forfeiture."²⁹ In *Various Items*, the defendant had been convicted of failing to pay taxes on certain alcoholic beverages in violation of federal law.³⁰ Following his conviction, the Government instituted a civil forfeiture action against the defendant's distillery, warehouse, and denaturing plant.³¹ The defendant argued that the civil forfeiture action violated the Double Jeopardy Clause.³² The Court, rejecting this argument, resorted to a legal fiction and concluded that since an *in rem* civil forfeiture action proceeds against the property, as opposed to an *in personam* civil action, which proceeds against the wrongdoer, the multiple-punishment prong of the Double Jeopardy Clause was not violated as the wrongdoer was not being punished twice.³³

Building on this rationale, the *Ursery* Court next turned its

²⁴ *Id.* at 2149.

²⁵ *Id.* at 2140 (citing Act of July 31, 1789; *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827)).

²⁶ *Ursery*, 116 S. Ct. at 2139-41.

²⁷ *Id.* at 2140.

²⁸ 282 U.S. 577 (1931).

²⁹ *Ursery*, 116 S. Ct. at 2140.

³⁰ *Various Items*, 282 U.S. at 579.

³¹ *Id.* at 578.

³² *Id.* at 579.

³³ *Id.* at 581 (citing *Origet v. United States*, 125 U.S. 240, 245-47 (1888)).

attention to the case of *One Lot Emerald Cut Stones and One Ring v. United States*,³⁴ which it cited as affirming the rule of *Various Items*.³⁵ In *One Lot Emerald Cut Stones*, the defendant was prosecuted and later acquitted for smuggling jewels into the United States.³⁶ The Government then instituted forfeiture proceedings against the jewels.³⁷ In rejecting the defendant's double jeopardy argument, the Court held that the *in rem* civil forfeiture action did not criminally punish the defendant because no second *in personam* penalty was sought.³⁸

Lastly, the *Ursery* Court turned to what it called its "most recent decision"³⁹ in the area; namely, the case of *United States v. One Assortment of 89 Firearms*.⁴⁰ In that case, the defendant had been acquitted of various criminal weapons charges when the Government commenced a civil forfeiture action against the firearms the defendant had possessed.⁴¹ The Court, in rejecting defendant's double jeopardy challenge, introduced a two-prong test to determine whether a civil sanction constituted "punishment" for the purposes of double jeopardy.⁴² The first

³⁴ 409 U.S. 232 (1972) (per curiam).

³⁵ *Ursery v. United States*, 116 S. Ct. 2135, 2141 (1996).

³⁶ *One Lot Emerald Cut Stones*, 409 U.S. at 232-33.

³⁷ *Id.* at 233. Specifically, the defendant was charged with violating 18 U.S.C. § 545 and section 497 of the Tariff Act of 1930. *Id.* It should be noted that while 18 U.S.C. § 545 provided for both civil forfeiture and criminal prosecution for the same underlying transaction, section 497 of the Tariff Act provided exclusively civil penalties. *See id.* at 232 n.1, 233 n.2.

³⁸ *Id.* at 235 ("If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments.").

³⁹ *Ursery*, 116 S. Ct. at 2141.

⁴⁰ 465 U.S. 354 (1984).

⁴¹ *Id.* at 356 (noting that civil forfeiture action was brought pursuant to 18 U.S.C. §924(d)). Title 18 U.S.C. 924(d)(1) provides, "[a]ny firearm or ammunition involved in or used in any knowing violation of ... section 922, ... or any violation of any other criminal law of the United States, ... where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture" 18 U.S.C.S. 924(d)(1) (Law. Co-op. 1996).

⁴² *89 Firearms*, 465 U.S. at 362-63 (citing *United States v. Ward*, 448 U.S. 242, 248 (1980)). The two part *Ward* test is actually a combination of two separate tests set forth in *One Lot Emerald Cut Stones*, 409 U.S. 232 and *Flemming v. Nestor*, 363 U.S. 603 (1960). In *One Lot Emerald Cut Stones*, the Court analyzed the legislative intent in order to determine whether the statute created remedial civil sanctions or criminal punishments. *One Lot Emerald Cut Stones*, 409 U.S. at 236-37. In *Flemming*, the Court conducted an extended analysis to ensure that even though the statute was characterized as remedial, it did not have the actual effect of being so punitive as to render the statute unconstitutional under the Double Jeopardy Clause. *Flemming*, 363 U.S. at 613-21.

prong required a court to examine Congress' intent and to inquire whether the statute in question was designed as a remedial civil sanction.⁴³ The second prong asked "whether the statutory scheme [was] so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism."⁴⁴

Applying this test to the case at bar, the *Ursery* Court concluded that Congress clearly envisioned both 21 U.S.C. § 881 and 18 U.S.C. § 981 as civil penalties.⁴⁵ The Court noted that forfeiture is, by law, an *in rem* action that has "traditionally been viewed as [a] civil proceeding, with jurisdiction dependent upon seizure of a physical object."⁴⁶ The Court further pointed to various procedural mechanisms in support of this conclusion.⁴⁷

With regard to the second prong of inquiry, the Court concluded that "there [was] little evidence, much less the 'clearest proof' that we require... suggesting that forfeiture proceedings ... [were] so punitive in form and effect as to render them criminal despite Congress' intent to the contrary."⁴⁸ First, the Court noted that forfeiture serves the remedial goals of both encouraging owners to prevent their property from being used in drug activities and to ensure that persons do not profit from the proceeds of illegal drug transactions.⁴⁹ The Court next cited to

⁴³ *89 Firearms*, 465 U.S. at 363.

⁴⁴ *Id.* at 365 (quoting *Ward*, 448 U.S. at 248-49). The *Flemming* Court noted, however, that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming*, 363 U.S. at 617.

⁴⁵ *Ursery v. United States*, 116 S. Ct. 2135, 2147 (1996). The Court found that the procedural mechanisms in the forfeiture statutes demonstrated Congress' intent that the forfeitures be remedial in nature. *Id.*

⁴⁶ *Id.* (quoting *89 Firearms*, 465 U.S. at 363).

⁴⁷ See *Ursery*, 116 S. Ct. at 2147-48. For example, the Court noted that, under either statute "actual notice of the impending forfeiture is unnecessary when the Government cannot identify any party with an interest in the seized article ... [and] that seized property is subject to forfeiture through a summary administrative procedure if no party files a claim to the property." *Id.*

⁴⁸ *Id.* at 2148 (internal citations omitted). The Court found the statutes applicable in *Ursery* to be "indistinguishable from those reviewed, and held not to be punitive, in *Various Items*, *Emerald Cut Stones*, and *89 Firearms*." *Id.*

⁴⁹ *Id.*; see also *89 Firearms*, 465 U.S. at 364 (noting forfeiture statute "furthers broad remedial aims" by "furthering the prophylactic purposes of the 1968 gun control legislation by discouraging unregulated commerce in firearms"); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974) (stating forfeiture "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.").

Various Items, Emerald Stones and 89 Firearms, as well as a string of federal forfeiture statutes, to support its view that historically “*in rem* civil forfeiture has not ... been regarded as punishment ... under the Double Jeopardy Clause.”⁵⁰ Lastly, the Court noted that civil forfeiture should not be considered punitive because it required no showing of scienter.⁵¹

In short, the *Ursery* Court concluded that defendants’ double jeopardy rights had not been violated because the civil forfeiture statutes in question did not impose “punishment” on defendants under what it deemed to be the controlling *89 Firearms* standard.⁵² Consequently, the Court reversed the decisions of both the Sixth and Ninth Circuits.⁵³

II. DISCUSSION

A. *The Double Jeopardy Clause*

The Double Jeopardy Clause simply states: “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”⁵⁴ This clause has been understood to protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.⁵⁵ At issue, when the Government commences a

⁵⁰ *Ursery*, 116 S. Ct. at 2149.

⁵¹ *Id.* But see *Austin v. United States*, 509 U.S. 602, 619 (1993) (stating that “the inclusion of innocent-owner defenses ... reveals a congressional intent to punish only those involved” in a criminal enterprise, and that the exemptions “serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less.”).

⁵² *Ursery*, 116 S. Ct. at 2149.

⁵³ *Id.*

⁵⁴ U.S. CONST. amend. V.

⁵⁵ See, e.g., *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)); see also *United States v. Dixon*, 509 U.S. 688, 696 (1993) (noting that Double Jeopardy Clause applies to both successive prosecutions and multiple punishments); *Illinois v. Vitale*, 447 U.S. 410, 415 (1980) (noting three separate guarantees granted by Double Jeopardy Clause). The principle justification against reprosecution is to protect persons against erroneous convictions, increased sentences, continued embarrassment, and the expense of litigation. See *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984); *Serfass v. United States*, 420 U.S. 377, 388 (1975); *Green v. United States*, 355 U.S. 184, 187-88 (1957); see also *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (“Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.”).

The justification for multiple-punishment protection is to confine a court’s sen-

drug prosecution and a parallel civil forfeiture action, is the multiple-punishment protection of the third prong because civil forfeiture may "punish" a defendant.⁵⁶

Despite arguments to the contrary,⁵⁷ the history behind the enactment of the Double Jeopardy Clause provides few answers to the specific question of whether double jeopardy protects an individual against the institution of both a criminal prosecution and a civil *in rem* action against that individual's property for the same illegal act.⁵⁸ Nonetheless, it is well established that the Double Jeopardy Clause bars the Government from twice punishing an individual for the same underlying event in separate proceedings.⁵⁹ Any logical inquiry of the multiple-punishment prong, therefore, must examine the purpose of civil forfeiture to determine whether it serves remedial or punitive goals.⁶⁰ If a

tencing discretion to the limits specified by the legislature. *Johnson*, 467 U.S. at 499.

⁵⁶ See, e.g., *Ursery*, 116 S. Ct. at 2139; *Halper*, 490 U.S. at 441 (examining whether statutory penalty under False Claims Acts constitutes penalty when added to criminal penalty and fine already assessed).

⁵⁷ See *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting) (arguing that Double Jeopardy Clause protects against successive prosecutions, not successive punishments).

⁵⁸ See *Mack*, *supra* note 3, at 220 (noting that statutory roots of double jeopardy are unclear). Early versions of the Double Jeopardy Clause from Colonial State Constitutions indicate that double jeopardy historically applied only to criminal prosecutions. *Id.* at 221. Adoption of the Double Jeopardy Clause as written today, however, is less clear and may not be restricted to criminal offenses. *Id.* at 221-22.

⁵⁹ See *supra* note 56. However, the multiple-punishment prong of the Double Jeopardy Clause does not bar a Government from seeking cumulative punishments in the same proceeding provided that the legislature has authorized and intended such cumulative punishment. *Halper*, 490 U.S. at 451 n.10. (noting that Government may seek criminal penalty and civil penalty in same proceeding); see also *Kurth Ranch*, 511 U.S. at 788-805 (Scalia, J., dissenting) (arguing that Double Jeopardy Clause does not preclude multiple punishments in separate proceedings).

⁶⁰ See *Halper*, 490 U.S. at 447-49 (explaining need for court to examine whether sanctions are remedial or for deterrent or retributive purposes); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) ("The question, then, is whether a ... forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial."); see also *Ursery*, 116 S. Ct. at 2146-47 (reviewing need to determine if punishment is punitive or remedial); *Kurth Ranch*, 511 U.S. at 777 (applying *Halper* language).

In order for civil forfeiture to violate double jeopardy, a court must not only conclude that a person has been punished, but also that this punishment was imposed as part of the same underlying event commenced in separate proceedings. See *Ursery*, 116 S. Ct. at 2139-40. The *Ursery* court, however, did not have to address the issues of whether civil forfeiture should be considered the "same offense" and "same proceeding" because it held that civil forfeiture does not constitute "punishment." *Id.* at 2149. For a discussion of these issues not addressed in *Ursery*,

civil forfeiture statute is characterized as remedial, the action does not violate the Double Jeopardy Clause because the defendant has not twice been "punished."⁶¹ If, however, a civil forfeiture statute is characterized as punitive, then the Double Jeopardy Clause is violated whenever the Government brings both a criminal prosecution and, either before or after, a civil forfeiture action.⁶²

The legislative history behind civil forfeiture statutes supplies compelling evidence that Congress created civil forfeiture for the express purpose of serving certain "punitive goals."⁶³ But

see *United States v. \$405,089.23 in United States Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994) (holding that criminal prosecution and civil forfeitures are separate proceedings), *rev'd on other grounds, Ursery*, 116 S. Ct. 2135 (1996). *But see United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993) (finding that criminal prosecutions do not constitute separate proceedings for parallel civil forfeiture actions for double jeopardy purposes); *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994) (same).

This Comment addresses only the first issue of whether civil forfeiture "punishes" an individual. It is suggested, however, this issue is the most difficult to resolve. If the Supreme Court revisits this issue and holds that civil forfeiture constitutes "punishment," courts would have much less difficulty concluding that criminal prosecutions and civil forfeiture punish for the same underlying offense in separate proceedings. See *\$405,089.23 in United States Currency*, 33 F.3d at 1218-1222 (tracing civil forfeiture debate); *United States v. Ursery*, 59 F.3d 568, 572-75 (6th Cir. 1995) (finding civil forfeiture constitutes punishment and that civil and criminal sanctions are not same offenses or proceedings), *rev'd*, 116 S. Ct. 2135 (1996); see also *McClain*, *supra* note 4, at 958-974 (reasoning that civil forfeiture and criminal prosecution are separate proceedings that punish for same offense); *Subin*, *supra* note 4, at 270-77 (same).

⁶¹ See *Halper*, 490 U.S. at 448 ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment"); *89 Firearms*, 465 U.S. at 362 ("Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable.").

⁶² See *supra* note 60; see also *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir. 1990) (per curiam) (applying same test whether civil penalty or criminal punishment comes first), *cert. denied*, 498 U.S. 865 (1990).

⁶³ See S. Rep. No. 98-225, p. 191 (1983) (commentating with respect to 21 U.S.C. § 881(a)(7) that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs"). This statute was enacted as part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 1837, 1976-85. The Senate Report accompanying the Act did not distinguish between civil and criminal forfeiture, referring to forfeiture as an additional sanction to penalize crimes for which traditional penalties prove inadequate. S. Rep. No. 98-225.

With respect to 21 U.S.C. § 881(a)(6), the Joint Explanatory Statement submitted to Congress explicitly recognized "the penal nature of forfeiture statutes." 1978 U.S.C.C.A.N. 9518, 9522. The sponsor of the bill, Senator Nunn, stated in a speech that:

this finding alone is not dispositive.⁶⁴ Although civil forfeiture may violate double jeopardy, it does so not because the statute serves certain punitive goals; rather, the Supreme Court, in *Halper*, has enunciated a test requiring a court to ask whether the civil statute "may not fairly be characterized as remedial."⁶⁵ This test requires a court to undertake a proportionality analysis to determine whether a sanction is so large, as compared to governmental and societal costs, that the sanction can no longer be fairly explained as serving remedial goals.⁶⁶ Only when the civil forfeiture statute cannot fairly be said to serve a remedial purpose does the civil sanction violate double jeopardy.⁶⁷

Notably, the *Ursery* Court chose not to apply the *Halper* proportionality test,⁶⁸ but instead indicated that a court should

The criminal justice system can only be effective if there is a meaningful deterrent The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking Thus, the punitive and deterrent purposes of the Controlled Substances Act would have greater impact on drug trafficking.

124 Cong. Rec. 23055 (July 27, 1978) (remarks of Sen. Nunn.).

The Supreme Court also has recognized the punitive nature of *in rem* forfeiture. *Austin v. United States*, 509 U.S. 602, 614 (1993) ("Our cases ... have recognized that statutory *in rem* forfeiture imposes punishment.").

On a slightly different note, the application of the tests set forth in *Kennedy v. Mendoza-Martrinez*, 372 U.S. 144 (1963) and *United States v. Ward*, 448 U.S. 242 (1980) [hereinafter "Kennedy/Ward factors"] also support a finding that civil forfeiture is punitive. See *Ward*, 448 U.S. at 248-49 (stating two-part test used to determine whether sanction is punitive or remedial); *Kennedy*, 372 U.S. at 168-69 (listing factors used to test whether sanction is penal in nature). The inclusion of an innocent owners defense indicates that the culpability of an owner is relevant. See *Ward*, 448 U.S. at 248 (listing first part of two-part test to determine if sanction is punitive in nature); *Kennedy*, 372 U.S. at 168 (espousing factors relevant in determining when nominally civil actions may be properly considered punitive). For an alternative application of the Kennedy/Ward factors, see *Ursery*, 116 S. Ct. at 2149 (concluding that factors support finding that civil forfeiture is not criminal).

⁶⁴ See *Halper*, 490 U.S. at 448-49 (holding that relevant test is whether "sanction may not fairly be characterized as remedial").

⁶⁵ *Halper*, 490 U.S. at 449.

⁶⁶ *Id.* Specifically, the Court stated, "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the 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 penalty sought in fact constitutes a second punishment." *Id.* at 449-50. For example, the Court noted in *Halper* that the civil penalty of \$130,000 bore no rational relation to the actual damages suffered or the \$16,000 of expenses incurred by the Government in apprehending and prosecuting defendant. *Id.* at 452.

⁶⁷ *Id.* at 448-49.

⁶⁸ *Ursery*, 116 S. Ct. at 2145. The Court in *Ursery* first applied the two-prong 89 *Firearms* test, then applied the Kennedy/Ward factors. *Id.* at 2147-49. Prior to this

apply the 89 *Firearms* two-prong test.⁶⁹ It is submitted that the *Ursery* Court erred in failing to recognize the universal applicability of the *Halper* proportionality test to all civil sanctions, including *in rem* civil forfeiture actions, and therefore erred in failing to apply *Halper* to the facts of *Ursery*.

B. *Halper and Austin*

Halper involved a defendant who had been convicted under the false-claims statute for submitting sixty-five inflated Medicare claims.⁷⁰ Following his conviction, the Government commenced a civil action against defendant which imposed a fine of \$2,000 per violation of the false-claims statute.⁷¹ The district court concluded that because the defendant's liability under the civil penalty was \$130,000, as compared to the Government's estimated loss plus \$16,000 in costs to prosecute the case, the civil penalty constituted a second "punishment" against the defendant in violation of the Double Jeopardy Clause.⁷² The Supreme Court affirmed the district court's decision, stating:

[w]e therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution 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.⁷³

decision, however, many courts were indeed reading *Halper* to require a proportionality analysis in determining whether an *in rem* forfeiture action was punitive or remedial. See *United States v. Borromeo*, 1 F.3d 219, 221 (4th Cir. 1993) (stating that "an inquiry into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture would seem to be in order"); *Johnson v. State*, 882 S.W.2d 17, 19-20 (Tex. Ct. App. 1994) (applying proportionality analysis to determine "whether the forfeiture amount approximates the cost of investigating, apprehending, and prosecuting the defendant, or whether the forfeiture relates otherwise to any actual damages that the defendant caused the state"); see also *Smith v. United States*, 76 F.3d 879, 882-83 (7th Cir. 1996) (finding drug proceeds by definition directly proportional to the loss to government and society); *United States v. Tilley*, 18 F.3d 295, 299 (5th Cir. 1994) (holding forfeiture not disproportionate to costs to government and society); *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 36-37 (2d Cir. 1992) (evaluating sanction against value obtained by criminal conduct).

⁶⁹ *Ursery*, 116 S. Ct. at 2147-48; see also *supra* notes 40-42 and accompanying text (describing elements of 89 *Firearms* two-prong test).

⁷⁰ *Halper*, 490 U.S. at 437.

⁷¹ *Id.* at 438. The defendant was charged with violating 31 U.S.C. § 3729 (1982).

Id.

⁷² *Halper*, 490 U.S. at 438-39.

⁷³ *Id.* at 448-49 (emphasis added) (citations omitted). The Court further noted

In the case of *Austin v. United States*,⁷⁴ the defendant was convicted of possessing cocaine with intent to distribute.⁷⁵ Following his conviction, the Government initiated a civil forfeiture proceeding against his mobile home and auto shop, contending that they were "used" or were "intended for use" in the commission of a drug offense.⁷⁶ Defendant contested the forfeiture on the ground of the Excessive Fines Clause of the Eighth Amendment.⁷⁷ The Court, in considering whether the Excessive Fines Clause was violated, asked whether the forfeiture statutes "punished" the defendant for purposes of the Eighth Amendment.⁷⁸ The Court concluded that "forfeiture under [the statutes] constitutes 'payment to a sovereign as punishment for some offense', ... and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause."⁷⁹

Read together, the *Austin* and *Halper* decisions⁸⁰ have been,

that:

the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

Id. at 447-48. (footnotes omitted).

⁷⁴ 509 U.S. 602 (1993).

⁷⁵ *Id.* at 604.

⁷⁶ *Id.* at 604-05. The government proceeded against the property pursuant to 21 U.S.C. §§ 881(a)(4) and (a)(7). *Id.*

⁷⁷ *Id.* Specifically, the Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

⁷⁸ *Austin*, 509 U.S. at 617.

⁷⁹ *Id.* at 622. Specifically, the Court noted that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." *Id.* at 618. The Court also pointed out that "[t]he legislative history of § 881 confirms the punitive nature of these provisions." *Id.* at 620. Thus, "[i]n light of the historical understanding of forfeiture as punishment, the clear focus of [the statutes] on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," the Court concluded that the statutes clearly imposed "punishment" on a defendant. *Id.* at 621-22.

⁸⁰ *Kurth Ranch* also supports the use of the *Halper* proportionality test. In *Kurth Ranch*, the Court considered whether a state tax imposed on marijuana was invalid under the Double Jeopardy Clause when a taxpayer had already been criminally convicted of marijuana possession. *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994). The Court held that although the state had labeled the civil sanction a "tax," the question must be asked whether the tax was so punitive as to constitute punishment subject to the Double Jeopardy Clause. *Id.* at

and should continue to be, read by courts as adopting a proportionality analysis for the purpose of determining whether a statute “punishes” an individual. Applying these principles to the facts of *Ursery*, it necessarily follows that defendant Ursery was “punished” twice when nearly half the equity in his real property had been forfeited for growing marijuana on his property. As Justice Stevens noted in his dissent,⁸¹ no evidence was introduced establishing that the house was purchased with the proceeds of drug sales.⁸² In fact, the evidence showed that defendant had not sold marijuana for profit, but rather grew and used the drugs for home consumption.⁸³ Under these facts, it is very difficult to understand how the defendant lost his home without characterizing the forfeiture as “punishment.”⁸⁴ It seems abundantly clear that Ursery’s civil sanction could not be fairly char-

1945. Applying this analysis, the Court concluded that the tax was indeed punitive, and therefore subject to the Double Jeopardy Clause. *Id.* at 1948.

⁸¹ *United States v. Ursery*, 116 S. Ct. 2135, 2152 (1996) (Stevens, J., concurring in part and dissenting in part). Justice Stevens argued that different forfeiture statutes may require different treatment. Therefore, Justice Stevens divided forfeiture statutes into three different categories according to the type of property that was being forfeited. The three categories are: (1) proceeds, (2) contraband, and (3) “property that has played a part in the commission of a crime.” *Id.* at 2152. Justice Stevens believed that Ursery’s house did not fall into any of these categories. In *Ursery*, the evidence showed that the house was not purchased with the proceeds of drug sales and, in fact, the defendant only used the marijuana for his own private consumption. *Id.* at 2158-59.

Conversely, Stevens agreed with the majority regarding the second situation before the Court in which the U.S. government seized \$405,089.23 of proceeds from a felonious drug transaction. *Id.* at 2152. Such confiscation is a remedial mechanism which places a criminal back in the position he or she would have been in had he or she not undertaken the criminal activity. *Id.*; see also Hall, *supra* note 2 at 528 (suggesting one goal of forfeiting proceeds from criminal activity is removal of any economic benefit to criminal activity).

⁸² *Ursery*, 116 S. Ct. at 2152 (Stevens, J., concurring in part and dissenting in part).

⁸³ *Id.* at 2153.

⁸⁴ *Id.* Justice Thomas also has expressed concern over the scope of 21 U.S.C. § 881(a)(7).

[I]t is unclear whether the central theory behind *in rem* forfeiture, the fiction “that the thing is primarily considered the offender,” can fully justify the immense scope of § 881(a)(7)... Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.

United States v. James Daniel Good Real Property, 510 U.S. 43, 82 (1993) (Thomas, J., concurring in part and dissenting in part) (citations omitted) (analyzing section 881 civil forfeiture action under Due Process Clause).

acterized as remedial, but rather was excessive and intended to be retributive. Consequently, the Court should have reversed *Ursery's* criminal conviction, as this prosecution constituted a second "punishment" in violation of the Double Jeopardy Clause.

With respect to the \$405,089.23 seized and forfeited by Arlt and Wren, it is submitted that such forfeiture did not violate the Double Jeopardy Clause. More specifically, the forfeiture of proceeds may fairly be characterized as a remedial mechanism, as the forfeiture of proceeds merely placed the individuals back into the position they would have been in had they not undertaken the unlawful activity in the first place, thereby preventing unjust enrichment. With respect to the contraband, it also is urged that this forfeiture did not violate double jeopardy because "it exact[ed] no price in liberty or lawfully derived property" from the defendants.⁸⁵ As this analysis suggests, not all forfeiture statutes are identical; indeed, an application of the same forfeiture statute may require different results depending upon the circumstances. Nevertheless, in *Ursery*, the Court explicitly rejected the application of *Halper* and *Austin* in the *in rem* civil forfeiture context.⁸⁶

The *Ursery* Court distinguished *Halper* by reasoning that the decision applied only to *in personam* civil penalties.⁸⁷ By "cabining"⁸⁸ the *Halper* holding, the Court rendered the *Halper* test inapplicable to an *in rem* civil forfeiture action and thereby affirmed the test of *89 Firearms* as controlling.⁸⁹ Similarly, the Court distinguished *Austin* as irrelevant for purposes of a double jeopardy inquiry because the Amendment at issue in *Austin* was the Excessive Fines Clause, not the Double Jeopardy Clause.⁹⁰

⁸⁵ *Ursery*, 116 S. Ct. at 2151 (Stevens, J., concurring in part and dissenting in part).

⁸⁶ *Id.* at 2144-47.

⁸⁷ *Id.* at 2144.

⁸⁸ *Id.* at 2156 (Stevens, J., concurring in part and dissenting in part).

⁸⁹ *Ursery*, 116 S. Ct. at 2142. Recall that the *89 Firearms* test asks whether Congress intended the forfeiture as a civil remedy, and, if it did, whether the defendant can demonstrate by "the clearest proof" that the statutory scheme is so punitive as to negate Congress' intention to create a civil remedial sanction. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984). It is argued that such a test places an undue burden on a defendant to show by the "clearest proof" that Congress' scheme is punitive, and is unfair because it does not examine the particular facts giving rise to the forfeiture.

⁹⁰ *Ursery*, 116 S. Ct. at 2147 ("[W]e decline to import the [Excessive Fines Clause] analysis of *Austin* into our double jeopardy jurisprudence.").

Consequently, the Court reasoned that its earlier finding under *Austin*, that civil forfeiture “punished” a defendant, was inappropriate for a double jeopardy case.⁹¹

These distinctions are specious. The *Halper* decision does not require an interpretation that its holding be limited to *in personam* civil penalties. An examination of the language of *Halper* reveals the use of the term “civil sanction,” as opposed to *in personam* civil penalty.⁹² Moreover, the primary justification offered for treating *in personam* and *in rem* civil penalties differently seems unconvincing. Specifically, the Court maintained that because *in rem* actions proceed against the property, a person cannot be “punished” because it was the property which was “punished” as the wrongdoer.⁹³ This resort to legal fiction is flawed because it elevates form over substance by failing to account for the reality of *in rem* forfeiture actions—namely, that civil forfeiture often does punish the owner of the property.⁹⁴

Moreover, the Court’s reasoning that *Austin* was inapplicable,⁹⁵ as it examined the issue of “punishment” for purposes of review under the Excessive Fines Clause, should be rejected because it requires that the same statute considered punitive under the Eighth Amendment now be considered remedial under the Fifth Amendment. How can the same statute the Court unani-

⁹¹ *Id.* at 2147.

⁹² *United States v. Halper*, 490 U.S. 435, 448-49 (1989) (“We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional *civil sanction* to the extent that the second sanction may not fairly be characterized as remedial”) (emphasis added). There is, however, dicta in the *Ursery* case which states that this is a rule for “the rare case”, *i.e.*, a fixed-penalty case. *Id.* at 435.

⁹³ *Ursery*, 116 S. Ct. at 2144-45. The Court further opined that “[t]he narrow focus of *Halper* followed from the distinction that we have drawn historically between civil forfeiture and civil penalties. Since at least *Various Items*, we have [held that] ... in an *in rem* forfeiture proceeding, ‘it is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned.’ ” *Id.* (citing *Various Items of Personal Property v. United States*, 282 U.S. 577, 580-81 (1931)).

⁹⁴ *See, e.g., Ursery*, 116 S. Ct. at 2151 (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971)) (espousing that owner feels pain and stigma of the forfeiture, not the loss of property); *Ursery*, 116 S. Ct. at 2161 (Stevens, J., concurring in part and dissenting in part) (stating that “formalistic distinctions that obscure the obvious practical consequences of governmental action disserve the ‘humane interests’ protected by the Double Jeopardy Clause”) (citations omitted).

⁹⁵ The Court, although applying the 89 *Firearms* test, needed to distinguish *Halper* under the second prong in order to conclude the statute did not impart “punishment” on the defendants. *See Ursery*, 116 S. Ct. at 2146.

mously labeled punitive in *Austin* now suddenly be characterized as remedial under *Ursery*?

III. THE HALPER TEST

Even if the Court correctly construed *Halper* as applying only to *in personam* civil penalties, a comparison of the *89 Firearms* test and the *Halper* test demonstrates that the better rule in cases of *in rem* civil penalties is nevertheless that of the *Halper* proportionality analysis. In comparing these two tests, it should be noted that the second prong of the *89 Firearms* test is nearly identical to that of the *Halper* test, except for a variation in burdens. Under the second prong of *89 Firearms*, a court must find by the "clearest of proof" that the statute operates punitively.⁹⁶ In contrast, a court following *Halper* asks whether the statute "may not fairly be characterized as remedial."⁹⁷ Thus, although the question asked by each test is the same, *i.e.*, whether the statute is punitive or remedial, the second prong of *89 Firearms* is more difficult to meet because it places on defendants a greater burden to show by the "clearest of proof" that the statute is not primarily a remedial mechanism.⁹⁸

The basic purpose of the Double Jeopardy Clause is to protect individuals against Government imposition of multiple punishments for the same offense.⁹⁹ Accordingly, it is argued that application of the *89 Firearms* test is inconsistent with the aims of double jeopardy because it impermissibly places on individuals the burden of establishing the punitive nature of a civil forfeiture statute.¹⁰⁰ That burden should be placed on the government.

On the other hand, *Halper* could be interpreted for the opposite proposition, namely that any civil statute that does not operate as "solely remedial" is punitive.¹⁰¹ Although such an in-

⁹⁶ *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984); see also *supra* note 89 and accompanying text (touching on "clearest-proof" test).

⁹⁷ *United States v. Halper*, 490 U.S. 435, 449 (1989).

⁹⁸ *89 Firearms*, 465 U.S. at 365 (citing *United States v. Ward*, 448 U.S. 242, 249 (1980)).

⁹⁹ See *supra* note 55-57 and accompanying text.

¹⁰⁰ See Anderson, *supra* note 4, at 549 (describing *89 Firearms* position as extreme).

¹⁰¹ See, e.g., *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1222 (9th Cir. 1994), amended on denial of reh'g en banc, 56 F.3d 41 (9th Cir. 1995) (adopting "solely remedial" *Halper* rule to invalidate civil forfeiture), *rev'd sub nom.* *United States v. Ursery*, 116 S. Ct. 2135 (1996).

terpretation would be most consistent with double jeopardy jurisprudence law because it would invalidate any civil sanction serving any punitive purpose, it is urged that this interpretation should be discarded.¹⁰² This is because virtually every forfeiture statute would then be deemed punitive, and more importantly, *Halper* itself does not take such a restrictive view.¹⁰³ Instead, *Halper* utilizes a proportionality test which seems to fairly balance both the Government's interests and the individual's constitutional protections.

There is, moreover, even less justification for applying the first prong of the *89 Firearms* test, as it creates a presumption that a statute labeled as civil by Congress is in fact remedial.¹⁰⁴ By placing this hurdle in a defendant's path, the *Ursery* Court again endorses a formalistic view by permitting a Congressional label on a statute to enjoy a presumption against constitutional challenge. A court should attribute less deference to Congress' intent and more deference to the practical effect a statute has on individuals.

Finally, by endorsing the bright-line test of *89 Firearms*, the Court effectively creates a *per se* rule that civil forfeiture never violates double jeopardy.¹⁰⁵ In the process, the *Ursery* Court

¹⁰² *United States v. Ursery*, 116 S. Ct. 2135, 2145-46 n.2 (1996) (noting that "solely remedial" language of *Halper* would require virtually every civil sanction to be deemed "punishment" as "it is hard to imagine a sanction that has no punitive aspect whatsoever"). Such an interpretation would also be erroneous because the *Halper* case itself does not base its decision on the "solely remedial" test, but rather on a proportionality analysis. *See Halper*, 490 U.S. at 452 (concluding "that the disparity between its approximation of the Government's costs and Halper's \$130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy") (emphasis added). *But see* Subin, *supra* note 4, at 268-70 (arguing that proportionality test is unfair and unworkable).

¹⁰³ *See Halper*, 490 U.S. at 449 (noting dispositive test is whether "the second sanction may not fairly be characterized as remedial ...").

¹⁰⁴ *Ursery*, 116 S. Ct. at 2147-48.

¹⁰⁵ Even the Court seems to recognize this flaw of the *89 Firearms* test. *See id.* at 2148, n.3 (denying "that *in rem* civil forfeiture is *per se* exempt from ... the Double Jeopardy Clause."). The courts that have considered double jeopardy challenges in the civil forfeiture context after *Ursery* have indeed rejected such claims. *See, e.g.*, *United States v. Imngren*, 98 F.3d 811, 814 (4th Cir. 1996) (holding forfeiture of driving privileges does not violate Double Jeopardy Clause under *Ursery*); *United States v. Guest*, No. 95-6428, 1996 WL 537926, at *1 (10th Cir. Sept. 24, 1996) (stating claim of civil forfeiture as violating Double Jeopardy Clause is nearly foreclosed by *Ursery*); *United States v. Brophil*, 96 F.3d 31, 33 (2d Cir. 1996) (applying *Ursery* and dismissing Double Jeopardy claim); *United States v. Sardone*, 94 F.3d 1233, 1235-36 (9th Cir. 1996) (same); *United States v. \$187,917.00 U.S. Currency*, No. 95-3171, 1196 WL 376920 (7th Cir. July 2, 1996) (invoking *89 Firearms* test in

tramples a constitutional right by placing an insurmountable barrier in front of all double jeopardy claims involving civil forfeiture. The *Halper* proportionality test, in contrast, recognizes that certain civil forfeitures may violate double jeopardy if the statute may not fairly be characterized as remedial. Thus, the *Halper* proportionality test, because it doesn't foreclose constitutional challenges, is a better test; one that balances the interests served by civil sanctions against the protection from multiple-punishment contained in the Double Jeopardy Clause.

CONCLUSION

It has been submitted that the Supreme Court erred in failing to adopt the *Halper* proportionality test in *Ursery*. The arguments offered by the Court in distinguishing *Halper* and *Austin* are unconvincing. By creating different rules for *in rem* and *in personam* actions, the Court only perpetuates the legal fiction that *in rem* actions do not "punish" a defendant because the action proceeds against the property. Even if *Halper* properly can be distinguished from *Ursery*, it is suggested that perhaps it should not be. The *Halper* test can be universally applied to all civil sanctions with the knowledge that it comports with the limitations contained in the Constitution on the power to punish. Although *Halper* requires a court to undertake a more demanding analysis than the bright-line rule of 89 *Firearms*, it more effectively balances the interests of prosecutorial access to civil sanctions against an important constitutional right.

For these reasons, it is urged that the Supreme Court reconsider its position and overrule *Ursery*.

Adam C. Wells