NOTES

UNITED STATES v. URSERY:
DRUG OFFENDERS FORFEIT THEIR
FIFTH AMENDMENT RIGHTS

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INTRODUCTION

For more than 200 years, the United States government has possessed the power to confiscate property through forfeiture. Laws authorizing the forfeiture of property used in illegal activities, such as customs offenses and piracy, were among the earliest statutes enacted by Congress. During the early years of the nation, forfeiture laws served vital national interests, allowing for vessel forfeitures in times of war as well as seizure of Confederate property during the Civil War.
Today, forfeiture is playing an expanded role in fighting a new war: the war against drugs. Congress enacted the Comprehensive Drug Abuse and Prevention Control Act ("the Act" or "§ 881") in 1970 to broaden the powers of the federal government in combatting drugs. Originally the Act enabled the government to institute civil forfeiture actions against property used to facilitate illegal narcotics transactions. Such "facilitating property" most often includes automobiles, aircraft, and boats used to transport illegal narcotics, or homes used to conduct narcotics transactions. Congress eventually determined that civil

3. See United States v. James Daniel Good Real Property, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part, dissenting in part) ("[S]ince the Civil War [the Supreme Court has] upheld statutes allowing for the civil forfeiture of real property."); 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASE § 2.01, at 2-2 (tracing historical uses of civil forfeiture laws); Leach & Malcolm, supra note 1, at 248 (analyzing history of forfeiture laws); Franze, supra note 1, at 375 (setting forth early uses of forfeiture statutes).

4. See Buena Vista Ave., 507 U.S. at 1190 (plurality opinion) (describing modern forfeiture as significant expansion of governmental power); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 634 (1989) ("Forfeiture provisions are powerful weapons in the war on crime.").


6. See Buena Vista Ave., 507 U.S. at 119.

7. See Pub. L. No. 91-511, § 511, 84 Stat. 1236, 1276 (1970); see also 116 CONG. REC. 977-78 (1970) (statement of Sen. Dodd) (emphasizing that Comprehensive Drug Abuse and Prevention Act was "strictly and entirely a law enforcement measure... designed to crack down hard on the narcotics pusher and the illegal diverters of pep pills and goof balls"). Ironically, in all of the debates, no one criticized the forfeiture provisions. The only time forfeiture was mentioned was before the final vote. Senator Hruska, while summarizing the bill, remarked that the forfeiture provisions "were for the most part carried over from existing law" and that the provisions would take the "much needed mobility" away from drug traffickers. Id. at 1665 (statement of Sen. Hruska). The bill passed the Senate with a vote of 82-0. See id. at 1671.

8. See 21 U.S.C. § 881(a)(4). For purposes of this Note, forfeiture under § 881(a)(4) will be referred to as "forfeiture of facilitating property." Section 881(a)(4) provides in relevant part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9).

9. See id. § 881(a)(7). For purposes of this Note, forfeiture under § 881(a)(7) also will be referred to as "forfeiture of facilitating property." Subsections 881(a)(4) and (a)(7) will not be distinguished because they both involve property that facilitates illegal narcotics activity. The only difference between the two subsections is the types of property that can constitute facilitating property. Section 881(a)(7) provides in relevant part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(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 . . . .
forfeitures pursuant to the Act were not fulfilling their anticipated goals. To remedy this shortcoming, Congress amended § 881, granting the government power to confiscate proceeds traceable to illegal narcotics transactions in addition to facilitating property. Forfeiture of "proceeds" can include money or anything of value exchanged for illegal drugs, as well as a home or any property purchased with such money. Although forfeiture of proceeds and facilitating property under § 881 have proven to be the most effective

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Id. Congress included § 881(a)(7) as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306(a), § 511(a)(7), 98 Stat. 1837, 2050. Forfeitures under § 881(a)(7) most often occur when a home is used to have meetings to arrange drug transactions or the transactions actually take place in the home. See Franze, supra note 1, at 981 (citing United States v. 19 & 25 Castle St., 31 F.3d 35, 37 (2d Cir. 1994)).


12. See 21 U.S.C. § 881(a)(6). For the purposes of this Note, forfeitures pursuant to § 881(a)(6) will be referred to as "forfeiture of proceeds." Section 881 (a)(6) provides in relevant part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in 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.

Id. This section allows for the forfeiture of property in three situations. First, forfeiture cases under the "exchange" provision usually involve instances when the only evidence of an exchange is the proximity of large quantities of money discovered near drugs or drug paraphernalia. See id.; Franze, supra note 1, at 379 (discussing situations where forfeitures involving proceeds arise). Other instances often involve a person carrying a large sum of money and acting in a suspicious manner. See id. Second, forfeiture under the "proceeds" provision allows for the forfeiture of all proceeds traceable to an illegal drug exchange. See id. The term "proceeds" is used in this section to mean property derived from money or other things of value that are directly exchanged for drugs. See id. at 379 n.55. If probable cause exists that a home or any other property was purchased with money obtained as "proceeds" from illegal drug transactions, then the property may be forfeited to the government. See id. Finally, all monies, negotiable instruments, and securities exchanged or intended to be exchanged for drugs are subject to forfeiture under this provision. See 21 U.S.C. § 881(a)(6).
and most utilized\textsuperscript{13} weapons in the nation's war on drugs, they also have been among the most controversial.\textsuperscript{14}

In \textit{United States v. Ursery},\textsuperscript{15} the Supreme Court expanded the government's forfeiture powers pursuant to § 881, permitting parallel criminal prosecution and civil forfeiture of property involved in drug offenses.\textsuperscript{16} The Court determined that such concurrent proceedings did not violate the Double Jeopardy Clause's\textsuperscript{17} protection against multiple punishments for the same offense.\textsuperscript{18} Chief Justice Rehnquist, writing for the majority, held that forfeiture of proceeds and facilitating property pursuant to § 881 constituted a remedial civil sanction and therefore was not punitive.\textsuperscript{19} Specifically, the Court determined that because civil forfeitures did not constitute punishment under the Double Jeopardy Clause, forfeitures could not violate the Constitution's protection against double jeopardy.\textsuperscript{20} Although the Court's decision gave the government more leverage to combat drugs, it did so at the expense of defendants' Fifth Amendment rights.

This Note argues that the Supreme Court unnecessarily abridged drug offenders' Fifth Amendment protections at a time when law enforcement resources far outweigh those of most defendants.\textsuperscript{21} Part I reviews the procedural advantages of civil forfeiture proceedings that make such actions a powerful tool for federal prosecutors. Part II sets forth the legal standards relevant to any double jeopardy
challenge. Part III discusses the Supreme Court's decisions involving civil forfeiture and the Double Jeopardy Clause. Part IV examines the rationales underlying Sixth and Ninth Circuit decisions that the Supreme Court reversed in *Ursery*. Part V reviews the Supreme Court's holding and rationale in *Ursery*. Part VI analyzes the Court's application of precedent relevant to *Ursery*. In particular, Part VI discusses the previously apparent requirement that a second civil sanction must serve a "solely remedial" purpose to avoid invoking the protections of the Double Jeopardy Clause. Part VI also argues that forfeitures pursuant to § 881(a)(4) and (a)(7) do not fit this characteristic because they are punitive in nature. Part VII suggests that the Court in *Ursery* reduced the degree of Fifth Amendment protection afforded to defendants by permitting the government to proceed both criminally and civilly against drug offenders. Consequently, the government can take advantage of the more favorable procedures offered in civil forfeiture proceedings, in which defendants should receive the constitutional protections mandated in criminal proceedings. Finally, this Note concludes that the Court applied an obscure line of cases in place of a sound and long-relied upon line of cases.

### I. PROCEDURAL ADVANTAGES OF CIVIL FORFEITURE

The Supreme Court determined in *Various Items of Personal Property v. United States* that civil forfeitures are *in rem* actions, stating that "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." In contrast, criminal forfeitures are classified as "*in personam* proceedings instituted as part of the criminal case against a defendant." The *in rem* status of civil forfeitures enables the government to avoid the procedural safeguards

22. 282 U.S. 577 (1931).
mandated in criminal forfeitures. Because civil forfeiture actions treat the property owner as a bystander, the government can proceed directly against the offending property. As a result, the government need not prove the culpability of the owner. In effect, this imposes strict liability on owners whose property is used illegally, regardless of who used the property or whether anyone was charged with an offense.

Indeed, in civil forfeiture actions, the government only need establish probable cause that the property either facilitated a drug transaction or constitutes proceeds thereof. The burden then shifts to the claimant to prove by a preponderance of the evidence that the property was not used illegally. In contrast, criminal


26. See Various Items, 282 U.S. at 581 (noting in rem proceedings are against property); see also Steven L. Schwarz & Alan E. Rothman, Civil Forfeiture: A Higher Form of Commercial Law?, 62 FORDHAM L. REV. 287, 291-93 (1993) (stating that theory behind civil forfeitures is that property is guilty of crime committed).


28. See id. (asserting that effect of no culpability requirement is strict liability).

29. See Republic Nat'l Bank v. United States, 506 U.S. 80, 87 (1992) (stating that government has power to confiscate property in civil forfeiture actions upon showing of probable cause); United States v. One 1978 Piper Cherokee Aircraft, 91 F.3d 1204, 1208 (9th Cir. 1996) (holding that probable cause must exist before government institutes civil forfeiture action and that court will not consider post-filing evidence of probable cause); United States v. One Parcel of Real Property, 85 F.3d 985, 988 (2d Cir. 1996) (noting that probable cause allows for in rem seizure of property); United States v. Two Parcels of Real Property, 92 F.3d 1123, 1126 (9th Cir. 1996) (holding that government has burden to demonstrate probable cause that seized property was substantially connected to drug dealing); United States v. 9844 South Titan Court, 75 F.3d 1470, 1477 (10th Cir. 1996) (“In a § 881 forfeiture proceeding, the government bears the initial burden of showing probable cause that the property to be forfeited was used illegally.”); Williams v. United States, No. 95-228, 1996 WL 117011, at *9 (7th Cir. Mar. 11, 1996) (unpublished order) (stating that government must demonstrate probable cause to believe property is traceable to drug proceeds); United States v. 15603 85th Ave. N., 933 F.2d 976, 979 (11th Cir. 1991) (explaining that government first must establish probable cause when seeking forfeiture under § 881).

30. See Republic Nat'l Bank, 506 U.S. at 87 (stating that burden shifts to claimants after government has established probable cause); United States v. All Right, Title & Interest In Real Property & Appurtenances, 77 F.3d 648, 657 (2d Cir. 1996) (holding that once government establishes probable cause, the burden shifts to claimant); 9844 South Titan Court, 75 F.3d at 1477 (explaining that burden shifts to claimants once government establishes probable cause).

Under § 881, an owner also may file a claim alleging that he did not know about the property's illegal use. This commonly is known as the "innocent owner" exception and is codified in many forfeiture statutes. See, e.g., CONN. GEN. STAT. § 54-36K (1995) (codifying innocent owner defense to forfeiture of automobile used in patronizing prostitute); FLA. STAT. ch. 932.704 (1996) (discussing policy of Florida to protect proprietary interests of innocent owners in forfeiture proceedings); MO. REV. STAT. § 513.617 (stating that “[t]he rights of an innocent owner are superior to any right or claim of the state or county”); see also One Parcel of Real Property, 85 F.3d at 988 (establishing “innocent owner” as affirmative defense to preponderance standard); Two Parcels of Real Property, 92 F.3d at 1129 (emphasizing that claimant, not government, has burden of demonstrating innocent ownership). “Innocent
forfeitures require the government to prove beyond a reasonable doubt that the property was used illegally in the underlying offense.\textsuperscript{31} Generally, property may not be forfeited in criminal forfeitures until the defendant is convicted of the underlying crime.\textsuperscript{32}

Understandably, prosecutors prefer civil rather than criminal forfeiture due to the procedural advantages.\textsuperscript{33} The lower burden of proof and lack of a culpability requirement have made civil forfeiture pursuant to § 881 a powerful law enforcement weapon in the war against drugs.\textsuperscript{34} Accordingly, the government commonly institutes civil forfeiture proceedings against a defendant's property in addition to the criminal trial of the defendant for the underlying drug charges.\textsuperscript{35} Such parallel civil and criminal proceedings are an extremely effective method of depriving drug offenders of the economic benefits of their crimes.\textsuperscript{36} These separate proceedings, however, raise the question of whether parallel proceedings violate

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owners" are persons who entrust their property to another who, unbeknownst to the owner, uses the property illegally. \textit{See id.} In \textit{Bennis v. Michigan}, 116 S. Ct. 994 (1996), the Supreme Court held that although a Michigan forfeiture statute contained no innocent owner exception, it did not violate the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment. \textit{See id.} at 1001. Writing for the majority, Chief Justice Rehnquist determined that a culpability requirement was unnecessary for civil forfeiture statutes. \textit{See id.} at 1000-01. The Court held that innocent owners could be held strictly liable for the uses made of their property. \textit{See id.} at 998.

\textsuperscript{31} See \textit{United States v. Tanner}, 61 F.3d 231, 233 (4th Cir. 1995) (stating that proof that property was used illegally must be demonstrated beyond a reasonable doubt in criminal forfeiture action); \textit{United States v. Pelullo}, 14 F.3d 881, 904-06 (3d Cir. 1994) (articulating that in criminal forfeiture proceeding government must prove beyond reasonable doubt that property was involved in criminal activity); \textit{United States v. Elgersma}, 929 F.2d 1538, 1548 (11th Cir. 1991) (concluding that "beyond a reasonable doubt" standard is proper in criminal forfeiture proceeding); Cheh, \textit{supra} note 24, at 5 n.28 (reasoning that defendants in criminal forfeiture cases are afforded all rights recognized in criminal cases).


\textsuperscript{33} See Meredith S. Katz, Comment, Attorney-General of the State of New York v. One Green 1993 Four Door Chrysler: \textit{Does the Punishment Fit the Crime?}, 12 Touro L. Rev. 715, 719-720 (1996) ("In recent history, civil forfeiture has been most commonly used as a device to combat the trafficking of illegal drugs.").

\textsuperscript{34} See Judd J. Balmer, Note, \textit{Civil Forfeiture Under 21 U.S.C. § 881 and the Eighth Amendment's Excessive Fines Clause}, 38 Ariz. L. Rev. 999, 999-1000 (1996) ("A potent weapon in the judicial arsenal, civil forfeiture has emerged as a favored method for imposing significant economic sanctions against narcotics traffickers and for crippling drug-trading enterprises.").


\textsuperscript{36} \textit{See id.} at 943 (describing § 881 as powerful tool to prosecute drug offenders).
II. THE GUARANTEE AGAINST DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The proscription against double jeopardy is one of the oldest ideas in western civilization and is fundamental to our system of justice. The Supreme Court has held that the Clause consists of the following three separate constitutional protections for defendants: (1) protection against a second prosecution for the same offense after conviction; (2) protection against a second prosecution for the same offense after acquittal; and (3) protection against multiple punishments for the same offense.

The Double Jeopardy Clause preserves the finality of judicial decisions. By barring successive prosecutions after a defendant's acquittal or conviction, the Double Jeopardy Clause preserves a defendant's expectation of finality. An unconstitutional addition to a sentence would occur, for example, when a judge imposes a

37. See U.S. Const. amend. V.
38. Id.
40. See Benton v. Maryland, 395 U.S. 784, 794-96 (1969) (determining that guarantee against double jeopardy is "fundamental"). The Supreme Court has held that the Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See id. at 794. Benton overruled Palko v. Connecticut, 302 U.S. 319 (1937), which held that states could deny constitutional rights to their citizens if the totality of the circumstances did not deprive them of fundamental fairness. See id. at 328-29.
43. See Jones v. Thomas, 491 U.S. 376, 385 (1989); see also Crist v. Bretz, 437 U.S. 28, 33 (1978) (determining that primary purpose of double jeopardy guarantee is to preserve finality of judgments); Arizona v. Washington, 444 U.S. 497, 503 (1978) (holding that public interest in finality of judgments is so significant that even when acquittal was based on erroneous foundation defendant may not be retried); Brown, 432 U.S. at 165 (stating that Double Jeopardy Clause serves to promote finality of decisions); Jorn, 400 U.S. at 479 (plurality opinion) ("The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality.").
fifteen year sentence under a statute permitting fifteen years to life, has second thoughts after the convict serves the time, and subsequently hails the defendant back to court to impose ten more years. In preserving the right to finality, the clause protects the basic principles of our legal system, including the prevention of government oppression, the protection of innocent defendants from wrongful convictions, and the elimination of unfairness in punishing an individual twice for the same offense.

Under modern criminal and civil law, it is not uncommon for multiple charges to arise from the same act or series of acts. Accordingly, protection under the Double Jeopardy Clause depends on whether the two offenses constitute the "same offense." Determining whether multiple offenses constitute the same offense is


45. See Jennifer E. Dayok, Comment, Administrative Driver's License Suspension: A Remedial Tool That Is Not in Jeopardy, 45 AM. U. L. REV. 1151, 1160 (1996). For more on the issue of the prevention of government oppression, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 25.1(b) (2d ed. 1992) ("[T]he adverse consequences of . . . governmental oppression . . . are checked in several different ways by a double jeopardy clause aimed at preserving the 'finality' or 'integrity' of final judgments.").

46. See Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970) ("In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction."); Eric Loeb et al., Criminal Procedure Project, 83 GEO. L.J. 1037, 1051 (1995) (asserting that under complex modern criminal law, it is possible to be charged with multiple crimes for the same act or series of acts).

important in multiple prosecutions for related acts,\textsuperscript{48} such as those involved in parallel civil forfeitures and criminal proceedings.

To determine whether multiple prosecutions for a single act or series of acts violate the constitutional protection against being punished twice for the same offense, courts use the "statutory elements" test set forth in Blockburger v. United States.\textsuperscript{49} Under the "statutory elements" test, when the same act or transaction constitutes a violation of two statutes, the test applied to determine if there are two offenses is whether each offense requires proof of an element that the other does not.\textsuperscript{50} If each statutory violation requires proof of an element that the other does not, Blockburger's test is satisfied, and prosecution for both offenses is not barred by the Double Jeopardy Clause.\textsuperscript{51}

\textsuperscript{48} See Loeb et al., supra note 46, at 1051. Compare United States v. Mintz, 16 F.3d 1101, 1106 (10th Cir. 1994) (barring successive prosecutions for Kansas and Florida drug conspiracies because conspiracies were interdependent), and Davis v. Herring, 800 F.2d 513, 520 (5th Cir. 1986) (barring successive prosecutions of shooting into occupied building and murder because offenses constituted single act), with United States v. Besborn, 21 F.3d 62, 68-69 (5th Cir. 1990) (holding that multiple prosecutions for conspiracy involving bank transactions and conspiracy to defraud United States were permissible because objects of two conspiracies differed), and Henry v. McFaul, 791 F.2d 48, 51 (6th Cir. 1986) (per curiam) (allowing successive prosecutions for reckless operation of motor vehicle and attempted murder because proof of different statutory elements is required), and United States v. Coachman, 752 F.2d 685, 692 (D.C. Cir. 1985) (allowing successive prosecutions for two contempt charges because separate contempts are punishable as separate offenses).


\textsuperscript{50} See Blockburger v. United States, 284 U.S. 299, 304 (1932); see also Rutledge, 116 S. Ct. at 1243 (determining under Blockburger "whether each of the statutory provisions requires proof of a fact which the other does not"); Witte, 115 S. Ct. at 2204 (holding, under Blockburger's test, that indictment did not charge same offense to which petitioner previously had plead guilty); Dixon, 509 U.S. at 2856 (examining whether each offense contained statutory element not contained in other under Blockburger); Grady, 495 U.S. at 516 (1990) ("If application of [the Blockburger] test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred."); Brown v. Ohio, 432 U.S. 161, 166 (1977) (holding that Blockburger test is used to determine whether two offenses constitute same offense).

\textsuperscript{51} See Albernaz v. United States, 450 U.S. 333, 338 (1981); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975). Although there may be a substantial overlap in the evidentiary showings for the two offenses, Blockburger's test still may be satisfied. See id.; see also Felix, 503 U.S. at 386 ("[M]ere overlap in proof between the prosecutions does not establish a double jeopardy violation."); Albernaz, 450 U.S. at 338 (determining that substantial overlap in proof does not violate double jeopardy). The Double Jeopardy Clause also protects against multiple prosecutions of lesser included offenses. See Payne v. Virginia, 468 U.S. 1062, 1062 (1984) (per curiam) (stating that double jeopardy bars prosecution of lesser included offenses); Illinois v. Vitale, 447 U.S. 410, 420-21 (1980) (holding that defendants cannot be tried subsequently for lesser included offense after conviction). A lesser included offense does not contain any elements beyond those of the greater offense. See Brown, 432 U.S. at 167 (finding that
III. RELEVANT SUPREME COURT PRECEDENT

The underlying protections afforded by the Double Jeopardy Clause serve as the background against which parallel criminal and civil forfeiture proceedings must be analyzed. In *United States v. One Assortment of 89 Firearms*, the Supreme Court articulated what appeared to be an inflexible rule that civil forfeitures do not constitute punishment for double jeopardy purposes. The circuits began to question this rule, however, in light of several subsequent Supreme Court decisions. In *United States v. Halper*, the Court held for the first time that a civil penalty could constitute punishment for double jeopardy purposes. After *Halper*, the Court decided two closely related cases, *Austin v. United States* and *Department of Revenue v. Kurth Ranch*. In *Austin*, the Court held that civil forfeitures of facilitating property pursuant to § 881(a)(4) and (a)(7) were subject to the limitations of the Eighth Amendment’s Excessive Fines Clause. In *Kurth Ranch*, the Court determined that a civil drug tax constituted double jeopardy when imposed with a criminal prosecution for the same offense. Determining whether parallel civil forfeiture actions pursuant to § 881 constitute punishment for double jeopardy purposes requires both close examination of the relationships between these four cases and analysis of the Court’s rationale in each.

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“joyriding” was lesser included offense within auto theft); Loeb et al., *supra* note 46, at 1054 (stating that lesser included offense is one that does not contain elements beyond greater offense). In determining what constitutes a lesser included offense, courts analyze only the statutory elements of the two offenses. *See* United States v. DeShaw, 974 F.2d 667, 671-72 (5th Cir. 1992) (finding that RICO conspiracy offense is not a lesser included offense of narcotics conspiracy offense); United States v. Cavanaugh, 948 F.2d 405, 415-16 (8th Cir. 1991) (analyzing statutory elements of assault resulting in serious bodily injury and assault resulting in death); Loeb et al., *supra* note 46, at 1054 (stating that courts will look to statutory elements rather than trial evidence to determine what is a lesser included offense).

A. United States v. One Assortment of 89 Firearms: The Two-Pronged Test

In United States v. One Assortment of 89 Firearms, the Supreme Court addressed the issue of whether a civil forfeiture action initiated after a criminal acquittal violated the Double Jeopardy Clause. Initially, a gun dealer was indicted, but later acquitted, of the criminal offense of selling firearms without a license. Following his acquittal, the government instituted a civil forfeiture action against the firearms seized from his home. The gun dealer argued that double jeopardy barred the subsequent forfeiture action.

In a unanimous decision by Chief Justice Burger, the Court framed the issue as "whether a ... forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial." The Court determined that Congress had intended the forfeiture statute at issue to be a remedial, civil sanction rather than a criminal punishment. In determining whether a forfeiture proceeding is criminal or civil, the Court in 89 Firearms relied on the test set forth in United States v. Ward, stating:

“Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention."
The Court noted that "only the clearest proof that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction."68 Because the Court concluded that double jeopardy does not bar a civil, remedial forfeiture proceeding following an acquittal on related criminal charges,69 the subsequent forfeiture proceeding against the firearms was permissible.70

With its holding in 89 Firearms, the Court appeared to have settled the question whether civil forfeitures constituted punishment under the Double Jeopardy Clause. In 1989, however, the Court determined that civil penalties could be considered punishment for double jeopardy purposes in United States v. Halper.71

B. United States v. Halper: The Solely Remedial Test

In Halper, the Supreme Court considered whether a civil penalty that bore "no rational relation to the goal of compensating the government for its loss"72 constituted double jeopardy.73 Halper, who managed a medical service provider, submitted inflated claims for reimbursement to an insurance company.74 As a result, the insurance company overpaid the medical service provider, resulting in a $585 loss to the government.75 Halper was convicted on sixty-five counts of violating the criminal false claims statute and sixteen counts of mail fraud for submitting inflated insurance claims.76 As a result, Halper was sentenced to two years imprisonment and fined $5000.77 The government then brought suit against Halper under the civil False Claims Act, seeking to recover $130,000 ($2000 per false claim).78 The district court refused to impose the penalty, however, stating that it bore no "rational relation" to the government's actual

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68. 89 Firearms, 465 U.S. at 365 (quoting Ward, 448 U.S. at 249).
69. See id. at 366. The Court was careful to limit its holding to the particular forfeiture statute at issue and not to make general conclusions. The Court stated: "We hold that a gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent in rem forfeiture proceeding against those firearms under § 924(d)." Id.
70. See id.
73. See id. at 436.
74. See id. at 437.
75. See id.
76. See id.
77. See id.
78. See id. at 438.
loss or to the cost of legal fees and investigations of the respondent's false claims.\footnote{79}

On direct appeal from the district court, the Supreme Court rejected the prosecution's argument that double jeopardy could not apply in a civil case.\footnote{80} The Court held that under the Double Jeopardy Clause, an individual who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction for the same conduct if the civil sanction is punitive, and not remedial, in nature. In other words, when analyzing parallel criminal and civil sanctions, if the civil sanction is punitive in nature, it violates the Double Jeopardy Clause's protection against multiple punishments for the same offense.\footnote{81} The Court stated that "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, as we have come to understand the term."\footnote{82}

The Supreme Court's decision in \textit{Halper} opened the door for defendants in civil cases to make double jeopardy challenges previously thought impossible as a result of the Court's holding in \textit{89 Firearms}. Four years later, the Court applied \textit{Halper}'s "solely remedial" test in \textit{Austin v. United States}\footnote{83} when examining civil forfeiture in the context of the Eighth Amendment's Excessive Fines Clause.\footnote{84}

\section*{C. Austin v. United States: The Eighth Amendment and Civil Forfeitures}

In \textit{Austin}, the Supreme Court revisited the issue of whether a civil forfeiture constituted punishment, but this time in the context of the Excessive Fines Clause of the Eighth Amendment.\footnote{85} The defendant in \textit{Austin} plead guilty to one count of violating drug laws and was sentenced to seven years imprisonment.\footnote{86} Subsequently, the govern-
ment instituted a civil forfeiture action pursuant to § 881(a)(7) against the individual’s mobile home and auto body shop, asserting that they were facilitating property. The defendant argued that the forfeiture violated the Eighth Amendment’s protection against excessive fines.

Contrary to six of the seven circuit courts that had ruled on the issue, the Supreme Court held that forfeiture of facilitating property pursuant to § 881(a)(4) and (a)(7) was subject to the limitations of the Excessive Fines Clause of the Eighth Amendment, despite the in rem nature of such actions. The Court analyzed the historical purposes behind in rem forfeitures, concluding that they “have been understood, at least in part, as punishment.” The Court expressly relied on the analysis set forth in _Halper_, concluding that the forfeitures of facilitating property under § 881(a)(4) and (a)(7) did not serve an entirely remedial purpose and therefore constituted punishment subject to limitation under the Eighth Amendment. The Court in _Austin_, however, ruled only on the nature of forfeiture with respect to the Eighth Amendment’s Excessive

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87. See id.
88. See id. at 605 & n.2.
89. Prior to _Austin_, six of seven federal circuit courts that considered the issue held that the Excessive Fines Clause of the Eighth Amendment did not apply to civil forfeitures. Compare United States v. Plat 20, Lot 17, 960 F.2d 200, 206-07 (1st Cir. 1992) (holding proportionality analysis under Eighth Amendment unnecessary in civil forfeiture cases brought pursuant to § 881(a)(7)), and United States v. 6250 Ledge Rd., 949 F.2d 721, 727 (7th Cir. 1991) (“Eighth Amendment does not apply to civil in rem actions . . . “) (citing United States v. OnLeong Chinese Merchants Ass’n Bldg., 918 F.2d 1289, 1296 (7th Cir. 1990)), and United States v. 3097 S.W. 111th Ave., 921 F.2d 1551, 1557 (11th Cir. 1991) (determining that Eighth Amendment proportionality analysis does not apply to civil forfeiture cases), and United States v. 107.9 Acre Parcel of Land, 898 F.2d 396, 400-01 (9th Cir. 1990) (concluding that § 881(a)(7) does not violate Eighth Amendment), and United States v. Santoro, 866 F.2d 1598, 1544 (4th Cir. 1989) (declining to extend Eighth Amendment protections to § 881(a)(7)), and United States v. Tax Lot 1500, 861 F.2d 232, 239-35 (9th Cir. 1988) (refusing to apply Eighth Amendment to civil forfeiture actions), with United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir. 1992) (holding that Eighth Amendment analysis did not apply).
90. See _Austin_, 509 U.S. at 622.
91. See id. at 615 (“The fiction ‘that the thing is primarily considered the offender’ has a venerable history in our case law.” (quoting Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921))). The Court refused to rely on the in rem nature of the proceeding in _Austin_. See id. at 616 n.9. The Court stated: “We do not understand the Government to rely separately on the technical distinction between proceedings in rem and proceedings in personam, but we note that any such reliance would be misplaced.” _Id._
92. _Id._ at 618; see also _Calero-Toledo v. Pearson Yacht Leasing Co._, 416 U.S. 663, 686 (1974) (noting punitive and deterrent purposes served by forfeiture statutes).
93. See _Austin_, 509 U.S. at 621. In its decision, the Court relied heavily on the innocent owner provision of the Act, which focused on the culpability of the owner in a way that made it look more like punishment. See _id._ The Court also recognized that under § 881(a)(4) and (a)(7), the forfeiture was tied directly to the commission of a drug offense. See _id._ Finally, the Court examined the legislative history of the statute in which Congress had recognized that the traditional aim of forfeiture was to punish. See _id._ at 622 n.14.
Fines Clause, leaving open the question of whether forfeiture was subject to the Fifth Amendment's Double Jeopardy Clause.

D. Department of Revenue v. Kurth Ranch: Tax Statutes and Double Jeopardy

In Department of Revenue v. Kurth Ranch, the Court departed from Halper's "solely remedial" test when faced with a double jeopardy challenge to a Montana drug tax imposed after the conviction of several individuals. In Kurth Ranch, six members of a family were convicted of cultivating and selling marijuana. The state revenue department attempted to collect $900,000 in taxes on the possession of marijuana pursuant to Montana's Drug Tax Act. The defendants claimed that the tax violated the Double Jeopardy Clause.

A divided Supreme Court held that the drug tax imposed on convicted drug dealers was punitive for double jeopardy purposes. In its analysis, the Court determined that Halper's test for punishment could not be applied due to the differing objectives of tax statutes and civil penalties. The Court noted that tax statutes usually serve the nonpunitive purpose of raising revenue, whereas civil penalties typically serve punitive purposes. Although the Court did not apply Halper's test for punishment, it relied on the definition of punishment enunciated in Halper, stating that the drug tax constituted "a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence,' and therefore must be imposed during the first prosecution or not at all." Based on the high tax assessment in proportion to the drugs' market value, the tax's deterrent effect, the fact that imposition of the tax was contingent on the commission of a crime, and the fact that the state sought to levy the tax on property that never was owned legally because the drugs constituted contraband, the Court concluded that the tax was punitive and thus barred by the Double Jeopardy Clause.

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94. See id at 622.
97. See id. at 1942.
99. See Kurth Ranch, 114 S. Ct. at 1943.
100. See id. at 1948.
101. See id.
102. See id. at 1946.
103. Id. at 1948 (quoting United States v. Halper, 490 U.S. 435, 440 (1989)).
104. See id. at 1946-47.
IV. THE ROAD TO UNITED STATES V. URSEY: THE CIRCUIT COURT DECISIONS

In light of the Court's findings in Halper, Austin, and Kurth Ranch, the circuits' application of the law regarding parallel criminal and civil proceedings pursuant to § 881 was unpredictable. A pair of cases from the Ninth and Sixth Circuits presented the Supreme Court with the opportunity to resolve the split. In United States v. $405,089.23, the Ninth Circuit determined that civil forfeiture of proceeds pursuant to § 881(a)(6) constituted punishment for double jeopardy purposes. In United States v. Ursery, the Sixth Circuit held that civil forfeiture of facilitating property pursuant to § 881(a)(4) and (a)(7) constituted punishment for double jeopardy purposes. The Supreme Court granted certiorari for both cases which then were consolidated.

A. The Ninth Circuit Decision in United States v. $405,089.23: Forfeiture of Proceeds is Punishment

In $405,089.23, the government tried Charles Arlt and James Wren for conspiracy to aid and abet the manufacture of methamphetamine. The district court convicted both Arlt and Wren of the underlying criminal offenses. Five days after the criminal indictments, the government filed an in rem complaint against a bank account, helicopter, shrimp boat, airplane, and numerous automobiles. The government alleged that these properties were connected to the offenses charged in the parallel criminal cases and therefore were forfeitable as proceeds of illegal narcotics transactions under § 881(a)(6). All parties agreed to defer the forfeiture

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105. 33 F.3d 1210 (9th Cir. 1994).
106. See United States v. $405,089.23, 33 F.3d 1210, 1222 (9th Cir. 1994), opinion amended on denial of reh’g by 56 F.3d 41 (9th Cir. 1995), rev’d sub nom. United States v. Ursery, 116 S. Ct. 2135 (1996).
110. See §405,089.23, 33 F.3d at 1214.
111. See id.
112. See id.
113. See id. The government also argued that the property was forfeitable as property "involved in" money laundering violations under 18 U.S.C. § 981(a)(1)(A). See id. The district court concluded that probable cause was established with regard to both the narcotics transactions and money laundering, and that the property therefore was forfeitable pursuant to either statute. See id. at 1215.
litigation for the duration of the criminal prosecution. Subsequent to Arlt's and Wren's criminal convictions, however, the district court granted summary judgment in favor of the United States, finding that all of the assets were subject to forfeiture as proceeds of illegal narcotics activity. Arlt and Wren appealed, contending that the Double Jeopardy Clause barred the civil forfeiture action because they already had been prosecuted for criminal violations arising from the same acts.

Guided primarily by *Austin* and *Halper*, the Ninth Circuit held that the Double Jeopardy Clause barred the subsequent civil forfeiture pursuant to § 881(a)(6). The court first determined that the civil and criminal trials, although roughly contemporaneous, constituted "separate proceedings" for double jeopardy purposes. Although acknowledging that two other circuits had reached the opposite conclusion, the Court found that a "forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time." Applying *Halper*, the Ninth Circuit held that forfeiture of proceeds pursuant to § 881(a)(6) constituted punishment for double jeopardy purposes. Although the court recognized that under the Supreme Court's analysis in *Firearms* civil forfeitures did not constitute punishment in the double jeopardy context, it concluded that in *Halper* the Supreme Court had abandoned the two-prong analysis of *Firearms* and essentially had "changed its collective mind." The

114. See id. at 1214.
115. See id. The court granted summary judgment in favor of the government when the defendants failed to introduce any evidence demonstrating that the property was not subject to forfeiture. See id.
116. See id. at 1215. Appellants also claimed "that the government lacked probable cause to institute [the] proceedings, . . . that the forfeiture violate[d] the Excessive Fines Clause of the Eighth Amendment, and that the district court lacked in rem jurisdiction over a small part of the res." Id.
117. See id. at 1222.
118. See id. at 1216.
119. See id. The Ninth Circuit recognized that the Second and Eleventh Circuits recently had held that parallel criminal prosecutions and civil forfeitures constituted the same proceeding for double jeopardy purposes. See id. In *United States v. One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994), the Eleventh Circuit determined that, because the forfeiture action and criminal prosecution took place at approximately the same time and involved the same criminal violations, they were part of a "single, coordinated prosecution." Id. at 1499. Similarly, in *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), the Second Circuit found "that the civil and criminal actions were but different prongs of a single prosecution of the [respondents] by the government." Id. at 20. The Ninth Circuit, however, concluded "that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent as well as common sense." §405,089.23, 33 F.3d at 1216.
120. §405,089.23, 33 F.3d at 1216 (emphasis added).
121. See id. at 1218-19.
122. Id. at 1218.
court further held that in *Austin* the Supreme Court specifically had applied *Halper*'s solely remedial test to determine whether forfeiture under §§ 881(a)(4) and (a)(7) constituted punishment.\(^{123}\) Because *Austin* had concluded that forfeiture of facilitating property constituted punishment for purposes of the Eighth Amendment, the Ninth Circuit held that it constituted punishment under the Double Jeopardy Clause as well.\(^{124}\)

**B. The Sixth Circuit Decision in United States v. Ursery: Forfeiture of Facilitating Property is Punishment**

The Sixth Circuit employed a similar analysis in *United States v. Ursery*\(^{125}\) when examining civil forfeiture of facilitating property pursuant to § 881. In *Ursery*, police officers executing a search warrant found evidence that Guy Ursery was growing, processing, and consuming marijuana at or near his home.\(^{126}\) Initially, the government brought a civil forfeiture action against Ursery's home as facilitating property pursuant to § 881(a)(7),\(^{127}\) which resulted in the entry of a consent judgment for $13,250.\(^{128}\) Ursery later was criminally indicted and charged with one count of manufacturing marijuana.\(^{129}\) The district court convicted and sentenced Ursery to sixty-three months imprisonment and four years of supervised release.\(^{130}\) Ursery appealed the district court's decision, arguing that his criminal prosecution and punishment subsequent to the civil forfeiture proceeding violated the Double Jeopardy Clause of the Fifth Amendment.\(^{131}\)

In reversing Ursery's conviction, the Sixth Circuit concluded that forfeiture of facilitating property pursuant to § 881(a)(7) constituted punishment subject to the Fifth Amendment's Double Jeopardy Clause.\(^{132}\) Relying on *Halper* and *Austin*, the court held that "any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment

\(^{123}\) See id. at 1220.

\(^{124}\) See id. at 1219. The Ninth Circuit concluded that "if a forfeiture constitutes punishment under the *Halper* criteria, it constitutes 'punishment' for purposes of both clauses." Id. (footnote omitted).


\(^{127}\) See id.

\(^{128}\) See id.

\(^{129}\) See id.

\(^{130}\) See id.

\(^{131}\) See id.

\(^{132}\) See id. at 573. The Sixth Circuit first determined that jeopardy had attached in the civil forfeiture proceeding because the consent judgment was analogous to a guilty plea entered in a criminal case, which constitutes jeopardy. See id. at 571.
for double jeopardy purposes.\textsuperscript{133} The court further determined that Ursery's criminal conviction and the civil forfeiture of his property constituted punishment for the same offense.\textsuperscript{134} Applying the "statutory elements" test articulated by the Supreme Court in \textit{Blockburger v. United States},\textsuperscript{135} the court found that the criminal offense did not require any elements of proof beyond those required by the civil forfeiture action.\textsuperscript{136} Because the two constituted the same offense for double jeopardy purposes, the subsequent civil forfeiture action was barred. Although the court recognized that the government can impose multiple punishments for the same offense if done within a single proceeding,\textsuperscript{137} it declined to hold that the parallel civil and criminal actions at issue constituted a single, coordinated proceeding for double jeopardy purposes.\textsuperscript{138}

V. \textit{UNITED STATES V. URSERY: THE SUPREME COURT'S HOLDING AND RATIONALE}

Led by Chief Justice Rehnquist, the majority in \textit{United States v. Ursery}\textsuperscript{139} relied on "a long line of cases . . . consistently concluding

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\item \textsuperscript{133} See id. at 573.\textsuperscript{134} See id. at 573-74.\textsuperscript{135} See 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").\textsuperscript{136} See \textit{Ursery}, 59 F.3d at 574-75.\textsuperscript{137} See id. at 574 (relying on United States v. Halper, 490 U.S. 435, 450 (1989)).\textsuperscript{138} The Sixth Circuit did not adopt the rationale set forth by any of the other circuits that had ruled on the issue of when parallel civil forfeiture and criminal proceedings can constitute a "single, coordinated proceeding." See id. at 575. The court stated that "the existence of a single, coordinated proceeding" could arguably satisfy the requirements of the Double Jeopardy Clause, as suggested by the Second and Eleventh Circuits, [but] the facts in this case fail to reveal such a single, coordinated proceeding." Id. The court noted that both proceedings were presided over by different judges, decided by separate judgments, and instituted four months apart. See id. The court also recognized that there was no communication between the government lawyers assigned to the civil and criminal actions. See id. Additionally, the court did not adopt the Ninth Circuit's belief—as set forth in \textit{United States v. $405,089.23}, 33 F.3d 1210, 1216 (9th Cir. 1994)—that parallel criminal and civil forfeiture proceedings always will violate double jeopardy. See id. Its decision suggested the permissibility of concurrent criminal and civil forfeiture actions in limited situations.\textsuperscript{139} In an extremely critical dissent, Judge Milburn rejected the majority's rationale, arguing that the issue of whether parallel civil and criminal actions constitute a "single proceeding" for double jeopardy purposes should turn on the timing of the proceedings and the potential for government abuse. See id. at 577 (Milburn, J., dissenting). Judge Milburn criticized the majority's approach as "unpredictable," arguing that his approach "avoids the inevitable difficulty of a case-by-case comparison of the level of coordination" between the civil and criminal actions. Id. at 577-78 (Milburn, J., dissenting). He concluded that because the "government was not acting . . . out of dissatisfaction with the first outcome" and because the actions were maintained during the same time frame, the actions constituted a single proceeding that did not violate the Double Jeopardy Clause. See id. at 578 (Milburn, J., dissenting).\textsuperscript{139}
that the [Double Jeopardy] Clause does not apply to [civil forfeiture] actions because they do not impose punishment." \(^{140}\) Although the Sixth and Ninth Circuits found that *Halper*, *Austin*, and *Kurth Ranch* created a new test for determining whether a civil sanction constitutes punishment under the Double Jeopardy Clause, \(^{141}\) the Supreme Court held that the circuits had misread those decisions. \(^{142}\) The Court stated that *Halper*, *Austin*, and *Kurth Ranch* could not be applied in *Ursery* because none of them concerned the issue in *Ursery*: whether in rem civil forfeitures violate the Double Jeopardy Clause. \(^{143}\) Instead, the majority considered the forfeitures under the rationales set forth in *Various Items of Personal Property v. United States*, \(^{144}\) *One Lot Emerald Cut Stones v. United States*, \(^{145}\) and *United States v. One Assortment of 89 Firearms*, \(^{146}\) each of which concluded that civil forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause. \(^{147}\)

Using the two-prong analysis set forth in *89 Firearms*, \(^{148}\) the majority in *Ursery* determined that the civil forfeiture of facilitating property and proceeds under 18 U.S.C. \(\S\) 981 (a) (1) (A) and 21 U.S.C. \(\S\) 881 (a) (6) and (a) (7) did not constitute punishment under the Double Jeopardy Clause. \(^{149}\) Under the first prong, the majority examined whether Congress intended the proceedings to be civil or criminal, concluding that Congress had intended the forfeiture of

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141. See id. at 2142-43.
142. See id. at 2147.
143. See id.
144. 282 U.S. 577 (1931).
147. See Ursery, 116 S. Ct. at 2140-42 (relying on *Various Items*, *Emerald Cut Stones*, and *89 Firearms*). In *Various Items*, the Court determined that the civil forfeiture of a distilling plant used to produce illegal alcohol during the Prohibition Era did not constitute punishment for double jeopardy purposes. See *Various Items of Personal Property v. United States*, 282 U.S. 577, 580-81 (1931). The Court determined that because the proceeding was in rem against property, it could not constitute punishment. See id. at 581. Similarly, in *Emerald Cut Stones*, the Court determined that the civil forfeiture of smuggled jewels did not constitute punishment due to the remedial purposes of 19 U.S.C. \(\S\) 1497. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-36 (1972). The Court held in *89 Firearms* that civil forfeiture of firearms did not constitute punishment for double jeopardy purposes because the cause of action arose from the Gun Control Act, and Congress intended the cause of action to be remedial, not punitive. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984).
148. The first part of the analysis requires the Court to determine whether Congress intended the forfeiture statute to be civil or criminal. See *89 Firearms*, 465 U.S. at 362-63. The second part of the analysis requires the Court to determine "[w]hether the statutory scheme [is] so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial mechanism." Id. at 365 (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)); see also supra note 67 and accompanying text (discussing two-prong test in *89 Firearms*).
149. See Ursery, 116 S. Ct. at 2147-49.
both facilitating property and proceeds to be civil in nature.\textsuperscript{150} Applying the second prong of the 89 Firearms test, the majority examined the statute for the "clearest proof" that it was so punitive in purpose or effect as to negate Congress' intent.\textsuperscript{151} The Court found little evidence that forfeiture of proceeds and facilitating property pursuant to § 881 was "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary."\textsuperscript{152}

The majority also relied heavily on the classification by Various Items of civil forfeitures as in rem proceedings against property,\textsuperscript{153} contrasting these types of proceedings with in personam proceedings against the individual.\textsuperscript{154} The majority reasoned that in rem civil forfeitures could not be punitive because they are proceedings against property and not the individual.\textsuperscript{155} The Court concluded that the civil forfeiture of both proceeds and facilitating property under § 881 was not punitive for purposes of the Fifth Amendment Double Jeopardy Clause.\textsuperscript{156}

In his dissent in Ursery, Justice Stevens suggested that 89 Firearms and Emerald Cut Stones were not incompatible with Halper, Austin, and Kurth Ranch; rather, 89 Firearms and Emerald Cut Stones "set the stage for the modern understanding of how the Double Jeopardy Clause applies in nominally civil proceedings."\textsuperscript{157} Justice Stevens argued that Halper's solely remedial test for punishment should have been applied to civil forfeitures brought pursuant to § 881.\textsuperscript{158} Although Justice Stevens concurred with the majority's judgment that the forfeiture of proceeds was not punitive,\textsuperscript{159} he stated that with regard to the forfeiture of facilitating property, "[f]idelity to both reason and precedent dictates the conclusion that this forfeiture was 'punishment' for purposes of the Double Jeopardy Clause."\textsuperscript{160}

\textsuperscript{150} See id. at 2147-48.
\textsuperscript{151} See id. at 2148.
\textsuperscript{152} Id.
\textsuperscript{153} See id. at 2140; Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (determining that civil forfeiture proceeding was not punishment because it was in rem proceeding against property).
\textsuperscript{154} See Ursery, 116 S. Ct. at 2141 (relying on Various Items, 282 U.S. at 581).
\textsuperscript{155} See id. at 2140-41, 2149.
\textsuperscript{156} See id. at 2149.
\textsuperscript{157} Id. at 2155 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{158} See id. at 2155-56 (Stevens, J., concurring in part and dissenting in part) (referring to United States v. Halper, 490 U.S. 435, 448 (1989)).
\textsuperscript{159} See id. at 2152 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{160} Id. at 2161 (Stevens, J., concurring in part and dissenting in part) (emphasis added).
VI. Analysis of United States v. Ursery

Although Ursery allows for the continued use of civil forfeitures in the government's war against drugs, the Court's rationale was inconsistent with applicable precedent. The majority failed to recognize and apply the general rule set forth in Halper: that a civil sanction must serve a solely remedial purpose in order to avoid invoking the protections of the Double Jeopardy Clause.\(^\text{161}\) In so doing, the Court accorded too much import to the "pedantic" distinction between in rem and in personam proceedings.\(^\text{162}\) Rather, the Court should have acknowledged that Halper's "solely remedial" test refined the two-prong analysis of 89 Firearms. The Court's decision severely weakened the Fifth Amendment proscription against double jeopardy.

A. The Court Should Have Applied Halper

The majority in Ursery refused to adopt the analysis employed by the Sixth and Ninth Circuits. The Court attempted to distinguish its prior decisions in Halper, Austin, and Kurth Ranch, declaring those cases inapplicable.\(^\text{163}\) According to the majority in Ursery, none of those decisions discarded the Court's traditional understanding that civil forfeitures do not constitute punishment under the Double Jeopardy Clause.\(^\text{164}\) Instead, the Court looked to 89 Firearms, Emerald Cut Stones, and Various Items as controlling precedent.\(^\text{165}\) The majority's analysis, however, is incomplete.

1. Harmonizing 89 Firearms and Emerald Cut Stones with Halper

Contrary to the majority's assertion in Ursery, Emerald Cut Stones and 89 Firearms never endorsed a traditional understanding that civil forfeiture could not be punitive under the Double Jeopardy Clause. In fact, the Court in Emerald Cut Stones used an analysis similar to that...

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\(^\text{161}\) See Halper, 490 U.S. at 449.
\(^\text{162}\) See Ursery, 116 S. Ct. at 2160 (Stevens, J., concurring in part and dissenting in part) (suggesting that distinction between in rem and in personam proceedings is pretext for Court's real basis of decision).
\(^\text{163}\) The Court limited Halper to the issue of whether a civil penalty could constitute punishment for double jeopardy purposes. See id. at 2143. Similarly, Austin applied only to civil forfeitures in the context of the Eighth Amendment Excessive Fines Clause. See id. at 2143-44. Finally, the Court narrowly construed Kurth Ranch to apply only to tax statutes that are so punitive that they constitute punishment for purposes of the Double Jeopardy Clause. See id. at 2144.
\(^\text{164}\) See id. at 2147.
\(^\text{165}\) See id.
The Court in *Emerald Cut Stones* analyzed the purposes of the forfeiture statute at issue, 19 U.S.C. § 1497, in deciding whether Congress intended it to be remedial or punitive in nature. Only after an examination of the character of the particular forfeiture statute at issue did the Court in *Emerald Cut Stones* conclude that it was remedial and did not constitute punishment. Thus, the Court's holding in *Emerald Cut Stones* announced no broad rule that civil forfeitures could not be considered punitive in the double jeopardy context.

Similarly, the Court's decision in *89 Firearms* is not inconsistent with *Halper*. The Court in *89 Firearms* examined the "broad remedial aims" of the gun control forfeiture statute at issue and determined that keeping firearms away from unlicensed dealers was a remedial goal. Thus, the statute was not punitive. The Court concluded that the forfeiture statute was a remedial sanction and therefore was not barred by the Double Jeopardy Clause. This analysis bears a strong resemblance to the *Halper* test, which requires a solely remedial purpose. Because the similarities between the analyses of *Halper*, *89 Firearms*, and *Emerald Cut Stones* indicate a closer relation-

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166. In *Emerald Cut Stones*, after being tried and acquitted of smuggling jewels into the United States, the owner of the jewels intervened in a subsequent forfeiture proceeding against the jewels. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 232-33 (1972). The district court held that the Fifth Amendment protection against double jeopardy barred the subsequent forfeiture proceedings. See id. at 235.

In a brief opinion, the Supreme Court held that the forfeiture proceeding was not barred by the Double Jeopardy Clause because it "involve[d] neither two criminal trials nor two criminal punishments." Id. at 235. In making its decision, the Court carefully examined the character of the forfeiture statute at issue, 19 U.S.C. § 1497. See id. at 236-37. It found that the forfeiture provided a reasonable form of liquidated damages to reimburse the government for expenses incurred as a result of investigation and enforcement. See id. at 237. The Court further recognized that the purposes behind the statute were remedial, not punitive. See id. Finally, the Court determined that the penalties imposed were not "so unreasonable or excessive that [they] transform[ed] what was clearly intended as a civil remedy into a criminal penalty." Id.

For a discussion of the Court's analysis in *Halper*, see *supra* notes 72-84 and accompanying text.

167. See *Emerald Cut Stones*, 409 U.S. at 237 (analyzing character of forfeiture statute in double jeopardy context).

168. See id.


171. See id.

172. See id. at 366.
ship than the majority acknowledged,\footnote{\textit{Ursery}, 116 S. Ct. at 2140.} the Court should have included \textit{Halper} in its "long line of cases."\footnote{\textit{Ursery}, 116 S. Ct. at 2144 (citing \textit{Halper}, 490 U.S. at 449-50).} The Court's omission of \textit{Halper} from its "long line of cases" was likely due to the policy implications involved. If the Court had held that the civil forfeiture of proceeds or facilitating property was punitive for double jeopardy purposes, it would have eliminated an extremely useful tool in the nation's war against drugs. This would have been a major setback to law enforcement agencies at all levels of government. The majority had to distinguish \textit{Halper} to avoid applying its "solely remedial" test because the forfeiture of facilitating property under § 881(a)(4) and (a)(7) likely would not have passed constitutional muster under that analysis.

2. \textit{The Court's narrow construction of Halper}

The majority in \textit{Ursery} determined that the analysis in \textit{Halper} was only appropriate for the "rare case" involving civil penalties such as fines.\footnote{\textit{Id.} at 2145.} Although the majority classified civil penalties as a form of liquidated damages compensating the government for harm caused by a defendant,\footnote{\textit{Id.} at 2144-45.} it determined that civil forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."\footnote{\textit{Id.} at 2145.} Due to

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\footnote{173. \textit{See United States v. Halper}, 490 U.S. 435, 447-49 (1989) (examining purposes and character of penalty to determine whether civil sanction constitutes punishment); \textit{89 Firearms}, 465 U.S. at 363-64 (examining purpose and character of 18 U.S.C. § 924(d) in determining whether it was punitive); \textit{Emerald Cut Stones}, 409 U.S. at 236 (assessing character of forfeiture statute in order to determine whether it was remedial or punitive in nature).} \footnote{174. \textit{Ursery}, 116 S. Ct. at 2140.} \footnote{175. \textit{See Ursery}, 116 S. Ct. at 2144 (citing \textit{Halper}, 490 U.S. at 449-50).} \footnote{176. \textit{See id.} at 2144-45.} \footnote{177. \textit{Id.} at 2145.} \end{footnotesize}
these different objectives, the Court concluded that Halper could not be applied in the civil forfeiture context.\footnote{178}

The Court's limitation of the analysis in Halper to civil penalties, however, was inappropriate. The majority misconstrued the Court's holding in Halper, merging the two rules it set forth.\footnote{179} Both the majority and Justice Stevens, in his dissent, agreed that Halper set forth a narrow rule for rare cases involving disproportionate civil penalties.\footnote{180} The majority, however, explicitly rejected the notion that Halper also set forth a general rule.\footnote{181}

As argued by Justice Stevens, Halper established a general rule that "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, as we have come to understand the term."\footnote{182} Although the majority in Ursery attempted to dismiss Halper's general rule as mere dictum, it did nothing to refute the fact that the Court in Austin expressly relied on this general rule.\footnote{183} As Justice Stevens noted in his dissent, "Austin expressly quoted Halper and followed its general rule that a sanction should be characterized as 'punishment' if it serves any punitive end."\footnote{184} It seems unlikely that the Court in Austin would have relied on what the majority in Ursery refers to as dictum. Contrary to the majority's opinion, the general rule set forth in Halper did exist, at least as far as the Court in Austin was concerned.\footnote{185}

\footnote{178. See id. The majority determined that it was not possible to quantify the nonpunitive purposes of a particular civil forfeiture. See id. It further found that it was too difficult to determine whether a particular forfeiture bears a rational relationship to its nonpunitive purposes. See id. Because Halper's analysis requires courts to compare the harm suffered by the government to the size of the penalty imposed on the individual, the majority concluded that it could not be applied. See id.}

\footnote{179. For a discussion of Halper, see supra notes 72-84 and accompanying text.}

\footnote{180. The majority limited Halper by holding that it applied only in "the context of civil penalties." Ursery, 116 S. Ct. at 2144. In his dissent, Justice Stevens agreed that Halper set forth a narrow rule for rare cases involving disproportionate civil penalties. See id. at 2157 (Stevens, J., concurring in part and dissenting in part).}

\footnote{181. See id. at 2145 n.2. "Nowhere in Halper does the Court set forth two distinct rules or purport to apply a two-step analysis. Justice Stevens finds his 'general rule' in a dictum from Halper ...." Id.}

\footnote{182. Id. at 2156 (Stevens, J., concurring in part and dissenting in part) (quoting United States v. Halper, 490 U.S. 435, 448-49 (1989)).}

\footnote{183. See Ursery, 116 S. Ct. at 2145 n.2 (failing to give an explanation for the Court's reliance in Austin on Halper's general rule).}

\footnote{184. Id. at 2157 (Stevens, J., concurring in judgment in part and dissenting in part).}

\footnote{185. The majority's reliance on Kurth Ranch to refute the application of Halper's analysis to civil forfeitures similarly is misplaced. See id. at 2146 (noting that Court in Kurth Ranch "expressly disclaimed reliance on Halper"). The majority relied on the Court's determination in Kurth Ranch that "because 'tax statutes serve a purpose quite different from civil penalties, ... Halper's method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute.'" Id. (quoting Department of Revenue v. Kurth Ranch, 114 S.
Furthermore, this general rule is applicable to all "civil sanctions,"186 which, as the Court held in *Kurth Ranch*, includes civil forfeitures. In *Halper*, the Court "assess[ed] the character of the actual *sanctions* imposed on the individual" in determining "whether [the] particular civil *sanction* constitute[d] ... punishment."187 Subsequently, in *Kurth Ranch*, the Court expressly stated that "[criminal] fines, [civil] penalties, and [civil] forfeitures are readily characterized as sanctions."188 Thus, although the Court in *Halper* examined the character of the sanctions, *Kurth Ranch* recognized that civil forfeitures constitute sanctions. Contrary to the majority's opinion in *Ursery*, therefore, *Kurth Ranch* extended *Halper*'s analysis to include civil forfeitures as well as civil penalties.

By refusing to acknowledge the general rule in *Halper*, the Court in *Ursery* significantly lowered the threshold for characterizing civil statutes as remedial for double jeopardy purposes. Under the *Halper* test, which requires a solely remedial purpose, civil statutes are subject to a more rigorous analysis of whether they are indeed remedial in nature. Due to the majority's refusal to apply *Halper*, civil forfeiture statutes can have punitive aspects and yet be classified as remedial under the Double Jeopardy Clause.189 In effect, because civil forfeiture statutes may be considered remedial while retaining punitive aspects, the government may circumvent the constitutional protections required in criminal proceedings. The lesser burden of proof in civil proceedings effectively is imported into the criminal realm.

**B. The In Rem Fiction**

In reaching its decision, the majority in *Ursery* relied heavily upon the distinction the Court made in *Various Items* between *in rem* civil

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187. *Halper*, 490 U.S. at 447 & n.7 (emphasis added).
189. In *Ursery*, the Court even acknowledged that subsections (a)(6) and (a)(7) have "certain punitive aspects." *Ursery*, 116 S. Ct. at 2148. Despite these punitive aspects, the Court determined that civil forfeitures pursuant to § 881 did not constitute punishment. *See id.* at 2149.
forfeitures and in personam civil penalties. Because the majority determined that civil forfeitures are in rem actions against property, such proceedings could not be deemed punishment for purposes of the Double Jeopardy Clause. The Court, however, placed too much importance on this distinction.

The difference between in rem civil forfeitures and in personam civil penalties is merely a "pedantic distinction." In Austin, the Court made clear that it would give little weight to this distinction, declaring that "[w]e do not understand the government to rely separately on the technical distinction between proceedings in rem and proceedings in personam, but we note that any such reliance would be misplaced." The primary purpose behind creation of the in rem fiction was to expand judicial jurisdiction over property in situations where the courts lacked in personam jurisdiction over individuals, not to create immunity from double jeopardy review. Thus, the majority in Ursery went too far in relying upon this distinction to deny claimants double jeopardy protection.

Further, the Court in Austin expressly stated that "forfeiture proceedings historically have been understood as imposing punishment despite their in rem nature." In Austin, the Court recognized that the in rem fiction rested on the idea that the owner was

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190. See Ursery, 116 S. Ct. at 2141 (determining that Various Items drew "sharp distinction between in rem civil forfeitures and in personam civil penalties").

Various Items was one of the first cases in which the Supreme Court considered civil forfeitures in the context of double jeopardy. See Various Items of Personal Property v. United States, 282 U.S. 577 (1931). In Various Items, a distilling company had been ordered to forfeit a distillery, warehouse, and denaturing plant on the ground that the company had defrauded the government of taxes, in violation of federal law. See id. at 578. The government admitted that, prior to the forfeiture proceeding, the company had been charged and convicted on criminal violations based on "the transactions set forth ... as a basis for the forfeiture." Id. at 579.

After considering the distilling company's argument that the subsequent civil forfeiture proceeding violated the Double Jeopardy Clause, the Supreme Court determined that double jeopardy protection did not apply. See id. at 580-81. The Court held that the civil forfeiture was an in rem proceeding to forfeit the property the company used in committing the crime. See id. at 580. The Court further determined that in an in rem proceeding, "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious." Id. at 581. Finally, the Court contrasted criminal prosecutions, in which the person is proceeded against, from civil forfeitures, in which "[t]he forfeiture is no part of the punishment for the criminal offense." Id.

191. See Ursery, 116 S. Ct. at 2149 (holding that in rem civil forfeitures do not constitute punishment under Double Jeopardy Clause).

192. See id. at 2160 (Stevens, J., concurring in part and dissenting in part).


194. Id. at 616 n.9.

195. See Republic Nat'l Bank of Miami v. United States, 113 S. Ct. 554, 559 (1992) ("The fictions of in rem forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties.").

196. Austin, 509 U.S. at 616 n.9.
negligent in allowing his property to be involved in a crime. The Court explained that "such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by the forfeiture." The Court realized that despite the civil forfeiture's in rem nature, the owner was being punished. Although the Court in Austin recognized that the in rem proceedings at issue were against the property and not the person, it refused to use this distinction as a reason to deny the defendants constitutional protections. If the Court in Austin refused to rely on the in rem nature of the proceeding, the majority in Ursery should have done the same.

The majority's reliance on the distinction between in rem and in personam proceedings has, in Justice Stevens' words, "cut deeply into a guarantee deemed fundamental by the Founders." To underscore his point Justice Stevens, in his dissent, compared the circumstances under which Various Items and 89 Firearms were decided with those of Ursery. Various Items involved the forfeiture of a Prohibition era distillery that served no other purpose than to manufacture illegal alcohol, and 89 Firearms involved the forfeiture of firearms sold without a license. In contrast, Ursery involved a forfeiture action against an individual's home that served as a family residence. Justice Stevens asked what the Court's reaction would have been if Congress had authorized the forfeiture of all homes where alcohol was consumed in 1931.

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197. See id. at 615.
198. Id. at 618 (quoting Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921)). In his concurrence in Ursery, Justice Kennedy acknowledged that the distinction between in rem and in personam is a "fiction alive in Various Items but condemned in Austin." United States v. Ursery, 116 S. Ct. 2135, 2151 (1996) (citations omitted) (Kennedy, J., concurring in judgment). Justice Kennedy partially agreed with Justice Stevens' dissent, stating that "[i]t is the [property] owner who feels the pain and receives the stigma of the forfeiture, not the property." Id. (Kennedy, J., concurring in judgment). Contrary to Justice Stevens, however, Justice Kennedy determined that the distinction was appropriate because its purpose is to "quiet title to forfeitable property in one proceeding." Id. This determination, however, runs contrary to the reasoning set forth by the Court in Republic Nat'l Bank. See supra note 195 and accompanying text (discussing jurisdictional rationale for in rem distinction). Moreover, Justice Kennedy's determination fails to explain why the majority in Ursery could rely on this distinction in the double jeopardy context.

199. See Austin, 509 U.S. at 616 n.9 (stating that reliance on in rem fiction would be misplaced).
200. Ursery, 116 S. Ct. at 2163 (Stevens, J., concurring in part and dissenting in part) (asserting that Court's holding in Ursery erodes Fifth Amendment guarantee prohibiting double jeopardy).
201. See id. (Stevens, J., concurring in part and dissenting in part).
204. See Ursery, 116 S. Ct. at 2138-39.
205. See id. at 2163 (Stevens, J., concurring in part and dissenting in part).
Justice Stevens feared that merely labeling the statute "civil" or "in rem" may have been enough to avoid characterizing it as punitive for double jeopardy purposes.206

Justice Stevens' comments raise an important issue concerning forfeitures of facilitating property: Where do officials draw the line as to what facilitates a drug transaction? If someone uses a car to travel to the bank to withdraw money for use in a later drug transaction, does the car constitute facilitating property? If an individual uses a road map on a computer Internet program to locate where a drug transaction will occur, does the computer facilitate the drug transaction? Although courts never might face these particular circumstances, the hypothetical situations posited serve to highlight the potential for abuse by officials.

C. Ursery "Stands Austin on Its Head"207

In Ursery, the majority discredited the circuit courts' reliance on Austin, because "[i]t was decided solely under the Excessive Fines Clause of the Eighth Amendment . . . which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment."208 The majority narrowly construed the Court's holding in Austin, determining that the only effect of Austin was to subject the forfeiture of facilitating property to the limitations of the Excessive Fines Clause of the Eighth Amendment,209 not the Double Jeopardy Clause.210

The majority's contention that the Fifth and Eighth Amendments never have been understood as being "parallel" to each other, however, misses the point. The Sixth and Ninth Circuits did not find that the Fifth and Eighth Amendments were parallel to each other in their entirety, only that the definition of the word "punishment" within the two Amendments was parallel.211 As Justice Stevens observed, "[i]t is difficult to imagine why the Framers of the two

206. See id. (Stevens, J., concurring in part and dissenting in part).
207. See id. at 2158 (Stevens, J., concurring in part and dissenting in part).
208. Id. at 2146.
209. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fees imposed.").
210. See Ursery, 116 S. Ct. at 2143-44 (rejecting relevancy of characterizing proceeding as civil or criminal and focusing on forfeiture itself to determine if it constituted punishment).
211. See generally United States v. $405,089.23, 33 F.3d 1210, 1221 (9th Cir. 1994) (relying on Austin for purposes of analysis of civil forfeiture statute under both Eighth and Fifth Amendments), rev'd sub nom. United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995) (relying on Austin for analysis of civil forfeiture statute under Fifth Amendment's Double Jeopardy Clause), rev'd, 116 S. Ct. 2135 (1996). Because both the Sixth and Ninth Circuits relied on Austin in their decisions involving the Fifth Amendment, they implied that the definition of "punishment" is the same for purposes of both the Fifth and Eighth Amendments.
amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offense.” Justice Stevens further noted that it would “make little sense” to find that civil forfeiture may be punishment under the Excessive Fines Clause but not under the Double Jeopardy Clause. Indeed, for the Framers of the Constitution to use the word “punishment” in the context of the Fifth Amendment and to use the same word just three amendments later, meaning something entirely different, makes no sense at all.

The majority in 
Ursery also determined that the approaches in Austin and Halper were “wholly distinct” due to the different purposes of the respective analyses under the Eighth Amendment Excessive Fines Clause and the Fifth Amendment Double Jeopardy Clause. The majority maintained that analysis of a civil sanction under the Excessive Fines Clause asks whether a sanction is “so large as to be ‘excessive,’” and analysis in the double jeopardy context asks whether the sanction has any remedial goals. Concluding that Austin's holding applied only to the Excessive Fines Clause of the Eighth Amendment, the majority held that Austin could not be applied in the double jeopardy context.

The majority, however, failed to recognize that Austin expressly relied on the rule in Halper that a sanction is classified as punishment if it serves any punitive ends. In Austin, the Court quoted Halper, stating “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving

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212. Ursery, 116 S. Ct. at 2157 n.5 (Stevens, J., concurring in part and dissenting in part).

213. Id. at 2157 (Stevens, J., concurring in part and dissenting in part).

214. Similarly, at oral argument for Ursery, Justice Scalia maintained that he could not understand why the Drafters would write that what constitutes punishment for Eighth Amendment purposes does not constitute punishment for Fifth Amendment purposes. See 64 U.S.L.W. 3751, 3752 (U.S. May 14, 1996).

215. See Ursery, 116 S. Ct. at 2146 (stating that “categorical approach under the Excessive Fines Clause [is] wholly distinct from the case-by-case approach of Halper”).

216. See id.

217. See id. at 2147. “Forfeitures effected under 21 U.S.C. § 881 (a)(4) and (a)(7) are subject to review for excessiveness under the Eighth Amendment after Austin; this does not mean, however, that those forfeitures are so punitive as to constitute punishment . . . . [W]e decline to import the analysis of Austin into our double jeopardy jurisprudence.” Id.

218. The Court asserted that in Austin it “explained that the difference in approach[es between Halper and Austin] was based in a significant difference between the purposes of our analysis under each constitutional provision.” Id. at 2146. The footnote that the majority relied on, however, nowhere stated that the two tests were “wholly distinct.” See Austin v. United States, 509 U.S. 602, 622 n.14 (1993) (determining not to follow Halper but rather to focus on § 881(a)(4) and (a)(7)). It merely stated that the “focus [is] on § 881(a)(4) and (a)(7) as a whole” rather than “the sanction as applied in the individual case,” because it “involved a small, fixed-penalty provision.” Id. (quoting in part United States v. Halper, 490 U.S. 435, 448 (1989)). These are just two different approaches to the same test that the Court set forth in Halper; they are not two “wholly distinct” tests.
either retributive or deterrent purposes, is punishment." The Court in Austin applied the general analysis in Halper, concluding that the forfeiture of facilitating property did not "serve[] solely a remedial purpose." This analysis is identical to that used in Halper, and nowhere in Austin does the Court state or imply that it is "wholly distinct."

If the majority believed that the forfeiture of facilitating property did not constitute "punishment" for double jeopardy purposes, perhaps it should have overruled Austin. Contrary to the majority's assertion in Ursery, Austin applied Halper's analysis to the identical statute under review in Ursery, concluding that it was punishment for Eighth Amendment purposes. Thus at least in Austin, the Court understood the definition of "punishment" to be identical for purposes of the Fifth and Eighth Amendments. As Justice Stevens stated in his dissent in Ursery, the majority has "ignore[d] the fact that Austin reached the opposite conclusion as to the identical statute under review here."

VII. CONSEQUENCES OF URSEY

Civil forfeitures of proceeds and facilitating property pursuant to § 881 have proven to be an effective tool in the nation's war against drugs, giving law enforcement agencies an edge against suspects and defendants. It has become common practice for the government to institute parallel civil forfeiture proceedings based on drug charges and civil forfeiture proceedings against property owned by the same defendant. Because of the usefulness of these parallel civil forfeiture proceedings, the Court's decision in Ursery likely was driven by policy,


220. See id. The Court in Austin made it clear at the outset of its decision that it was relying on Halper's analysis of punishment:

We said in Halper that "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, as we have come to understand the term." We turn, then, to consider whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today.

Id. at 610-611 (quoting Halper, 490 U.S. at 448) (citation omitted).


222. See Austin, 509 U.S. at 622.

223. Ursery, 116 S. Ct. at 2159 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

rather than dictated by precedent. Had the Court found the civil forfeiture statutes unconstitutional in *Ursery*, it would have invalidated an extremely effective law enforcement tool used in the war against drugs. Additionally, such a ruling would have raised doubts as to the constitutionality of similar statutes at all levels of government. Due to these considerations, the Court chose to find that neither of the forfeitures constituted punishment, thereby undercutting the Fifth Amendment's protection against double jeopardy, "a guarantee deemed fundamental by the Founders."227

A. Defendants Face More Obstacles

Because the Court in *Ursery* held that civil forfeitures pursuant to § 881 do not constitute punishment for double jeopardy purposes, it is likely that individuals facing drug charges now will be forced to defend themselves in two separate proceedings. Consequently, the government obtains a tactical advantage over defendants. Essentially, the government can use the civil trial as a test run for its criminal case against a defendant. Additionally, prosecutors can hone their trial strategies and perfect their presentation of evidence through successive trials. The government also may pursue a subsequent civil forfeiture action out of dissatisfaction with the outcome of the criminal prosecution. In more extreme instances, the government may use the threat of a parallel civil forfeiture action as leverage against criminal defendants. This may be used to encourage

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225. Every state has a civil forfeiture statute, many of which are modeled after § 881. See Brief of the State of Connecticut, 47 States, and the Commonwealth of Puerto Rico as Amici Curiae In Support of Petitioner, United States v. Ursery, 116 S. Ct. 2135, 2140 (1996). Even if states do not have civil forfeiture statutes modeled after § 881, they still would face double jeopardy challenges based on the decisions of the Sixth and Ninth Circuits. See id.

226. If the Court had chosen a middle route, holding that the forfeiture of facilitating property was punishment and that forfeiture of proceeds was not, the Court would have created additional issues for lower courts to address in the future. Defendants facing parallel proceedings then would argue that the property subject to forfeiture was facilitating, not proceeds of drug transactions. The courts thus would be faced with sorting out the difference between the two types of proceedings and, in many circumstances, would have to decide what to do when property could constitute both facilitating property and proceeds.


228. Parallel proceedings also will increase the cost of prosecuting drug offenders, which will be passed on to taxpayers. See Comment, *Tort Law—Civil Liability for Criminal Acts—Illinois Expands Civil Liability of Drug Traffickers*, 109 HARV. L. REV. 699, 703 (1996) ("In those cases in which duplicative criminal [and] civil forfeiture . . . actions are brought, the parallel proceedings may lead to inefficient and excessive resource expenditures."). But see Janice T. Martin, *Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game*, 46 FLA. L. REV. 661, 685 (1994) ("If the Court or Congress decides to force forfeiture strictly into the criminal setting . . . then the war on crime in America, and particularly the war on drugs, will necessarily become more efficient and less costly.").

plea bargaining or guilty pleas in return for the government's promise not to pursue civil forfeiture actions against the family home or other valuable properties. These advantages and the potential for abuse—created as a result of Ursery—leave defendants in a vulnerable position.

Defendants also face the burdensome task of defending themselves in two separate proceedings. Defendants risk losing twice to the government and are forced to spend twice as much time and money on their defense. This burden is magnified for defendants who lack the economic resources necessary for extensive litigation. Not only are parallel proceedings an onerous burden, but they also diminish defendants' likelihood of success.

B. Criminal Forfeiture Statutes Are Obsolete

By excluding Halper from its "long line of cases," the Court in Ursery effectively gave its stamp of approval to all but the most poorly drafted civil forfeiture statutes. Without Halper's solely remedial test, 89 Firearms' two-prong test provides few obstacles to civil forfeiture statutes. Congress merely has to exhibit an intent for the proceedings to be civil while being careful not to provide the courts with the "clearest proof" that the statute is punitive. Civil forfeitures rarely will constitute punishment under this type of examination.

Because civil forfeiture statutes are, for all practical purposes, immune from attack under 89 Firearms, it seems pointless for legislators to draft criminal forfeiture statutes. After Ursery, prosecutors can go forward with parallel civil forfeiture proceedings without concern for double jeopardy implications. The Court's holding in Ursery makes criminal forfeiture statutes unnecessary because the government may avail itself of the more favorable burden of proof in civil proceedings.

230. See Subin, supra note 224, at 267-68 ("[T]he government commonly uses the forfeiture of property as a plea bargaining tool in the criminal case.").

231. See supra notes 60-71 and accompanying text (discussing ease with which Congress may overcome obstacles imposed by 89 Firearms).

232. See supra notes 72-84 and accompanying text (including Halper analysis).

233. See supra notes 60-71 and accompanying text (discussing difficulty of showing that civil forfeiture statute constitutes punishment under test of 89 Firearms).

234. The government will keep the existing criminal forfeiture statutes, but only for the purpose of preserving judicial economy by combining the criminal forfeiture proceeding and the criminal proceeding against the individual. Criminal forfeiture proceedings will be used only in situations where the government has an extremely strong case and prosecutors are absolutely sure that they can meet the "beyond a reasonable doubt" standard.
VIII. A MORE REASONABLE ALTERNATIVE: HALPER REFINED THE FIRST PRONG OF 89 FIREARMS

It seems more logical to conclude that Halper was not stating the rule for the rare case, but instead was refining the two-part analysis the Court set forth in 89 Firearms. Without Halper, the test in 89 Firearms creates extremely difficult burdens for claimants to overcome, and imposes relatively insubstantial hurdles for the government. As a result, all but the most poorly drafted statutes will pass 89 Firearms' two-prong test without judicial analysis of the statute's actual character. Including Halper within the majority's "long line of cases" would give more substantive meaning to the analysis of 89 Firearms and would level the playing field between defendants and the government.

Under the first prong of 89 Firearms, the government need show only that Congress intended the civil forfeiture statute to be remedial. The majority in Ursery merely determined that the labels and procedures of § 881(a)(4), (a)(6), and (a)(7) had a civil appearance, thus passing this prong. In contrast, the Court in 89 Firearms considered three factors in examining the civil forfeiture statute under this prong: (1) the procedural mechanisms of the statute;
(2) the scope of the statute;\(^\text{240}\) and (3) the remedial aims furthered by the statute.\(^\text{241}\) Under the third consideration, the Court in \textit{89 Firearms} examined the "broad remedial aims" of the statute before concluding that the forfeiture was a remedial civil statute.\(^\text{242}\)

The analysis in \textit{89 Firearms} concerning the character of the statute is similar to the Court's inquiry in \textit{Halper}.\(^\text{243}\) It is likely that the Court in \textit{Halper} intended for its solely remedial test to refine the third factor within the first prong of \textit{89 Firearms}, examining the remedial aims furthered by a particular statute. This interpretation is supported by the Court's decisions in \textit{Austin} and \textit{Kurth Ranch}, which both suggest that \textit{Halper}'s analysis should be applied to civil forfeitures. If \textit{Halper} were to be included in the \textit{89 Firearms} analytical framework as precedent indicates it should, the first prong would be the most logical place.

Including \textit{Halper} within the third prong of \textit{89 Firearms} gives \textit{Halper} more substantive meaning. Rather than merely examining labels and procedures provided by Congress, courts will examine the actual character of the statute at issue. The government will have the burden of proving the solely remedial character of a statute, without relying merely on the labels and procedures attached by Congress.

\textbf{CONCLUSION}

The Supreme Court's decision in \textit{Ursery} severely weakened the Fifth Amendment protection against double jeopardy. Although precedent dictated otherwise, the Court concluded that the forfeiture of facilitating property under § 881 (a) (4) and (a) (7) did not constitute punishment for purposes of the Double Jeopardy Clause. By narrowly construing the issues of relevant cases, the Court decided that...

\(^{240}\) See \textit{89 Firearms}, 465 U.S. at 363-64. In \textit{89 Firearms}, the Court determined that the civil forfeiture statute was broader in scope than the criminal provisions under the parallel statute, 18 U.S.C. § 922. \textit{See id.} at 363. "[T]he differences in the language of these two statutes that the forfeiture provisions . . . were meant to be broader in scope than the criminal sanctions . . ." \textit{id.}

\(^{241}\) See \textit{id.} at 364. The Court concluded that "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive." \textit{id.}

\(^{242}\) See \textit{id.}

facilitating the nation's war against drugs justified sacrificing the protections afforded to defendants by the Fifth Amendment. Consequently, drug offenders may face parallel criminal and civil forfeiture proceedings without the protections afforded by the Fifth Amendment. The government may use these parallel proceedings to obtain tactical advantages over defendants, thereby diminishing defendants' likelihood of success. The burden of defending themselves in parallel proceedings will remain on defendants unless the Court revisits the issue and re-establishes double jeopardy protections as mandated by the Constitution.