Constitutional Law - To Punish or Not to Punish - That Is the Question - Taylor v. Cisneros: Addressing the Constitutional Prohibitions against Civil Sanctions in the Third Circuit

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I. Introduction

A punishment is "[a]ny fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him." The purpose of punishment is to deter future crime and to place a punitive restraint on the criminal. Nevertheless, the power to punish is subject to constitutional constraints. The Double Jeopardy Clause of the Fifth Amendment protects against successive or multiple punishments for the same crime. The Eighth Amendment protects against cruel and unusual punishment, as well as the imposition of excessive fines. The Ex Post Facto Clause protects against laws applying retroactively, thus allowing for increased punishment. Finally, the United States Constitution forbids the states
from "pass[ing] a Bill of Attainder," that is, the legislature cannot inflict punishment upon an individual without a judicial trial. To invoke any of these constitutional protections, the accused must first prove as a threshold matter that the action taken against him or her is punishment.

Over the past several years, legislatures have increased the use of civil sanctions, forfeitures and registration provisions to penalize sex offenders as well as to combat the harsh effects of other crimes. The use of civil

Facto Clause of the Constitution prevents the government from applying laws retroactively that "inflict[ ] a greater punishment, than the law annexed to the crime, when committed." Artway v. Attorney General, 81 F.3d 1235, 1253 (3d Cir. 1996). The United States Supreme Court defined the circumstances that the Ex Post Facto Clause encompasses in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). First, the Ex Post Facto Clause covers "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal." *Id.* (emphasis omitted). Second, the Ex Post Facto Clause also encompasses "[e]very law that aggravates a crime, or makes it greater than it was, when committed." *Id.* (emphasis omitted). Third, "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" is encompassed under the protection of the Ex Post Facto Clause. *Id.* (emphasis omitted). Fourth and finally, the Ex Post Facto Clause covers "[e]very law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender." *Id.* (emphasis omitted); see Collins v. Youngblood, 497 U.S. 37, 46 (1990) (re-establishing *Calder* categories); Beazell v. Ohio, 269 U.S. 167, 169-70 (1925) (rephrasing *Calder* categories as "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed").

7. See U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder . . . ."); see also U.S. CONST. art. I, § 9, cl. 3 (applying this restriction to federal government as well by stating that "[n]o Bill of Attainder or ex post facto Law shall be passed"). Thus, the Constitution prohibits legislatures from enacting measures "that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." Artway, 81 F.3d at 1253 (quoting United States v. Brown, 381 U.S. 437, 448-49 (1965)).

8. See generally United States v. Ursery, 116 S. Ct. 2135, 2138 (1996) (revisiting issue of whether civil in rem forfeitures are considered punishment for double jeopardy purposes); *Kurth Ranch*, 511 U.S. at 769 (addressing issue of whether tax on illegal drugs constitutes punishment, and thus, violates Constitution's prohibition against double jeopardy); Austin v. United States, 509 U.S. 602, 609-10 (1993) (noting that whether civil remedy violates Excessive Fines Clause turns on whether such action is punishment); *Halper*, 490 U.S. at 441 (addressing "whether the statutory penalty authorized by the civil False Claims Act . . . constitutes a second 'punishment' for the purpose of double jeopardy analysis"); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (discussing whether civil in rem forfeiture legislation possessed punitive intent required to constitute violation of Double Jeopardy Clause); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164 (1963) (determining that issue of whether divesting American citizenship for draft evasion or military desertion violated protections of Fifth and Sixth Amendments turned on, as initial matter, whether such action is "penal in character.").


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sanctions has increased partly because such proceedings do not invoke the stringent constitutional procedural protections that criminal proceedings do. In United States v. Halper,11 Austin v. United States12 and Department of Revenue v. Kurth Ranch,13 the Supreme Court changed and confused the law in the area of unconstitutional punishment.14 In these cases, the Court carved out a few instances when certain civil sanctions rise to the level of punishment and cross over the distinction between civil and criminal penalties.15 The Court, however, did not speak in general terms and

10. See Leonard W. Levy, A License to Steal: The Forfeiture of Property 106 (1996) (noting that civil forfeiture proceedings invoke less constitutional protection than criminal forfeiture proceedings); David Osgood, Crime and Punishment and Punishment: Civil Forfeiture, Double Jeopardy and the War on Drugs, 71 Wash. L. Rev. 489, 490 (1996) (discussing how civil forfeiture offers many procedural advantages over criminal forfeiture, such as lesser burden of proof and avoidance of other constitutional protections afforded to criminal defendants).


14. See id. at 769 (addressing issue of whether tax on illegal drugs constitutes punishment that violates Constitution’s prohibition against double jeopardy); Austin, 509 U.S. at 609-10 (stating that whether civil remedy violates Excessive Fines Clause depends on whether such action can be considered punishment); Halper, 490 U.S. at 448-49 (holding that civil penalty constituted punishment for double jeopardy purposes).

15. See Halper, 490 U.S. at 447-48 (stating that, in assessing punitive nature of fine, labeling fine “civil” or “criminal” is irrelevant). The Supreme Court explained that a civil penalty becomes punishment under the Double Jeopardy
did not carve out bright-line rules in its analysis. This sporadic precedent left lower courts confused as to which civil actions trigger the constitutional restrictions on punishment.

This Casebrief analyzes how the United States Court of Appeals for the Third Circuit has interpreted and applied the relevant Supreme Court precedent in the area of civil sanctions and constitutional punishment. This Casebrief also attempts to clarify the controlling analysis in the Third Circuit for determining whether a civil penalty or sanction amounts to unconstitutional punishment. Part II details the relevant Supreme Court cases that have addressed the issue of determining what is punishment for

Clause when the civil penalty "may not fairly be characterized as remedial." *Id.* at 449.

16. See id. at 449 ("What we announce now is a rule for the rare case."); see also United States v. Ursery, 116 S. Ct. 2135, 2147 (1996) (stating that Halper, Austin and Kurth Ranch do not alter traditional understandings of punishment determination for double jeopardy and civil in rem forfeiture, but rather these cases deal with specific facts and do not have general application to punishment analysis).

17. See United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995) (holding incorrectly that "under Halper and Austin, any civil forfeiture under § 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes"). *Rev'd*, 116 S. Ct. 2135 (1996); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1221-22 (9th Cir. 1994) (concluding incorrectly that forfeiture statute constitutes punishment under Halper and Austin and that this conclusion will force government "to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally)"), *rev'd*, 116 S. Ct. 2135 (1996). Exemplifying the confusion that Supreme Court precedent had caused in the punishment analysis, prior to the Supreme Court's decision in *Ursery*, the United States Courts of Appeals for the Sixth and Ninth Circuits held that Supreme Court precedent required a finding that civil in rem forfeiture constituted punishment and, thus, invoked constitutional restrictions on punishment. See *Ursery*, 59 F.3d at 573 (finding that, under Halper and Austin, any civil forfeiture constitutes punishment for double jeopardy purposes); $405,089.23 U.S. Currency, 33 F.3d at 1221-22 (concluding that forfeiture statute constitutes punishment under Halper and Austin). Other circuits disagreed with the Sixth Circuit in *Ursery* and the Ninth Circuit in $405,089.23 U.S. Currency and concluded that Halper and Austin did not control in deciding whether civil in rem forfeiture was punitive. See Smith v. United States, 76 F.3d 879, 882-83 (7th Cir. 1996) (disagreeing with Sixth and Ninth Circuits because there is "nothing in Austin which precludes the conclusion that a defendant has no claim to the proceeds of drug trafficking and that those proceeds are by definition directly proportional to the loss to the government and society"); United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160, 1169 n.15 (3d Cir. 1995) (rejecting conclusions of Sixth and Ninth Circuits and finding that Supreme Court precedent did not control determining civil in rem forfeiture as punishment), *cert. denied*, 117 S. Ct. 48 (1996); United States v. Clementi, 70 F.3d 997, 999 (8th Cir. 1995) (rejecting Ninth Circuit's "categorial approach to double jeopardy analysis"); United States v. Salinas, 65 F.3d 551, 553 (6th Cir. 1995) (distinguishing "civil forfeitures of property proportionately related to the offense from forfeitures of conveynances and real property, which, because of the dramatic variations in their value, bear no relation to the underlying offense"); United States v. Tilley, 18 F.3d 295, 298-300 (5th Cir. 1994) (distinguishing Halper and Austin as controlling precedent in cases addressing punitive nature of civil in rem forfeiture).
the purpose of invoking constitutional protections. Part II also discusses United States v. Ursery, the most recent Supreme Court case in this area. Part III discusses how the Third Circuit has interpreted and synthesized the Court's relevant precedent into a three-part test for determining which civil actions constitute punishment. Part III also focuses on the Third Circuit's application of that test in light of Ursery. Ultimately, this Casebrief outlines the appropriate analysis in the Third Circuit for addressing the constitutionality of civil sanctions and comments on whether the Third Circuit made an appropriate and sound assimilation of the Supreme Court case law in formulating a test for assessing what amounts to unconstitutional punishment.

II. BACKGROUND

As the Supreme Court has noted, "[c]riminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints." The Supreme Court has held that the government or the victim may seek civil relief with respect to the same act or omission that is considered criminal. Civil sanctions purport to serve a remedial purpose for victims of crime. The government and the individual victim of

18. For a discussion of the relevant Supreme Court cases in determining which civil actions are punishment invoking constitutional restrictions, see infra notes 37-62 and accompanying text.
20. For a discussion of Ursery, see infra notes 75-94 and accompanying text.
21. For a discussion of how the Third Circuit has interpreted Supreme Court precedent for determining which civil actions constitute punishment, see infra notes 95-122 and accompanying text.
22. For a discussion of the Third Circuit's development of a three-part test to determine which civil actions constitute punishment, see infra notes 123-74 and accompanying text.
23. For a discussion of the current analysis used in the Third Circuit for determining whether a civil sanction constitutes punishment, see infra notes 175-88 and accompanying text.
25. See Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (holding that government may impose criminal and civil sanctions for same act or omission, however, determination of whether civil sanction is punishment is question of statutory construction).
26. See, e.g., United States v. Halper, 490 U.S. 435, 446 (1989) (stating that government is entitled to remedial justice through compensation by criminals); Mack, supra note 9, at 244 (arguing that forfeiture laws were "designed to target those at the top of the drug distribution ladder—those who live off the profits illegally derived from the addictions and misfortunes of others . . . [and] forfeiture laws were, and remain, a valuable tool for fighting organized crime, major drug activity, and other crimes motivated by greed"). The "civil remedy" is "the remedy afforded by law to a private person in the civil courts in so far as his private and
a crime may use this route as a remedial measure for the loss that crime causes.\textsuperscript{27}

The Supreme Court, however, has not readily upheld all types of civil measures. In \textit{De Veau v. Braisted},\textsuperscript{28} the Court recognized that determining the punitive nature of certain civil sanctions requires an inquiry into the actual legislative purpose of the measure.\textsuperscript{29} In \textit{De Veau}, the Court addressed an ex post facto and bill of attainder challenge to a New York statute that barred labor organizations whose officers were convicted felons from collecting dues.\textsuperscript{30} The Court held that, in analyzing cases in which an individual suffers unpleasant consequences for prior conduct, a court should look to the legislative purpose of the measure imposing such consequences.\textsuperscript{31} The Court explained that the legislative intent or subjec-


\textsuperscript{28} 363 U.S. 144 (1960).

\textsuperscript{29} \textit{See id.} at 160 (emphasizing importance of actual legislative purpose in assessing punitive nature of statute).


\textsuperscript{31} \textit{See DeVea}, 363 U.S. at 160 (stating that judicial inquiry should focus on “whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation”).
tive purpose of a civil penalty is relevant in assessing whether it constitutes punishment.\textsuperscript{32}

Generally, the Supreme Court has held that civil \textit{in rem} forfeiture does not constitute punishment for purposes of the Double Jeopardy Clause.\textsuperscript{33} The Court has found that civil \textit{in rem} forfeiture has a remedial rather than punitive purpose.\textsuperscript{34} In recent years, the Supreme Court has addressed whether other civil sanctions violate constitutional limitations on punish-

\begin{itemize}
\item \textsuperscript{32} See \textit{id.} The Court upheld the statute on these constitutional grounds. \textit{See id.} The Court explained "that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." \textit{Id.}

\item \textsuperscript{33} See United States v. Ursery, 116 S. Ct. 2135, 2147-48 (1996) (concluding that intent and effect of civil \textit{in rem} forfeiture statutes was not to impose punishment); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (holding that civil \textit{in rem} forfeiture proceeding after acquittal of criminal activity does not violate Double Jeopardy Clause); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (holding that Double Jeopardy Clause is not applicable to forfeiture because forfeiture is not criminal offense).

\item \textsuperscript{34} See \textit{89 Firearms}, 465 U.S. at 362 (explaining that relevant inquiry in assessing punitive nature of forfeiture is "whether ... [the] proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial" and concluding under this analysis that forfeiture is remedial). The Court in \textit{89 Firearms} pointed out that "[r]esolution of this question begins as a matter of statutory interpretation." \textit{Id.} First, the court must determine whether Congress "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference" for punitive or remedial purposes. \textit{Id.} Second, if the intention of Congress was to establish a civil penalty, then the court must probe further to ascertain "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." \textit{Id.} at 362-63. The Court explained that a conclusion that such a measure is punitive should be evidenced by the "clearest proof" that Congress has provided a sanction so punitive as to "transform[ ] what was clearly intended as a civil remedy into a criminal penalty." \textit{Id.} at 366 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)); see \textit{Ursery}, 116 S. Ct. at 2147-48 (invoking analysis used in \textit{89 Firearms} to assess constitutionality of civil \textit{in rem} forfeiture); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 236-37 (1972) (explaining generally that Congress did not intend for civil \textit{in rem} forfeiture to be criminal punishment). For a discussion of \textit{Ursery}, see \textit{infra} notes 75-94 and accompanying text.
\end{itemize}
ment. In these cases, the Court has made the constitutionality of civil proceedings less clear.

A. Halper, Austin and Kurth Ranch: The Punishment Trilogy

Although civil remedies legitimately exist as remedial measures for the government, such penalties may not drastically exceed the actual loss suffered as a result of the crimes. In United States v. Halper, the Court recognized for the first time that a civil sanction, as well as a criminal sanction, can amount to unconstitutional punishment. In Halper, the Government indicted the defendant for sixty-five counts of Medicare fraud. The Government then sought civil remedial damages, under the False Claims Act, from Halper. Under this action, the Government was entitled to receive $130,000 in fines from Halper, although the actual damages for his fraudulent Medicare claims amounted to only $585.

35. See Department of Revenue v. Kurth Ranch, 511 U.S. 767, 784 (1994) (holding that Montana drug tax violated Double Jeopardy Clause because purpose of penalty was not remedial); Austin v. United States, 509 U.S. 602, 621-22 (1993) (holding that, "[i]n light of the historical understanding of forfeiture as punishment, the clear focus of § 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish," forfeiture under 21 U.S.C. § 881 is not remedial and violated Excessive Fines Clause); United States v. Halper, 490 U.S. 435, 448 (1989) (explaining "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").


37. See Halper, 490 U.S. at 449-50 (concluding that Government is entitled to remedial justice, but that remedy must be in proportion to loss sustained).

38. See Halper, 490 U.S. at 448 ("[P]unishment . . . cuts across the division between the civil and the criminal law.").

39. Id. at 437. Halper was a manager of New City Medical Laboratories, Inc., a company that provided medical services for patients eligible for Medicare benefits. See id. The Government alleged that between 1982 and 1983 Halper demanded reimbursement for several claims at $12 per claim when the actual service rendered entitled New City to only $3 per claim. See id. at 435. Specifically, this was a violation of 18 U.S.C. § 287, which prohibits "mak[ing] or presen[ting] ... any claim upon the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." Halper, 490 U.S. at 435 (citing 18 U.S.C. § 287 (1994)). A jury convicted Halper on all counts. See id. He was sentenced to two years in prison and fined $5000. See id.

40. 31 U.S.C. §§ 3729-3731 (1994). Specifically, the False Claims Act imposes liability on any person who uses false records to get the Government to pay a false claim. See id. § 3729 (stating that person is liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved").

41. See Halper, 490 U.S. at 438.

42. See id. at 439. The remedial provisions of the False Claims Act provided that a person "is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person and costs of the civil action." Id. at 438.
finding that this civil penalty violated the Double Jeopardy Clause, the Court held that a nominal "civil" penalty constitutes punishment if its actual purpose serves the punitive goals of retribution and deterrence. The Court explained that when a civil penalty "is so extreme and so divorced from the Government's damages and expenses," it constitutes punishment. The Halper Court recognized that rare cases may arise when civil penalties cross the line between remedial and punitive and violate the Constitution's protection against double jeopardy.

The historical understanding of a civil penalty is also a significant factor in assessing its punitive nature under the Constitution. In Austin v. United States, the Court held that forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7), which allow for forfeiture of drug proceeds, amounted to punishment under the Excessive Fines Clause. In Austin, the defendant was indicted on four counts of violating the drug laws in South Dakota. After the defendant pleaded guilty to one count and received his sentence, the United States initiated in rem proceedings against the defendant's property pursuant to § 881(a)(4) and (a)(7). The Court addressed the (citing 31 U.S.C. § 3729). Because Halper violated the False Claims Act 65 times, under § 3729, he was subject to a $130,000 penalty. See id. 43. See id. at 448. The Court noted that "[i]n drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: 'No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence.'" Id. at 440 (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed., 1789)).

44. Id. at 442. The Court explained that civil penalties lose their remedial character when the fines imposed far exceed the damage that the Government suffered. See id. at 448. The Court made it clear, however, that civil remedies are not a per se violation of the Constitution if they allow for recovery "in excess of the Government's actual damages." Id. at 442. Nevertheless, under the civil False Claims Act, Halper was subject to "liability of $130,000 for false claims amounting to $585." Id. at 441.

45. Id. The Court held that subsequent civil sanctions that "may not fairly be characterized as remedial, but only as a deterrent or retribution may amount to punishment... [and] rise to the level of a violation of Double Jeopardy." See id. at 448-49. The Court held that the Double Jeopardy Clause prohibits subjecting a defendant to a subsequent civil sanction that cannot fairly be characterized as remedial. See id. In a particular case, if a civil or criminal fine "serves the goals of punishment... [and] the twin aims of retribution and deterrence," it is punishment. Id. at 448. Thus, the Court put forth a proportionality balancing test for assessing the punitive nature of some civil sanctions. See id. at 449-50; see also Artway v. Attorney General, 81 F.3d 1255, 1254 (3d Cir. 1996) (describing rule in Halper as "[o]bjective [p]urpose through [p]roportionality"). In essence, the rule the Court carved out in Halper is one "for the rare case." Halper, 490 U.S. at 449.

46. See Austin v. United States, 509 U.S. 602, 610-11 (1993) (holding that historical understanding of forfeiture is relevant in assessing whether such penalty is punishment).

47. Id. at 622. For the language of § 881, see supra note 9.

48. Austin, 509 U.S. at 604 (noting that defendant pleaded guilty to one count of possessing cocaine with intent to distribute and was sentenced to seven years imprisonment).

49. See id. at 604-05. Austin's auto body shop and his mobile home were forfeited. See id.
sole question of whether this civil action violated the Eighth Amendment's Excessive Fines Clause. In concluding that there was a constitutional violation, the Court held that resolution of this issue turned on "whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture should be so understood today." The Court held that traditional historical understandings of forfeiture led to the conclusion that the forfeiture in this case constituted punishment under the Excessive Fines Clause. The Court’s

50. See id. at 606. The last time the Court had addressed this issue was in 
Browning-Ferris, the Court held that the Excessive Fines Clause "does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages." Id. (citing 
Browning-Ferris, 492 U.S. at 264). The Court also concluded in 
Browning-Ferris that both the Eighth Amendment and section 10 of the English Bill of Rights of 1689, from which the Eighth Amendment is derived, were intended to prevent the government from abusing its power to punish. 
Browning-Ferris, 492 U.S. at 266-67. Austin overruled 
Browning-Ferris, in part, by holding that the Excessive Fines Clause does not prevent civil fines unless "that proceeding is so punitive that it must be considered criminal under Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and 
United States v. Ward, 448 U.S. 242 (1980)." Austin, 509 U.S. at 607-08. In Austin, the Court clarified that the focus is not on whether the statute is criminal, but whether it is punishment. Id. at 610. For a discussion of 
Mendoza-Martinez, see infra note 108 and accompanying text.

51. Austin, 509 U.S. at 610-11. The Court looked at what types of forfeiture existed in England at the time the United States ratified the Eighth Amendment: the deodand, felony forfeiture and statutory forfeiture. See id. at 611. The Court stated:

At common law the value of an inanimate object . . . causing the accidental death of a King's subject was forfeited to the Crown as a deodand . . . . When application of the deodand to religious or eleemosynary purposes ceased, and the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness. Id. Felony forfeiture resulted when "[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." Id. at 611-12 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974)). Finally, the Court noted that "English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." Id. at 612 (quoting 
Calero-Toledo, 416 U.S. at 682). The Court noted that the deodand, felony forfeiture and statutory forfeiture all have elements of punishment, however, only statutory forfeiture was adopted in the United States. See id. at 613.

52. See id. at 622. In analyzing § 881 under this historical framework, the Court noted that "forfeiture has been justified on two theories—that the property itself is 'guilty' of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property." Id. at 615. In the Court's opinion, the rationale for forfeiture rests on punishing the negligence of the owners. See id. The Court concluded that, regardless of the fact that the First Congress did not consider forfeiture "to be beyond the purview of the Eighth Amendment," they did consider it to be punishment. Id. at 613. The Court also pointed out that the legislative history of § 881 confirms that it is punitive. See id. at 620. When Congress added subsection (a)(7) to § 881 in 1984, it “recognized ‘that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.’” Id. at 620 (quoting S. REP. NO. 98-225, at 191 (1983)). The Court noted that Congress “characterized
holding in *Austin* clarifies that the traditional historical understanding of the statutory civil penalty is another factor to consider in assessing the punitive nature of a statute that inflicts a civil sanction. 53

The Supreme Court has also stated that, in assessing the punitive nature of civil sanctions, the reviewing court should look to the true salutary nature of the measure. 54 In *Department of Revenue v. Kurth Ranch*, the Court held that Montana's Dangerous Drug Tax Act 55 imposed a criminal penalty and violated the Double Jeopardy Clause. 56 In *Kurth Ranch* the respondents were convicted of possession of marijuana. 57 In addition to the criminal charges against the respondents, the Department of Revenue also instituted a proceeding pursuant to the Dangerous Drug Tax Act. 58

In addressing whether the particular tax violated the Double Jeopardy Clause, the Court looked at whether it operated in a manner typical of the forfeiture of real property as 'a powerful deterrent.'” *Id.* (quoting S. Rep. No. 98-225, at 195); see also 124 Cong. Rec. 34670-71 (1978) (noting penal nature of forfeiture statutes). Finally, the Court held that “[i]n light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881 (a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish,” the Court could not “conclude that forfeiture under § 881 . . . serves solely a remedial purpose.” *Austin*, 509 U.S. at 621-22.

53. *Austin*, 509 U.S. at 620 (focusing on historical purpose of measure in determining its punitive nature). Under *Austin*, a measure that historically serves a punitive purpose is punishment unless the text or the legislative history indicates a purpose to the contrary. *See Artway v. Attorney General*, 81 F.3d 1235, 1257 (3d Cir. 1996) (interpreting *Austin* to mean that historical understanding of sanction together with statutory language and legislative history determine whether it is punitive for Eighth Amendment purposes).

54. *See Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 781-82 (1994) (emphasizing importance of salutary purpose of statutory sanction in assessing its punitive nature). “Salutary” is an objective term used to describe things that are “health-giving” or “beneficial.” *MERRIAM WEBSTER DICTIONARY* 461 (10th ed. 1995).


56. *Kurth Ranch*, 511 U.S. at 784. The Dangerous Drug Tax Act provided for a tax “on the possession and storage of dangerous drugs.” *Mont. Code Ann.* § 15-25-111(1). The Montana statute expressly provided that the tax “is to be collected only after any state or federal fines or forfeitures have been satisfied.” *Id.* § 15-25-111(3). The Act further defined a “dangerous drug” as that term is defined in the Montana Code provisions concerning such drugs. *See id.* § 15-25-103(2).

57. *Kurth Ranch*, 511 U.S. at 772. The respondents in *Kurth Ranch* operated a mixed grain and livestock farm in Montana. *See id.* at 771. They also used the farm for cultivating and selling marijuana. *See id.* Two weeks after the drug tax came into effect, law enforcement agencies raided the farm. *See id.*

58. *See id.* at 773. The State filed criminal charges, and the respondents eventually accepted a plea agreement. *See id.* at 772. Then, the county attorney filed forfeiture proceedings. *See id.* This forfeiture action sought recovery of the cash and equipment used in the marijuana operation. *See id.* The actual drugs were not forfeited in this action because they were destroyed presumably after the arrest. *See id.* The respondents settled the forfeiture action by agreeing to forfeit a cash amount and various equipment. *See id.*
taxes, that is, whether it served revenue-raising, rather than punitive purposes. In concluding that the Montana drug tax refuted that nonpunitive presumption, the Court emphasized that the imposition of this tax was conditioned on the commission of a crime and that the tax was levied after the commencement of a criminal proceeding against the taxpayer for the same conduct that triggered liability under Montana's Dangerous Drug Tax Act. Accordingly, the Court concluded that curative and remedial justifications "vanish when the taxed activity is completely forbidden." In light of Kurth Ranch, a reviewing court should emphasize the legitimacy of the purported beneficial purpose of a civil sanction when evaluating whether it is punitive.

B. Switching the Focus to the Effects of the Civil Sanction

In 1995, the Court added yet another factor in determining the punitive nature of a statutory sanction. In California Department of Corrections v. Morales, the Court shifted the focus of the analysis from a law's purpose to its effect. Jose Morales had been twice convicted of murder in California...
nia. Under the law in effect at the time of his second conviction, Morales would have been entitled to receive parole suitability hearings annually. One year after his conviction, however, the California Legislature authorized the Parole Board to defer suitability hearings for three years for those prisoners convicted of "more than one offense which involves the taking of a life." This left Morales ineligible for parole for a longer time period than originally anticipated. He appealed this result, claiming a violation of the Ex Post Facto Clause of the Constitution.

The Court rejected the assertion that this action violated the Ex Post Facto Clause. In reaching this conclusion, the Court addressed whether the amended statute increased Morales's punishment. The Court rejected this argument because denying the number of parole suitability hearings that Morales originally anticipated did not have a punitive effect. The Court's discussion in Morales of determining punishment in terms of the effects of a particular measure is applicable in generally assessing the punitive nature of civil sanctions. Consequently, Morales provides that another factor—the sanction's effect—is relevant in an overall determination of whether a civil sanction is punitive.

65. See Morales, 514 U.S. at 502.
66. See id. at 503.
67. Id. (citing CAL. PENAL CODE ANN. § 3041.5(b)(2) (West 1982)).
68. See id. (noting that Morales's next scheduled parole hearing was to be two years later than anticipated).
69. See id. at 504 (noting Morales filed federal habeas corpus petition asserting that he was being held in violation of his constitutional rights). For discussion of the Ex Post Facto Clause, see supra notes 6-7 and accompanying text.
70. See Morales, 514 U.S. at 504 (reversing Ninth Circuit finding of Ex Post Facto Clause violation).
71. See id. at 505 (noting legislation in question effected no change in definition of Morales's crime). The Supreme Court has held that the Ex Post Facto Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990).
72. See Morales, 514 U.S. at 513 (finding postponement of prisoner's suitability hearing did not extend actual period of confinement). The Court stated that the "California legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment." Id. at 514.
73. See Artway v. Attorney General, 81 F.3d 1235, 1260 (3d Cir. 1996) ("Morales makes clear that a law can be unconstitutional because of its punitive effect.")
74. See id. at 1261 (reading Morales to confirm that "'punishment' analysis depends on the context").
C. United States v. Ursery: The Supreme Court Explains "Where All the Pieces Fit"

The broad language and narrow holdings in *Halper*, *Austin* and *Kurth Ranch* caused some confusion in the lower courts. The United States Courts of Appeals for the Sixth and Ninth Circuits read these cases to mean that the Supreme Court "changed . . . [its] collective mind" and "adopted a new test for determining whether a nominally civil sanction constitutes 'punishment' for double jeopardy purposes." In *United States v. Ursery*, the Court clarified that it has consistently held that civil *in rem* forfeitures do not constitute punishment and, thus, do not violate the Constitutional prohibition against double jeopardy.

In *Ursery*, the defendants asserted that the Double Jeopardy Clause barred the criminal proceedings against them because a primary forfeiture action amounted to punishment. In agreeing with the defendants, the lower courts construed *Austin* and *Halper* very broadly to mean that

75. *Id.* at 2140 (noting Double Jeopardy Clause does not apply to civil forfeitures). In *Ursery*, the Court reaffirmed a rule that has its roots "in a long line of" Supreme Court cases. *Id.*; *see also* United States v. Ward, 448 U.S. 242, 248-49 (1980) (explaining that determination of whether civil *in rem* forfeiture constitutes double jeopardy turns on intent of legislature and effects of law); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (rejecting owner's double jeopardy objection to civil *in rem* forfeiture because it was not criminal proceeding); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (holding that prohibition against double jeopardy is not applicable to forfeiture because it is not criminal offense).


77. *Id.* at 2140 (noting Double Jeopardy Clause does not apply to civil forfeitures). In *Ursery*, the Court reaffirmed a rule that has its roots "in a long line of" Supreme Court cases. *See id.; see also* United States v. Ward, 448 U.S. 242, 248-49 (1980) (explaining that determination of whether civil *in rem* forfeiture constitutes double jeopardy turns on intent of legislature and effects of law); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (rejecting owner's double jeopardy objection to civil *in rem* forfeiture because it was not criminal proceeding); Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (holding that prohibition against double jeopardy is not applicable to forfeiture because it is not criminal offense).

78. *Ursery*, 116 S. Ct. at 2139 (noting holdings of lower courts). In *Ursery*, the Government initiated forfeiture proceedings against the defendant after finding him in possession of drugs. *Id.* at 2138-39. The police discovered marijuana growing adjacent to the defendant's house as well as marijuana seeds, stems, stalks and a grow light in the house. *See id.* The Government instituted forfeiture proceedings against Ursery's house pursuant to 21 U.S.C. § 881(a)(7) because the property had been used "to facilitate the unlawful processing and distribution of a controlled substance." *Ursery*, 116 S. Ct. at 2139. Subsequently, the Government sought a criminal conviction against the defendant for the same conduct. *See id.* (noting Ursery was indicted for manufacturing marijuana). Ursery settled the forfeiture claim with the Government for $13,250. *See id.* Before this settlement, the Government also indicted Ursery for manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1). *See Ursery*, 116 S. Ct. at 2139. A jury found him guilty and sentenced him to 63 months in prison. *See id.* In a companion case, before the defendants were tried on charges of conspiracy to aid and abet the manufacturer of methamphetamine and various counts of money laundering, the United States
civil forfeiture constituted a separate criminal proceeding and violated the Double Jeopardy Clause. In Ursery, the Supreme Court rejected this interpretation of its precedent. The Court explained the precedential significance of Halper, Austin and Kurth Ranch in assessing the constitutionality of civil sanctions. The Court reiterated that Halper considered the constitutionality of a civil penalty, not a civil forfeiture, and stressed that the case had a narrow focus. In Halper, the Court advised that when assessing whether a penalty provision constitutes punishment, the court should weigh and balance the harm suffered and the penalty imposed on a case-by-case basis. Under this analysis, Ursery clarified that instituted a civil in rem forfeiture action against various items of property owned by the defendants. See id.

79. See Ursery, 116 S. Ct. at 2140. The lower courts in Ursery read the language in Halper and Austin very broadly and concluded that those cases created a general presumption that forfeiture is a punitive measure for both double jeopardy and excessive fines purposes. See id. Thus, the Sixth Circuit reversed the conviction based on its interpretation of Halper and Austin. See id. at 2139. The circuit court interpreted these cases to mean that any civil forfeiture under § 887(a)(7) constituted punishment for purposes of the Double Jeopardy Clause. See id. (noting Sixth Circuit's view that Ursery had been "punished"). As such, the court vacated Ursery's subsequent conviction because under its determination the conviction violated the prohibition against double jeopardy. See id.

80. Id. at 2149 (noting that civil forfeiture does not constitute punishment for purpose of Double Jeopardy Clause).

81. See id. at 2143-47.

82. See id. at 2144 (noting that decision in Halper was "limited to the context of civil penalties"). The Court elaborated that "[i]t is difficult to see how the rule of Halper could be applied to a civil forfeiture. Civil penalties are designed as a rough form of 'liquidated damages' for the harms suffered by the Government as a result of a defendant's conduct." Id. at 2145; see also Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1956) (upholding civil sanction following criminal conviction because liquidated damages are allowable when damages are difficult to determine and, when reasonable, such damages are not punitive).

83. United States v. Halper, 490 U.S. 435, 448 (1989) ("[T]he determination whether a given civil sanction constitutes punishment . . . requires a particularized assessment of the penalty imposed and the purposes that penalty may fairly be said to serve."). But see Ursery, 116 S. Ct. at 2145 (noting case-by-case balancing analysis is inappropriate for civil forfeiture). The Court in Ursery noted: "Whether a 'fixed-penalty provision' that seeks to compensate the Government for harm it has suffered is 'so extreme' and 'so divorced' from the penalty's nonpunitive purpose of compensating the Government as to be a punishment may be determined by balancing the Government's harm against the size of the penalty." Id. (quoting Halper, 490 U.S. at 441). Justice Kennedy's concurring opinion in Halper urged that an analysis under the majority opinion is fact sensitive and dependent on the particular nuances of the statutory measure. Halper, 490 U.S. at 453 (Kennedy, J., concurring) (determining that majority ruling "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case"). Justice Kennedy explained that this kind of analysis for the lower courts "would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding." Id. (Kennedy, J., concurring). Many courts have refused to extend Halper beyond the limited context of a monetary penalty. See United States v. Stoller, 78 F.3d 710, 720 (1st Cir. 1996) ("Halper dichotomy should not be applied too far afield from its original context (monetary sanctions designed to make the government whole for
forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct," not to punish.\footnote{84}

The \textit{Ursery} Court distinguished \textit{Austin} because it addressed an excessive fines question and \textit{Ursery} dealt with a double jeopardy issue.\footnote{85} The Court added that \textit{Kurth Ranch} was distinguishable because it addressed whether a tax, not a civil forfeiture, violated the prohibition against double jeopardy.\footnote{86} None of these cases dealt with the type of measure at issue in \textit{Ursery}-civil \textit{in rem} forfeiture.\footnote{87} In distinguishing these three cases, \textit{Ursery} clarified that \textit{Halper, Austin and Kurth Ranch} did not purport to change the existing understandings of civil forfeiture and double jeopardy.\footnote{88}

\footnote{traceable losses).\)}, \textit{cert. dismissed.} 117 S. Ct. 378 (1996); United States v. Hernandez-Fundora, 58 F.3d 802, 806 (2d Cir. 1995) (refusing to apply \textit{Halper} punishment test to professional disciplinary context); Manocchio v. Kusserov, 961 F.2d 1539, 1541-42 (11th Cir. 1992) (holding that \textit{Halper} analysis is not applicable to administrative order barring doctor from participating in federal Medicare program and applying totality of circumstances test to find that purpose of exclusion was to protect public). The Supreme Court confirmed this limitation of \textit{Halper} and circuit courts have dutifully followed. \textit{See Ursery, 116 S. Ct. at 2147 (stating that \textit{Halper} was limited to cases addressing constitutionality of fixed penalties); see also United States v. Immagren, 98 F.3d 811, 814 (4th Cir. 1996) ("\textit{Ursery} makes clear that \textit{Halper} was limited to the context of civil penalties." (quoting \textit{Ursery, 116 S. Ct. at 2144))); United States v. Glyph, 96 F.3d 722, 725-26 (4th Cir. 1996) (discussing limits of \textit{Halper after Ursery); United States v. Borjesson, 92 F.3d 954, 956 (9th Cir. 1996) (noting that, in \textit{Ursery, Supreme Court found \textit{Halper}’s calculus inapplicable because it is "virtually impossible to quantify, even approximately, the non-punitive purposes served by a particular civil forfeiture.").}\footnote{84. \textit{Ursery, 116 S. Ct. at 2145.}}

\footnote{85. \textit{Id. at 2143-44 ("We limited our review [in \textit{Austin} to the question whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. \S\S 881(a)(4) and (a)(7)." (quoting \textit{Austin v. United States, 509 U.S. 609, 604 (1993))]). The Court emphasized that the only discussion of double jeopardy in \textit{Austin} is to confirm that civil forfeiture does not render itself to a double jeopardy protection. \textit{See id. at 2146 (noting Excessive Fines Clause is not "parallel to, or even related to" Double Jeopardy Clause).}\footnote{86. \textit{See id. at 2146 (stating that tax statutes serve purpose different from civil penalties and that \textit{Halper}’s method of determining whether exaction is remedial or punitive does not work with tax statutes).}}}}

\footnote{86. \textit{See id. at 2146 (stating that tax statutes serve purpose different from civil penalties and that \textit{Halper}’s method of determining whether exaction is remedial or punitive does not work with tax statutes).}}

\footnote{87. \textit{Id. at 2143-47 (distinguishing \textit{Ursery from Halper, Austin and Kurth Ranch}}. In reaffirming the rule that civil forfeiture does not violate the Double Jeopardy Clause, the Court drew a distinction between civil \textit{in rem} forfeiture and \textit{in personam} forfeiture. \textit{See id. The Court explained that \textit{in personam} civil sanctions could be punitive, but civil \textit{in rem} forfeiture could not. \textit{See id. at 2141; see also Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (stating that \textit{in rem} proceedings are not punitive under Constitution because "[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 a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished".}\footnote{88. \textit{Ursery, 116 S. Ct. at 2147 ("[N]othing in \textit{Halper, Kurth Ranch, or Austin, purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause."). The}}}}
Because Halper, Austin and Kurth Ranch were not of precedential significance, the Court in Ursery used the rule articulated in United States v. One Assortment of 89 Firearms to resolve the issue at hand. In 89 Firearms, the Supreme Court articulated a two-part test for assessing whether a measure constitutes punishment. Under that test, a court must first ask "whether Congress intended [the] proceedings . . . to be criminal or civil." Second, the court must inquire "whether the [effects of the] proceedings are so punitive in fact" that the court cannot conclude that they are "civil in nature." In applying this test, the Court held that civil in rem forfeiture proceedings are not punishment.

III. THE THIRD CIRCUIT NAVIGATES THROUGH THE SUPREME COURT’S MAZE

A. Artway v. Attorney General: A Pre-Ursery Synthesis Addressing the Constitutionality of Megan’s Law

Halper, Austin and Kurth Ranch elucidate a number of factors for determining whether a civil penalty amounts to unconstitutional punishment. The factors and conclusions drawn in this trilogy of cases have, Court further noted that “[i]t would have been quite remarkable for this Court to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so.” The Court further noted that “[i]t would have been quite remarkable for this Court to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so.”

90. See Ursery, 116 S. Ct. at 2147 (adopting two-part test in 89 Firearms).
91. 89 Firearms, 465 U.S. at 362-63 (adapting test used in United States v. Ward, 448 U.S. 242, 248 (1980)).
92. Ursery, 116 S. Ct. at 2147 (citing 89 Firearms, 465 U.S. at 366); see Ward, 448 U.S. at 248 (stating that question of determining punitive nature of civil in rem forfeiture statute “proceed[s] on two levels,” intent of Congress and effects of measure); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) ("[Q]uestion of whether a given sanction is civil or criminal is one of statutory construction.").
94. See id. at 2149 (stating civil forfeiture does not constitute punishment for purpose of Double Jeopardy Clause). The Court explained that forfeiture proceedings historically have been viewed as civil because they are an action against a thing, in contrast to “the in personam nature of criminal actions.” Id. at 2147 (citing 89 Firearms, 465 U.S. at 363). In Ursery the Court pointed out that, if the intention of Congress was to establish a civil penalty, then the court must probe further to ascertain whether the effect of the penalty was so punitive as to negate any purpose to the contrary. See id. 2147-48 (noting when not to give effect to Congress’s intent). This should be evidenced by the “‘clearest proof that Congress has provided a sanction so punitive as to ‘transfor[m] what was clearly intended as a civil remedy into a criminal penalty.’” Id. at 2142 (quoting 89 Firearms, 465 U.S. at 366). The Court went on to explain that the effects of the forfeiture in § 881 (a) (6) and (a) (7) were not so harsh as to rebut the traditional intention of nonpunishment. See id. at 2148 (declining to find sanctions “so punitive” as to render them criminal).
95. See Artway v. Attorney General, 81 F.3d 1235, 1263 (3d Cir. 1996) (analyzing various factors set forth in Halper, Austin and Kurth Ranch for assessing punitive nature of civil sanction). For a discussion of the factors on which the Supreme
however, caused great confusion in the lower courts.\textsuperscript{96} In \textit{Artway v. Attorney General},\textsuperscript{97} a pre-\textit{Ursery} case, the Third Circuit faced the issue of whether the registration and notification provisions of Megan’s Law violated the Bill of Attainder, Double Jeopardy and Ex Post Facto Clauses of the Constitution.\textsuperscript{98} In response to the arduous task of interpreting the relevant Supreme Court cases, the Third Circuit synthesized those cases and established a three-prong test for determining whether a civil sanction constitutes punishment for constitutional purposes.\textsuperscript{99}

Alexander Artway served seventeen years in jail for a sex offense.\textsuperscript{100} After he was released, Artway settled in a community, secured employment and married.\textsuperscript{101} On October 31, 1994, however, New Jersey enacted Megan’s Law.\textsuperscript{102} Megan’s Law requires that previous sex offenders register with local law enforcement:

\begin{itemize}
  \item Must provide personal information to local law enforcement.
  \item Must notify local law enforcement of changes in address.
  \item Must notify local law enforcement if they move to a new state.
\end{itemize}

For a list of cases that represent a circuit split over the extent of the application of \textit{Halper, Austin} and \textit{Kurth Ranch}, see supra note 17.

96. See Mack, supra note 9, at 218 (stating that shifts in law of Supreme Court jurisprudence have created “entirely new areas of double jeopardy interpretation with respect to parallel civil and criminal proceedings”); see also United States v. Stoller, 78 F.3d 710, 713 (1st Cir. 1996) (noting that extent of application of \textit{Halper, Austin, and Kurth Ranch} is unclear), cert. dismissed, 117 S. Ct. 578 (1996).

97. 81 F.3d 1235 (3d Cir. 1996).

98. \textit{Id.} at 1247.

99. See \textit{Id.} at 1263 (synthesizing uniform test for constitutional jurisprudence). The \textit{Artway} test suggests a method of analysis for generally assessing whether a measure is punishment under the Bill of Attainder Clause, Double Jeopardy Clause and Ex Post Facto Clause. \textit{See id.} at 1253-54 (noting purpose of test is to determine “whether the legislative aim was to punish”). The Third Circuit explained that it would not “distinguish among the Ex Post Facto, Bill of Attainder, and Double Jeopardy Clauses; their differences with respect to the requisites of ‘punishment,’ if any, are not relevant here.” \textit{Id.} at 1247. The \textit{Artway} analysis is not, however, applicable for assessing whether a statutory sanction violates the Excessive Fines Clause. \textit{See United States v. Various Computers and Computer Equipment}, 82 F.3d 582, 587-89 (3d Cir. 1996) (analyzing post-\textit{Artway} excessive fines claim under different analysis than \textit{Artway}), cert. denied, 117 S. Ct. 406 (1996); see also \textit{Taylor v. Cisneros}, 102 F.3d 1334, 1341 (3d Cir. 1996) (explaining that court should analyze excessive fines issue directly under \textit{Austin} and \textit{Various Computers}, and not under \textit{Artway}). For a discussion of \textit{Various Computers}, see infra note 155 and accompanying text. For a discussion of \textit{Taylor}, see infra notes 125-74 and accompanying text.

100. \textit{See Artway}, 81 F.3d at 1242. A jury convicted Artway in 1971 of sodomy. \textit{See id.} at 1243. The judge found that Artway used force and sentenced him to an indefinite term in prison. \textit{See id.} Based on a previous statutory rape charge, the sentencing judge characterized Artway’s actions as “a pattern of repetitive, compulsive behavior.” \textit{Id.} Artway was released in 1992. \textit{See id.}

101. \textit{See id.}

102. N.J. STAT. ANN. §§ 2C:7-1 to :7-5 (West 1995). Megan’s Law was the first of many sexual predator registration and notification laws that have emerged in various states around the country. \textit{See Artway}, 81 F.3d at 1250 n.11. The law is composed of a registration requirement, triggered if at sentencing the behavior was “characterized by a pattern of repetitive, compulsive behavior,” along with three tiers of notification. \textit{See N.J. STAT. ANN. § 2C:7-2b(1) (West 1996). The registrant must provide personal information to the local law enforcement: his or her
name, social security number, age, race, sex, date of birth, height, weight, hair and
eye color, address of legal residence and date and place of employment. See id.
§ 2C:7-4b(1). Every 90 days, the registrant must confirm his or her address, notify
the authorities if he or she moves and register again at the new location with local
authorities. See id. §§ 2C:7-2d to -2e. Law enforcement agencies are authorized to
release “relevant and necessary information [concerning registrants] when . . . neces-
sary for public protection.” Id. § 2C:7-5a. The prosecutor of the county in which
the registrant lives is responsible for reviewing the registrant’s information and
ascertaining whether the registrant represents a low, moderate or high risk of re-
peat offense. See id. § 2C:7-8d(1). The Attorney General has promulgated guide-
lines for determining which registrants are low, moderate or high risks. See Artway,
81 F.3d at 1244; see also N.J. STAT. ANN. §§ 2C:7-8a to -8b (authorizing risk scale
promulgated by Attorney General). The guidelines contemplate the following fac-
tors in determining risk: (1) seriousness of the offense, (2) offense history,
(3) characteristics of the offender and (4) community support. See Artway, 81 F.3d
at 1244. These four factors are comprised of a matrix of 13 other factors: degree
of force, degree of contact, age of victim, victim selection, number of offenses and
victims, duration of offensive behavior, length of time since last offense, history of
antisocial acts, response to treatment, substance abuse, therapeutic support, resi-
dential support and employment and educational stability. See id. at 1244 n.2. In
considering all these factors, the prosecutor will place the registrant in Tier 1 (low
risk), Tier 2 (moderate risk) or Tier 3 (high risk). See id. Under Tier 2, the prose-
cutor must notify schools, licensed day care centers, summer camps and design-
nated community organizations involved in the care of children or the support of
battered women or rape victims. See N.J. STAT. ANN. § 2C:7-8c(2). Under Tier 3,
law enforcement agencies must notify members of the public likely to encounter
the registrant. See id. § 2C:7-8c(3). Every state has enacted a sexual predator regis-
tration law, notification law or both. See People v. Ross, 646 N.Y.S.2d 249, 250
(1996) (noting universal sex offender registration requirements); see also Ala.
CODE § 13A-11-200 (1994); ALASKA STAT. §§ 12.63.010, 18.65.087 (Michie 1996);
ARIZ. REV. STAT. ANN. §§ 13-3821, 41-1750(B) (West 1996); ARK. CODE ANN. § 12-
12-901 (Michie 1995); CAL. PENAL CODE § 290 (West 1996 & Supp. 1997); COLO.
REV. STAT. § 18-3-123.5 (1996); CONN. GEN. STAT. ANN. § 54-102r (West 1997);
DEN. CODE ANN. tit. 11, § 4120 (1995); FLA. STAT. ANN. § 775.21 (West 1997); GA.
CODE ANN. § 42-1-12 (1997); HAW. REV. STAT. §§ 707-743 (1995); IDAHO CODE
§§ 18-8301 to -8311 (1997); 730 ILL. COMD. LAW § 175.45 (West 1997); IND.
CODE ANN. §§ 5-2-12-1 to -12 (West 1996); IOWA CODE ANN. §§ 692A.1-13
(West 1997); KAN. STAT. ANN. §§ 22-4902 to -4907 (1996); KY. REV. STAT. ANN.
§ 17.510 (Michie 1996); LA. REV. STAT. ANN. §§ 15:540 to :549 (West 1997); ME.
REV. STAT. ANN. tit. 34-A, §§ 11003-11004 (West 1996); MD. CODE ANN. art. 27,
§ 629B (1996); MASS. GEN. LAWS ANN. ch. 22, § 37 (West 1994); Mich. COMP. LAWS
ANN. §§ 28.721-730 (West 1997); MINN. STAT. ANN. § 243.166 (West 1997); MISS.
CODE ANN. §§ 45-33-1 (1997); MO. ANN. STAT. § 566.600 (West 1997); MONT. CODE
ANN. §§ 46-23-501 to -507 (1995); NEB. REV. STAT. §§ 29-4001 to -4013 (1996);
NEV. REV. STAT. ANN. §§ 207.151-157 (Michie 1997); N.H. REV. STAT. ANN. § 651-B:1 to
B:9 (1996); N.J. STAT. ANN. §§ 2C:7-1 to -7:5 (West 1996); N.M. STAT. ANN. §§ 29-
11A-1 to -8 (Michie 1996); N.Y. CORRECT. LAW § 168 (McKinney 1997); N.C. GEN.
STAT. §§ 14-208.5-13 (1996); N.D. CENT. CODE § 12.1-32-15 (1995); OHIO REV.
CODE ANN. §§ 2950.01-08 (Anderson 1996); OKLA. STAT. ANN. tit. 57, §§ 581-587
(West 1997); OR. REV. STAT. §§ 181.594-600 (1996); 42 PA. CONS. STAT. ANN.
§§ 42-9791 to -9798 (West 1997); R.I. GEN. LAWS §§ 11-37-16, -19 (1996); S.C. CODE
ANN. §§ 23-3-400 to -490 (LAW CO-OP. 1996); S.D. CODIFIED LAWS §§ 22-22.39 to -41
(Michie 1997); TENN. CODE ANN. §§ 40-39-101 to -108 (1996); TEX. CIV. PRAC. &
REM. CODE ANN. § 4415(51) (West 1997); UTAH CODE ANN. §§ 77-27-21.5 (1997);
VT. STAT. ANN. tit. 13, §§ 5401-5413 (1997); VA. CODE ANN. §§ 19.2-298.1-3, 19.2-
390.1 (Michie 1997); WASH. REV. CODE ANN. § 9A.44130 (West Supp. 1997); W. VA.
CODE §§ 61-8F-1 to -10 (Supp. 1997); WIS. STAT. ANN. § 175.45 (West 1996); Wyo.
ter with their local law enforcement authority. The law also requires community notification for registrants who are considered to present a future risk of sex offenses. Artway filed suit in the United States District Court of New Jersey.


Court for the District of New Jersey challenging Megan’s Law. The district court held that the registration provisions of Megan’s Law did not violate the Constitution although it enjoined enforcement of the notification aspects of the law’s retroactive application. Both parties appealed to the Third Circuit.

To answer the question of whether the registration provision of Megan’s Law constituted punishment, the Third Circuit synthesized the relevant Supreme Court case law and extracted a rule of law as to what constitutes punishment under the bill of attainder, double jeopardy and ex post facto protections of the Constitution. According to the Third Circuit, the law as a condition to receiving federal funds. See Sabin, supra note 27, at 335 n.35 (noting that some states could lose up to 10% of funds that this Act allocates if states do not enact sexual predator registration laws). The Act requires registration, but not notification. 42 U.S.C. § 14071(d) (listing what information “may be disclosed”). The Act does allow the states to require notification. Id. § 14071(d)(1)-(2) (stating information collected in state programs “may be released” to protect public). The Act does not apply the registration requirements retroactively. Id. § 14071(b) (noting person must first be released from prison, parole, supervised release or probation in order to be required to register).


106. See id. at 692 (finding that retroactive application of notification provisions violated Ex Post Facto Clause).

107. See Artway, 81 F.3d at 1242. Initially, the State argued that Artway’s constitutional claims regarding Megan’s Law were moot because he had moved out of New Jersey. See id. at 1245-46 (noting Artway’s duty to register kept him from returning to New Jersey). The court rejected this argument. See id. The court explained that the “opportunity for meaningful relief is still present here” because Artway asserted that he will move back into New Jersey if the court found Megan’s Law unconstitutional. See id. at 1246.

The State also asserted that Artway’s challenges were not ripe because there was no “case or controversy.” See id. at 1247. In analyzing the ripeness issue, the court “distinguish[ed] between the registration and notification provisions of Megan’s Law.” Id. The court noted that the constitutionality of Megan’s Law could possibly turn “on the most careful parsing of the Supreme Court’s rulings on ‘punishment’... [and] the law in this area needs clarification.” Id. at 1250-51. The court pointed out that whether Artway will ever be subject to the notification provisions of Megan’s Law remains to be seen. See id. at 1251. As such, the court held that under Article III of the Constitution, it could not undertake to dispose of this issue “without factual tools.” Id. at 1250-51.

108. See id. at 1254 (noting that court must devise test for punishment because of confused state of law in this area). In simulating this test, the Third Circuit rejected the relevancy of Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). See Artway, 81 F.3d at 1261. The Third Circuit in Artway stated that, in Mendoza-Martinez, “the [Supreme] Court held that divesting American citizenship for draft evasion or military desertion was ‘punishment’ requiring the procedural protections of the Fifth and Sixth Amendments.” Id. According to the Third Circuit, Mendoza-Martinez requires analysis of seven factors to determine whether a sanction constitutes punishment:

[1] whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punitive, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the burden to which it applies is already a crime, [6]
Circuit, "[a] measure must pass a three-prong analysis—(1) actual purpose, (2) objective purpose, and (3) effect—to constitute non-punishment."\textsuperscript{109}

The Third Circuit derived the first prong, actual purpose, from the emphasis the Supreme Court placed on the subjective legislative purpose of the statute in \textit{De Veau v. Braisted}.

The court derived the second prong, objective purpose, from the Supreme Court's guidance in \textit{Halper, Austin} and \textit{Kurth Ranch}.

Under this prong, the reviewing court must ask three questions. First, under \textit{Halper}, the court should ask if the sanction serves solely a remedial purpose. Second, following \textit{Austin}, the court must determine if historical analysis illustrates whether the court should regard the measure as punishment. Third, under \textit{Kurth Ranch}, whether an alternative purpose to which it may rationally be connected is assignable for it, whether it appears excessive in relation to the alternative purpose.

\textit{Id.} at 1261-62. The district court employed this test, but the Third Circuit refused to extend \textit{Mendoza-Martinez} beyond the determination of whether a punishment is severe enough to invoke criminal procedural rights, such as a jury trial and proof beyond a reasonable doubt. \textit{See id.} at 1262 (noting Supreme Court has made clear that \textit{Mendoza-Martinez} factors are not controlling on "punishment" determination).

\textit{But see Myers}, 923 P.2d at 1040 (invoking \textit{Mendoza-Martinez} factors in addressing whether Kansas's sexual predator registration and notification law violated Ex Post Facto Clause).

\textsuperscript{109.} \textit{Artway}, 81 F.3d at 1263.

\textsuperscript{110.} \textit{See id.} (adopting test in \textit{De Veau}). The \textit{Artway} court stated that in \textit{De Veau}, "the Supreme Court announced a subjective (or actual) legislative purpose test."

\textit{Id.} at 1254. The Third Circuit explained that

[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for the past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.

\textit{Id.}

\textsuperscript{111.} \textit{See id.} 1254-59 (analyzing development of "objective purpose" test).

\textsuperscript{112.} \textit{See id.} at 1263 (noting subparts of "objective purpose" test).

\textsuperscript{113.} \textit{See id.} (citing United States v. \textit{Halper}, 490 U.S. 435, 448 (1989)). According to the Third Circuit, \textit{Halper} articulates the "threshold question . . . whether a remedial purpose can explain the sanction. Only if the remedial purpose is insufficient to justify the measure, and one must resort also to retributive or deterrent justifications, does the measure become punitive." \textit{Id.} at 1255. To illustrate its interpretation of \textit{Halper}, the Third Circuit offered a hypothetical: "[A]ssume that someone is sent to the store in the snow for soupmeat. The trip can be explained solely by the remedial purpose of obtaining food, even though the trip through the cold could also serve retributive purposes." \textit{Id.} at 1255-56. According to the Third Circuit, this would not be punishment under \textit{Halper}. \textit{See id.} at 1256. The court explained: "[A]ssume now that, without additional justification, the agent is sent without clothes. This additional aspect of the trip cannot be explained by the remedial purpose of obtaining food; this excursion can only be explained as partly serving retributive purposes. It therefore constitutes 'punishment' under . . . \textit{Halper} . . . ." \textit{Id.}

\textsuperscript{114.} \textit{See id.} (citing \textit{Austin v. United States}, 509 U.S. 602, 610 (1993)). The court again explained, through a hypothetical, that "sending someone out into the snow would be punishment if doing so was traditionally regarded as punitive and
the court must inquire into the true nature of the purported salutary purpose of the provision.\textsuperscript{115} Under the third and final prong of the \textit{Artway} test, the court must look to the effects of the measure.\textsuperscript{116} The Third Circuit explained that a focus on effects is necessary to balance the possibility that a legislature may have the best of intentions and still effectuate a measure that is too harsh to be considered nonpunitive.\textsuperscript{117}

the sender did not make his plausible remedial purposes clear. This would be the case even though a remedial purpose—fetching soupmeat—could fully explain the action." \textit{Id.} at 1257 (emphasis omitted). Although \textit{Austin} suggested focusing on history, the Third Circuit applied it with some hesitancy because \textit{Austin} analyzed what constitutes punishment for purposes of the Excessive Fines Clause, an issue not before the court in \textit{Artway}. \textit{See id.} at 1258 (noting methodology of \textit{Austin} is applicable to other punishment determinations). The court questioned whether \textit{Austin} establishes "that 'punishment' for purposes of one constitutional protection is necessarily 'punishment' for another." \textit{Id.} In this regard, the Third Circuit disagreed with other circuits' conclusory holding that \textit{Austin} categorically applies to all cases regarding analysis of the punishment question. \textit{See id. But see United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994) ("We believe that the only fair reading of \textit{Austin} is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fine Clause."). rev'd, 116 S. Ct. 2135 (1996). The Third Circuit rejected the Ninth Circuit's reading of \textit{Austin} as "resolving all forfeitures . . . as presumptively punishment for purposes of the Double Jeopardy Clause." \textit{Artway, 81 F.3d at 1258; see also United States v. $184,505.01 United States Currency, 72 F.3d 1160, 1168 (3d Cir. 1995) (rejecting holding and reasoning of Ninth Circuit in $405,089.23 U.S. Currency). Nevertheless, the Third Circuit found the historical methodology of \textit{Austin}, as opposed to its broad language and holding, applicable to other punishment determinations. \textit{See Artway, 81 F.3d at 1258 (noting that "historical analysis is a staple of constitutional interpretation")}."

\textsuperscript{115} \textit{See Artway} 81 F.3d at 1258 (noting that even some deterrent purpose in remedial measures does not render measure "punishment"). In this regard, the court should determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its "usual" manner, consistent with its historically mixed purposes. \textit{See id.} (citing Department of Revenue v. Kurth Ranch, 511 U.S. 767, 780-84 (1994)). The Third Circuit elaborated that "[t]he main significance of the \textit{Kurth Ranch} limitation is that, at least for measures that have historically served salutary functions, even some deterrent purpose will not render a measure 'punishment.'" \textit{Id. at 1259 (emphasis omitted). The Third Circuit noted that this interpretation of \textit{Kurth Ranch} is contrary to the First Circuit's interpretation in \textit{Stoller}. \textit{See id.} (disagreeing with First Circuit's interpretation of \textit{Halper} and \textit{Kurth Ranch} in situations not involving fines or taxes). The First Circuit held in \textit{Stoller} that the \textit{Kurth Ranch} decision was the general rule, except for in the situation of monetary penalties, which should be decided under \textit{Halper}. United States v. Stoller, 78 F.3d 710, 718 (1st Cir. 1996) (concluding that \textit{Kurth Ranch} created "totality of the circumstances" test and \textit{Halper} is "exception" for "monetary penalties"), cert. dismissed, 117 S. Ct. 378 (1996). The Third Circuit refused to read \textit{Halper} as narrowly as the First Circuit in the absence of specific instruction from the Supreme Court. \textit{See Artway, 81 F.3d at 1259 n.24 (determining \textit{Halper} and \textit{Kurth Ranch} must be synthesized). For a further discussion of \textit{Stoller}, see supra note 36.}

\textsuperscript{116} \textit{Artway, 81 F.3d at 1263}.\textsuperscript{117} \textit{See id. at 1260 ("[A] law can constitute unconstitutional 'punishment' because of its effects."). The court noted that a measure with a harsh "sting" will not render a measure "punishment" per se. \textit{See id. at 1261. Sometimes, however, a
In applying the test to Megan’s Law, the court concluded that the law’s registration provisions, as they applied to Artway, did not violate the Constitution. Applying the first prong, the Third Circuit noted that the New Jersey Legislature enacted Megan’s Law to combat “the danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children.” Losing on the first prong, Artway argued under the second inquiry that the objective purpose of the legislation produced a nonremedial result. The Third Circuit disagreed and found that the remedial objective of knowing the whereabouts of sex offenders outweighed the fact that “the registrant may face some unpleasantness from having to register and update his registration.” Finally, the Third Circuit found that, under the third prong, the sting of the registration provisions of the statute were not too harsh in effect.

“Sting’ will be so sharp that it can only be considered punishment regardless of the legislators’ subjective thoughts. For example, the legislature with the purest heart(s), could extend the prison sentences of all previously convicted sex offenders for the sole reason of protecting potential future victims.”

118. See id. at 1267 (“[W]e conclude that registration under Megan’s Law does not constitute ‘punishment’ under any measure of the term.”).

119. Id. at 1264. The court noted that there was limited evidence of the actual purpose of Megan’s Law because of the way that the law was rushed into enactment. See id.; see also Megan’s Law: How Fair? How Effective?, supra note 104, at E1 (noting that New Jersey Legislature moved quickly when enacting Megan’s Law, which was unusual for legislative bodies).

120. See Artway, 81 F.3d at 1265. Artway argued that the statute inflicted the shame of punishment. See id. Artway also argued that Megan’s Law had an unconditionally punitive effect on him by comparing the measure to “‘[e]arly forms of punishment contain[ing] strong elements of gross public humiliation. . . . Physical punishments . . . were carried out publicly in ceremonial fashion [because it was] intended that the victim should be humiliated, for degradation figured largely in all contemporary theories of punishment.’” Id. (alterations in original) (quoting Jon A. Brilliant, Note, The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions, 1989 Duke L.J. 1357, 1360-61 (1989)); see also Claire M. Kimball, Note, A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released into the Community, 12 Ga. St. U. L. Rev. 1187, 1187 n.1 (1996) (“Laws that provide for community notification when sexual offenders are released are often referred to as ‘scarlet letter laws’ because they ‘brand’ the individual as sex offender in the eyes of the community.”). The Third Circuit explained that these assertions were irrelevant because it evaluated only the registration provisions of Megan’s Law. See Artway, 81 F.3d at 1265 (“[T]he notification issue is not before us.”). The court concluded that the registration provisions “bear little resemblance to the Scarlet Letter,” because they “[d]o not involve public notification.” Id.

121. Artway, 81 F.3d at 1265. The Third Circuit also noted that “the means chosen—registration and law enforcement notification only—is not excessive in any way.” Id.

122. See id. at 1266-67. In finding that the effects of Megan’s Law were not too harsh, the Third Circuit again emphasized that it was only addressing the registration provision of Megan’s Law. See id. at 1266. Artway asserted a strong basis for concluding that notification would produce “devastating effects,” but the court did not address the constitutionality of the notification provisions of Megan’s Law. Id. The court explained that the impact of the registration provisions “cannot be said
B. Taylor v. Cisneros: Explaining Where All the Pieces Fit in the Third Circuit

In Artway, the Third Circuit "attempted to harmonize a body of doctrine that . . . caused much disagreement in the federal and state courts."123 In formulating the Artway test, the Third Circuit explained that its analysis was "by no means perfect. Only the Supreme Court knows where all the pieces belong. The Court will, we hope, provide more guidance . . . in the near future."124 In Ursery, the Supreme Court issued a decision that appeared to provide that guidance.125 In Taylor v. Cisneros,126 the Third Circuit addressed whether Ursery's application to a state eviction proceeding was appropriate.127

1. Facts of Taylor

Silas Taylor used to reside in Bayonne, New Jersey, in low-income housing subsidized by the New Jersey Housing Authority.128 In 1992, Taylor pleaded guilty to possession of narcotics paraphernalia in the Bayonne Municipal Court.129 Taylor committed this offense on the property of the Housing Authority on which he resided, though not in his apartment.130 In 1994, Taylor again pleaded guilty to the same offense, this time committed on the property adjacent to his apartment complex.131 The Bayonne Municipal Court sentenced Taylor to thirty days in prison and to a fine of $625 on the second conviction.132

to have an effect so draconian that it constitutes 'punishment' in any way approaching incarceration." Id. at 1267.

123. Id. at 1263.
124. Id.
126. 102 F.3d 1334 (3d Cir. 1996).
127. Id. at 1343 (noting that "arguably Ursery [was] distinguishable" because it involved in rem proceedings).
128. See id. at 1336. The fair market rental value of Taylor's apartment was $706 a month. See id. Because the Housing Authority subsidized his rent, he paid only $125 a month in rent. See id. Taylor was also hearing and speech impaired. See id. His only income was a disability payment of $497 a month from social security. See id. The court concluded that, if evicted, Taylor would have no place to live and would become homeless. See id.
129. See id. (noting that possession of drug paraphernalia is violation of Comprehensive Drug Reform Act of 1987, N.J. STAT. ANN. § 2C:35-1).
130. See Taylor, 102 F.3d at 1336.
131. See id. (noting second offense was not committed on Housing Authority property).
132. See id. at 1337. The parties did not specify the penalty for Taylor's first offense, however, they did not dispute that it was similar to that of the second offense. See id.
These criminal penalties were not the end of the implications of the drug charges. 133 New Jersey's Anti-Eviction Act, 134 applicable to both public and private housing, outlines the circumstances under which a landlord may legally remove a tenant from a rental unit. 135 Under subsection 61.1n of the Anti-Eviction Act, if one is convicted or pleads guilty to an offense under the Comprehensive Drug Reform Act of 1987, 136 involving possession of drug paraphernalia "within or upon the leased premises or the building or complex of buildings and land appurtenant thereto . . . in which those premises are located, the landlord may evict the tenant." 137 Removal of a tenant pursuant to the Anti-Eviction Act is an in personam action. 138 Because Taylor pleaded guilty to such a charge, the Housing Authority was authorized to evict Taylor from his apartment. 139

On November 29, 1994, the Housing Authority served notice on Taylor that it was removing him from the apartment pursuant to subsection 61.1n of the Anti-Eviction Act. 140 In response to the eviction proceeding, Taylor filed an action pursuant to 42 U.S.C. § 1983, asserting that his eviction would violate the Double Jeopardy Clause because he had previously been prosecuted and punished for the crime of possession of drug paraphernalia. 141 Taylor also asserted that his eviction would violate the Excessive Fines Clause of the Eighth Amendment of the Constitution and would violate his due process rights under the Fourteenth Amendment. 142

2. The District Court

The district court held that Taylor's eviction did not violate either the Double Jeopardy or Excessive Fines Clauses of the Constitution. 143 The

133. See id. (noting conviction for drug offense on leased premises is sufficient grounds for removal).
135. See id. (listing 16 reasons for lawful eviction of tenant).
137. N.J. STAT. ANN § 2A:18-61.1n.
138. See Taylor, 102 F.3d at 1343.
139. See id. at 1337 ("[W]ithout question, the Housing Authority may evict Taylor under the Anti-Eviction Act . . . .")
140. See id. The court noted that the Housing Authority indicated that the removal notice was based upon both offenses, however, the court questioned whether the second offense could be the basis for Taylor's removal because the incident did not occur on the Housing Authority's property. See id. at 1337 n.1. Because the first incident clearly put Taylor within the scope of subsection 61.1n, the court considered it a nonissue. See id.
141. See id.
142. See id. The Housing Authority sought "summary dispossession" of Taylor's apartment in the Superior Court of New Jersey. See id. The state court stayed those proceedings, at Taylor's request, until the federal courts resolved his § 1983 claim. See id.
143. See id. at 1337-38. In the district court, the parties disagreed as to whether Taylor's claim should be considered an "as applied" challenge or a facial challenge to subsection 61.1n. See Taylor v. Cisneros, 913 F. Supp. 314, 318 (D.N.J. 1995), aff'd, 102 F.3d 1334 (3d Cir. 1996). An applied challenge to this statute
district court concluded that the eviction proceedings against Taylor were not intended to punish.\(^\text{144}\) The court explained that the label on a statute, whether "civil" or "criminal," is not relevant.\(^\text{145}\) The court pointed out that proceedings under subsection 61.1n of the Anti-Eviction Act are not intended to punish because "the eviction of . . . '[a] tenant is a rational and effective means of protecting all other tenants from activity antithetical to their health, safety and welfare.'\(^\text{146}\) The district court also rejected Taylor's excessive fines argument because it concluded that the sanction pursuant to subsection 61.1n was not punitive.\(^\text{147}\)

3. **The Third Circuit**

On appeal to the Third Circuit, Taylor argued that his eviction under subsection 61.1n was punitive because it had a "retributive function," despite some remedial characteristics.\(^\text{148}\) He claimed that under New Jersey law, an eviction constituted a forfeiture.\(^\text{149}\) He further asserted that the court should consider his fine excessive because his offenses were minor.\(^\text{150}\) Taylor also argued that the eviction proceeding violated the prohi-

would be based upon "the specific circumstance of Taylor's convictions and misfortune." See id. In other words, Taylor asserted that the statute at issue was not unconstitutional on its face, but rather that it was unconstitutional as it applied to him as an indigent who was being evicted from his subsidized housing and, most likely, being made homeless. See id. The court, however, concluded that because the state court had not applied the statute to the facts of this case it would be inappropriate to consider the case an "as applied challenge." Id. As such, the district court treated the action as a facial challenge. See id.

On appeal, Taylor argued that his challenge to 61.1n should not have been treated as a facial challenge. See Taylor, 102 F.3d at 1338. He explained that he did not challenge the general constitutionality of subsection 61.1n, but rather as it applied to him. See id. (citing United States v. Salerno, 481 U.S. 739, 745 (1987); Village of Hoffman Estates v. Flipside, 445 U.S. 489, 497 (1982); Jacobs v. Florida Bar, 50 F.3d 901, 905-06 (11th Cir. 1995)). The Third Circuit, however, did "not linger on the distinction between a facial and an as applied challenge because we find that subsection 61.1n is constitutional as applied to Taylor." Id. at 1339-40.

\(^\text{144}\) See Taylor, 102 F.3d at 1338.
\(^\text{145}\) See id. at 1337.
\(^\text{146}\) Id. at 1338 (quoting Taylor, 913 F. Supp. at 321). The district court noted that the causes for eviction in the Anti-Eviction Act are the only basis upon which a landlord may seek eviction outside "the traditional, and more cumbersome, common law ejectment action[s]." Taylor, 913 F. Supp. at 317. The court explained that the Anti-Eviction Act "is considered remedial legislation designed to address the serious housing shortage that has plagued New Jersey." Id.

\(^\text{147}\) See Taylor, 913 F. Supp. at 323.
\(^\text{148}\) Taylor, 102 F.3d at 1339 (quoting Brief for Appellant at 8, Taylor v. Cisneros, 102 F.3d 1334 (3d Cir. 1996) (No. 95-5873)).
\(^\text{150}\) See id. (citing Brief for Appellant at 23, Taylor (No. 95-5873)). Taylor argued that, based on the fact that he received a rental subsidy of $581 per month and he could potentially remain in the apartment for over the next 20 years, he is losing subsidies potentially worth more than $100,000. See id. He asserted such a loss was excessive compared to the offense. See id.
bition against double jeopardy because his eviction would not serve a remedial purpose, and moreover, that the court should render it punishment because eviction was a measure disproportionate to his conduct.\textsuperscript{151}

Initially, the State of New Jersey argued that the \textit{Artway} test controlled the definition of punishment for double jeopardy purposes.\textsuperscript{152} The State then modified its position after the Supreme Court's decision in \textit{Ursery} and asserted that \textit{Ursery} undermined the \textit{Artway} analysis and controlled in this case.\textsuperscript{153}

At the outset of the opinion, the Third Circuit recognized the relevance of \textit{Artway} and \textit{Ursery}.\textsuperscript{154} Instead of clarifying which case controlled in the disposition, the court resolved Taylor's double jeopardy claim under both \textit{Ursery} and \textit{Artway} and then addressed his excessive fine claim under \textit{Austin}.\textsuperscript{155} The court concluded that the eviction proceedings of

\begin{footnotesize}
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  \item \textsuperscript{151} See id.
  \item \textsuperscript{152} See id. For a discussion of the \textit{Artway} test, see \textit{supra} notes 108-17 and accompanying text.
  \item \textsuperscript{153} See Taylor, 102 F.3d at 1339.
  \item \textsuperscript{154} See id. at 1341 ("\textit{Artway} . . . and \textit{Ursery} . . . inform our result.").
  \item \textsuperscript{155} See id. The Third Circuit also noted that it would decide the excessive fines issue under \textit{United States v. Various Computers and Computer Equipment}, 82 F.3d 582 (3d Cir. 1996), \textit{cert. denied}, 117 S. Ct. 406 (1996). See Taylor, 102 F.3d at 1341. In \textit{Various Computers}, the Third Circuit did not invoke the \textit{Artway} test to reach its conclusion that civil in rem forfeiture under 18 U.S.C. § 981(a)(1)(C) does not violate the prohibition against double jeopardy. See \textit{Various Computers}, 82 F.3d at 586-89. In \textit{Various Computers}, the defendant pleaded guilty to one count of unauthorized use of a credit card pursuant to 18 U.S.C. § 1029(a)(2) and (a)(3). See \textit{Various Computers}, 82 F.3d at 583. After the court sentenced the defendant for this criminal conduct, the Government instituted forfeiture proceedings pursuant to 19 U.S.C. § 981(a)(1)(C), which allows for the forfeiture of proceeds that were the subject of a § 1029 offense. See id. at 584 n.2. The court sentenced the defendant to 10 years in prison and ordered him to make restitution in the amount of $13,674.50. See id. at 584. In addressing whether this subsequent forfeiture action violated the Double Jeopardy Clause, the court followed the analysis of the Fifth Circuit in \textit{United States v. Tilley}, 18 F.3d 295 (5th Cir. 1994). See \textit{Various Computers}, 82 F.3d at 588. In \textit{Tilley}, the Fifth Circuit held that forfeiture pursuant to 21 U.S.C. § 881(a)(6) and (a)(7) was not punishment because it does not take away anything in which the possessor had a legal interest or expectation that government should protect. \textit{Tilley}, 18 F.3d at 300. The Third Circuit had already adopted the \textit{Tilley} analysis in \textit{United States v. $184,505.01 United States Currency}, 72 F.3d 1160 (3d Cir. 1995), \textit{cert. denied}, 117 S. Ct. 48 (1996). See \textit{Various Computers}, 82 F.3d at 588. In $184,505.01 United States Currency, the Third Circuit "[f]ound the Fifth Circuit's reasoning . . . to be sound." $184,505.01 United States Currency, 72 F.3d at 1172. As such, the court extended its analysis to 19 U.S.C. § 981(a)(1)(C) in \textit{Various Computers}. See \textit{Various Computers}, 82 F.3d at 588.

The defendant in \textit{Various Computers} also asserted that the forfeiture under § 981(a)(1)(C) violated the Excessive Fines Clause of the Eighth Amendment. \textit{Id.} at 589. The court explained that because the forfeiture provision of the statute does not constitute punishment, it cannot violate the Excessive Fines Clause. See \textit{id.} (citing \textit{Austin v. United States}, 509 U.S. 602, 607 (1993)). It is apparent from \textit{Various Computers} that the question of whether a civil in rem forfeiture amounts to punishment for double jeopardy and excessive fine purposes is not properly analyzed under \textit{Artway}. See \textit{id.}

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the Anti-Eviction Act passed all three prongs of the Artway test and, thus, were not punishment.156

Taylor argued that he would suffer severely from an eviction.157 In addressing this argument, the Third Circuit pointed to the language in Ursery for assistance.158 In Ursery, the Supreme Court explained that "for Double Jeopardy purposes we have never balanced the value of property forfeited in a particular case against the harm suffered by the Government in that case."159 Thus, the Third Circuit incorporated the relevant teachings of Ursery into the Artway analysis in resolving an issue of whether a civil sanction is punitive.160

156. See Taylor, 102 F.3d at 1342. Under the subjective prong, the Third Circuit began its analysis with the fact that the Anti-Eviction Act "provides that for certain residential properties a tenant may be removed only for 'good cause.'" Id. at 1341 (quoting N.J. STAT. ANN. § 2A:18-61.1n (West 1996)). The court concluded this requirement indicated that "61.1n ... is nothing more than the legislature’s recognition that it is unreasonable to deny a landlord the right to terminate a lease when its property is being used for purposes unlawful under the New Jersey Comprehensive Drug Reform Act of 1987." Id. Thus, under subsection 61.1n, the landlord has the discretion to remove a tenant. See id. This was enough proof for the court to hold that the purpose of subsection 61.1n was not to punish the tenant but to give the landlord the necessary legal force to keep his or her property safe. See id. ("[The Legislature] ... merely permitted the landlord to protect its property from a tenant violating the law on the property.").

The court held that subsection 61.1n also passed the objective prong under Artway. See id. at 1342. The court addressed two questions under the Artway objective prong. In answering the first question under that prong, whether the section served solely a remedial purpose, the court explained that subsection 61.1n has "solely ... the remedial purpose" of protecting a landlord from the dangers of having unlawful activity occur on his or her property. Id. The court explained that landlords should not be subjected to unlawful activity on their property because "under both federal and New Jersey law a landlord in some circumstances runs the risk of its property being forfeited if it is aware of unlawful drug activity on its premises and does not take steps to end that activity." Id. Under the second question of the Artway objective prong, whether history supports a punitive or remedial purpose of the measure, the court observed that "removal of a tenant from a property traditionally has not been regarded as a punishment." Id. The Anti-Eviction Act provides for eviction under other circumstances that could not be considered punitive. See id.

Finally, the court addressed the third and final prong of Artway, an inquiry into the effects of the measure. See id. The Taylor court held the effects of subsection 61.1n were not too harsh because that determination does not hinge on "the value of the property forfeited in a particular case ... [or] the harm suffered by the government." Id.

157. See id. ("[Taylor] points out that the Supreme Court of New Jersey has said that a ‘forfeiture is in the nature of a penalty.’" (quoting Lehigh Valley R.R. Co. v. Chapman, 171 A.2d 653, 660 (1961))).

158. See id. ("[I]n Ursery, the Supreme Court held that civil forfeitures generally do not constitute punishment for purposes of the Double Jeopardy Clause.")


160. See Taylor, 102 F.3d at 1342. In Ursery, the Supreme Court distinguished Halper because it dealt with civil penalties and not civil forfeiture. Ursery, 116 S. Ct. at 2138. In Taylor, the Third Circuit noted that, according to the Supreme Court, Halper only extends to cases involving double jeopardy challenges to civil penalties, not civil forfeiture, because forfeiture does not invoke an analysis of balancing the
The court then explained that it only assumed the applicability of Artway after Ursery. In conceding that assumption may not be correct, the court analyzed the case under Ursery as well. The court explained that Ursery focused on in rem civil forfeiture and Taylor dealt with an in personam action. Accordingly, the Third Circuit held that "arguably" this distinction could render Ursery inapplicable to Taylor. Applying Ursery, the Third Circuit explained that the court must decide whether the legislature intended eviction proceedings under subsection 61.1n "to be criminal or civil and whether the proceedings are so punitive in fact that they may not be viewed as civil regardless of the legislature's intent." Under that test, the court concluded that an eviction pursuant to the Anti-Eviction Act is not a punitive measure. The court also concluded that an eviction under subsection 61.1n of the Anti-Eviction Act is not punitive for the reasons it set forth in the Artway analysis and for the historical understanding that evictions serve remedial purposes.

harm to the government against the cost of the forfeiture. Taylor, 102 F.3d at 1341 (citing Ursery, 116 S. Ct. at 2144). In Taylor, the court also explained that its conclusion that the effects of the eviction were not so harsh as to be considered punishment "[was] hardly surprising; if the termination of social security benefits, which can be critical to a disabled or elderly person, is not a punishment then why should the loss of a lease be punishment?" Id. at 1342.

161. See Taylor, 102 F.3d at 1342.

162. See id. at 1343.

163. See id. The distinction between in rem and in personam civil sanctions is significant in assessing whether a measure is punitive for constitutional purposes. See Ursery, 116 S. Ct. at 2138 (placing significant emphasis on fact that Congress did not intend forfeiture proceeding as punitive because action was in rem and not against person); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984) (same); United States v. LaFranca, 282 U.S. 568, 575 (1931) (holding that in personam proceeding to impose taxes upon defendant for sale of liquor is "an action to recover a penalty for an act declared to be a crime [and], in its nature, a punitive proceeding, although it take[s] the form of a civil action; and the word 'prosecution' is not inapt to describe such an action"); United States v. Reyes, 87 F.3d 676, 682 n.8 (5th Cir. 1996) ("The Ursery opinion... gives heavy emphasis to the in rem nature of the forfeitures there at issue, and distinguishes Halper and Kurth Ranch largely because those cases involved in personam proceedings.").

164. Taylor, 102 F.3d at 1343.

165. Id. (citing Ursery, 116 S. Ct. at 2147).

166. See id. (rejecting Taylor's claim under Ursery analysis).

167. See id. In Taylor, the Third Circuit also made some final points to solidify its conclusions concerning double jeopardy. Id. In this regard, the court noted that Taylor's double jeopardy claim failed because an eviction under subsection 61.1n is not part of the criminal system. See id. The Housing Authority is not a prosecutor. See id. Rather, in evicting Taylor, "the housing authority pursu[ed] a traditional civil remedy which both public and private landlords seek." Id. The court also pointed out that eviction under subsection 61.1n, unlike the registration provisions of Megan's Law at issue in Artway, is not mandatory. See id. The court also noted that a landlord could provide in a lease that the violation of drug laws on the premises is grounds for eviction. See id. Finally, the court commented that "[i]t would be strange" if a landlord was unable "to evict a tenant for drug activities because a prosecutor had brought criminal proceedings against the tenant for the activities." Id. at 1343-44. Such a result would unfairly increase the landlord's own
At the conclusion of the opinion, the court addressed Taylor’s excessive fine argument under *Austin*. The court explained that under *Austin*, “[t]he test for whether a civil in rem forfeiture constitutes punishment under the Excessive Fines Clause . . . is slightly different” from the double jeopardy analysis. The Third Circuit explained that *Austin* mandates a two-part inquiry for assessing the punitive nature of a forfeiture statute. First, the court should assess whether forfeiture was understood as punishment when the United States ratified the Eighth Amendment. Second, the court should assess whether the forfeiture involved in the case at bar “should be so understood today.” The Third Circuit explained that the second prong of the *Artway* analysis, the objective prong, incorporates that inquiry. Having already determined that subsection 61.1n was not punitive, the court concluded that it also did not violate the Excessive Fines Clause.

C. The Current State of the Law in the Third Circuit

In *E.B. v. Verniero*, the Third Circuit clarified the precedential impact of *Ursery* on *Artway*. In *Verniero*, the court upheld the constitutionality of the notification provisions of Megan’s Law, a question the court left open in *Artway*. The convicted sex offenders in *Verniero* argued that risk of forfeiting his property to the state or federal government for failing to report such activities. See *id.* at 1344.

168. See *id.* at 1344.

169. *Id.* (“[T]hus, even though the state proceeding against Taylor [was] in personam, Taylor [had] less of a burden in meeting the Excessive Fines Clause standard.”)

170. See *id.*

171. See *id.* (citing *Austin v. United States*, 509 U.S. 602, 610-611 (1993)).

172. *Id.* (citing *Austin*, 509 U.S. at 610-11).

173. See *id.* For a discussion of the objective prong of the *Artway* test, see *supra* notes 111-15 and accompanying text.

174. See *Taylor*, 82 F.3d at 1344 (affirming judgment of lower court).

175. 119 F.3d 1077 (3d Cir. 1997).

176. *Id.* at 1093-94 (stating that *Ursery* does not undermine appropriateness of *Artway*).

177. *Id.* at 1092-1105. For a discussion of why the Third Circuit declined to address the constitutionality of the notification provisions of Megan’s Law, see *supra* note 120.

In *Verniero*, the named appellant registered with the authorities subsequent to his parole for sex crimes against young boys. See *Verniero*, 119 F.3d at 1087-88. The New Jersey Superior Court, upon consideration of objection from E.B., held that he was properly classified as a Tier 3 offender and that notification was appropriate to 82 public and private educational institutions, licenced day care centers and summer camps and all residences within a one block radius of E.B.’s house. See *id.* at 1088. For a discussion of the classification of offender status under Megan’s Law, see *supra* note 102.

The court held that the notification provisions of Megan’s Law do not amount to punishment under the *Artway* test. See *Verniero*, 119 F.3d at 1105. In assessing the legislative purpose of Megan’s Law, the first prong of *Artway*, the court referred to the Supreme Court’s finding in *Artway* that the legislative purpose of the regis-
after Ursery the Artway synthesis was no longer appropriate for determining whether the notification provisions of Megan's Law constituted punishment.\textsuperscript{178} Having the guidance from both Artway and Ursery, the Third

\textsuperscript{178} Verniero, 119 F.3d at 1094-95. The district court held that Ursery rejected the legal foundation of Artway. See W.P. v. Poritz, 931 F. Supp. 1199, 1208-09 (D.N.J. 1996), rev'd sub nom. E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997). The district court explained that Ursery presented a new approach to addressing punishment that completely incapacitates the logical basis of the Artway test. See id. In Poritz, the United States District Court for the District of New Jersey refused to apply the Artway analysis in assessing the constitutionality of the notification provisions of Megan's Law. See id. The district court explained that Ursery "presented a different approach" to these issues. Id. The court held that Ursery rejects the "philosophical foundation of Artway that a universal rule for the definition of 'punishment' can and should be derived through a 'synthesis' achieved from analyzing the Supreme Court's recent decisions." Id.

The appellees also argued that the Artway synthesis was undermined by the Supreme Court's recent decision in Kansas v. Hendricks, 117 S. Ct. 2072 (1997). See Verniero, 119 F.3d at 1094. In Hendricks, the Supreme Court upheld a Kansas statute that provides for the civil commitment of "sexually violent predators." See Hendricks, 117 S. Ct. at 2081; see also Kan. Stat. Ann. §§ 59-29a01 to -29a07 (1996) (providing that person convicted or charged with offense and suffering from "mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence," may be confined to state custody for "control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large'"). The court stated that "[i]n determining the continuing viability of Artway, therefore, [it
Circuit held that *Ursery* did not incapacitate the *Artway* synthesis. The court explained that if it "disregard[ed] the *Artway* standard, [it] would be required, once again, to 'divine' a 'test for punishment' by looking for common considerations in essentially the same set of Supreme Court precedents." Accordingly, the Third Circuit explained that *Ursery* "confirms" that the *Artway* test is an appropriate standard and that it would not materially change the result of a case to devise a new test for assessing the punitive nature of a statute.

is necessary to give] careful consideration to how *Hendricks* addressed the question of whether civil commitment is punishment." *Verniero*, 119 F.3d at 1095. The Third Circuit found that there was "substantial overlap between the factors relied on in *Hendricks* and those that comprise the *Artway* test" and, thus, the court "discern[ed] no need to abandon (or overhaul) *Artway*." *Id.* The Third Circuit explained that "[l]ike *Ursery*, *Hendricks* does not establish a single formula for identifying which legislative measures constitute punishment and which do not." *Id.* Like the court in *Artway*, *Hendricks* made an inquiry into the legislative intent of the statute. See *id.* The court in *Verniero* also noted that *Hendricks* goes beyond the legislature's stated intent to consider additional factors that *Artway* incorporates into its objective purpose prong. See *id.* ("Like *Artway*’s inquiry into proportionality, *Hendricks* repeatedly describes how the Kansas statute is tailored to achieve its remedial purpose of protecting the public."). *Hendricks*, like *Artway*, relied heavily on history. See *id.* (noting that Supreme Court analogized civil confinement in Kansas statute to quarantines of those with highly contagious diseases, and noted that it has "never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others"). The Third Circuit further noted that *Hendricks* emphasized assessing the true salutary nature of a measure. See *id.* (noting that *Hendricks* Court looked to "multiple purposes of the Kansas statute, including incapacitation of dangerous sex offenders as well as their treatment" and concluded that statute did not constitute punishment). Finally, the court explained that even though the Court in *Hendricks* "does not explicitly discuss" the effects of the measure, the court found nothing in *Hendricks* inconsistent with *Artway*’s direction to examine what the challenged measure actually does to the affected individuals." *Id.* at 1095-96.

179. *See Verniero*, 119 F.3d at 1094 ("*Ursery* provides no justification for abandoning [the *Artway* standard].").

180. *See id.* ("Appellees insist that after *Ursery* and *Hendricks*, *Artway* does not provide an appropriate standard for determining whether Megan’s Law notification constitutes ‘punishment’ for purposes of the Ex Post Facto and Double Jeopardy Clauses. We disagree.").

181. *Id.* at 1094 n.14. The court explained that the “holding of *Ursery* is a narrow one limited to civil forfeitures. Neither of the principal rationales supporting its conclusion is pertinent here and we find nothing in the Court’s reasoning that is inconsistent with the *Artway* standard. It necessarily follows that *Ursery* provides no justification for abandoning that standard." *Id.* at 1094.

182. *See id.* ("*Ursery* confirms . . . (1) measures motivated by retributive animus are punishment, (2) even when the legislative action is not so motivated, an adverse consequence resulting from an in *personam* proceeding may be punishment if it is disproportionate to the remedial goal which the measure purports to pursue, and (3) measures that have traditionally been regarded as nonpunitive are not punishment in the absence of a retributive motive.").
It is clear that in the Third Circuit, *Ursery* does not overrule the *Artway* synthesis. The question that persists after *Taylor* is to what extent does the analysis in each case coexist. The analysis in *Taylor* does not resolve whether the *Ursery* test applies beyond a double jeopardy challenge to civil *in rem* forfeiture. Arguably, *Ursery*, on the one hand, could apply strictly to double jeopardy challenges to civil *in rem* forfeiture, and *Artway*, on the other hand, should control in cases that challenge other *in personam* actions, such as registration and notification provisions of sexual registration and notification laws. Nonetheless, in *Taylor*, the Third Circuit applied the *Artway* test and incorporated relevant guidance from *Ursery* in assessing the effects prong...
of the test and Taylor's in personam eviction.\textsuperscript{187} Accordingly, Taylor exemplifies the application of both standards and illustrates that both standards should coexist until the Supreme Court defines the analysis further.\textsuperscript{188}

IV. Conclusion

The issue of whether parallel civil and criminal proceedings violate the Constitution is ever prevalent and complex in the present-day legal arena.\textsuperscript{189} Forfeiture persists as a method for ensuring that criminals compensate the government.\textsuperscript{190} In personam license suspensions remain a popular tool among the states to fight drunk driving.\textsuperscript{191} Taxes, debarment proceedings and numerous other civil penalties are also prevalent civil sanctions.\textsuperscript{192} All of these measures are subject to the constitutional prohibitions against punishment.\textsuperscript{193} As the number and types of civil sanctions increase, the issue of the constitutionality of such measures becomes more complex.\textsuperscript{194} The law in the area of unconstitutional punish-

\textsuperscript{187}. Taylor, 102 F.3d at 1341 ("Artway, Various Computers, and Ursery . . . inform our result."). For a discussion of how the Third Circuit used Ursery in applying the Artway test, see supra notes 158-67 and accompanying text.

\textsuperscript{188}. See Taylor, 102 F.3d at 1343.

\textsuperscript{189}. See Mack, supra note 9, at 218 (noting that double jeopardy law is confusing, contradictory and fraught with exceptions).

\textsuperscript{190}. See Levy, supra note 10, at 88 (discussing increased use of forfeiture to combat rise in crime and drug use); Cole, supra note 9, at 251 ("[The] forfeiture remedy continues to spread.").

\textsuperscript{191}. See, e.g., Deutschendorf v. People, 920 P.2d 53, 59-60 (Colo. 1996) (invoking Halper as controlling precedent in challenge to in personam license suspension and distinguishing Ursery because it only addressed civil in rem forfeiture statute); State v. Gustafson, 668 N.E.2d 435, 442 n.2 (Ohio 1996) ("Ursery does not control disposition of the cases before us, which do not involve in rem civil forfeitures, but rather administrative suspensions of drivers' licenses."). In Gustafson, the court noted that it was not clear whether the Supreme Court would "confine application of Ursery solely to civil in rem forfeiture proceedings, or . . . [would] apply it more broadly, thereby minimizing the importance of Halper and its progeny as precedent." \textit{Id}. As a result, the court saw it fitting to apply Halper and its progeny to the license suspension. \textit{See id.} at 443.

\textsuperscript{192}. See, e.g., Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992) (addressing double jeopardy challenge to administrative order excluding physician from participating in Medicare program for at least five years following doctor's conviction and sentencing on criminal charges of Medicare fraud); United States v. Reed, 937 F.2d 575, 577 (11th Cir. 1991) (addressing double jeopardy challenge to disciplinary proceeding after criminal charge of misappropriation of postal funds that followed disciplinary suspension).

\textsuperscript{193}. See Department of Revenue v. Kurth Ranch, 511 U.S. 767, 777 (1994) (noting that all types of civil sanctions are subject to constitutional scrutiny). For a discussion of these constitutional protections, see supra notes 4-8 and accompanying text.

\textsuperscript{194}. See Mack, supra note 9, at 218 (noting that Supreme Court justices have created "entirely new areas of double jeopardy interpretation with respect to parallel civil and criminal proceedings"); \textit{see also} United States v. Stoller, 78 F.3d 710, 713 (1st Cir. 1996) (addressing whether administrative sanction imposed by Federal Deposit Insurance Corporation is punishment for double jeopardy purposes
ment and civil sanctions is ambiguous and unsettled. The analysis in both Artway and Taylor reflect the complex legal analysis in assessing the constitutionality of the emerging civil sanctions in the present-day legal arena. There are no bright-line rules and settled applications of the Supreme Court jurisprudence in this area. Nevertheless, in the Third Circuit, the Artway test persists as a guide to assessing the constitutionality of civil sanctions of varying types.

Caroline J. Patterson

and exploring "shadowy corner[s] of the Double Jeopardy Clause, dimly lit by a trilogy of recent Supreme Court cases"), cert. dismissed, 117 S. Ct. 378 (1996).

196. See Opinion of the Justices to the Senate, 668 N.E.2d 738, 749 (Mass. 1996) (noting that when assessing constitutional protections against punishment, distinction between double jeopardy, due process and ex post facto protections "is not self-defining, so that a system of doctrine distinguishing one from the other has grown up").