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You Can't Take That Away From Me: The Sanctity of the Homestead Property Right and Its Effect on Civil Forfeiture of the Home

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COMMENTS

You Can't Take That Away From Me: The Sanctity of the Homestead Property Right and Its Effect on Civil Forfeiture of the Home

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I. INTRODUCTION

Since the widely publicized “war” on drugs was declared in the early 1980s, one of the most controversial weapons employed by the government has been the device known as civil forfeiture. Both federal and state statutes allow prosecutors to bring actions in rem against property allegedly used in the furtherance of drug or other crimes.¹ For many years, boats, cars, and even homes were seized by the government on the theory that the property itself was somehow guilty of participating in criminal activity. The benefit of such seizures, as far as the government was concerned, was that the burden shifted to the property owner to come into court to prove that the property was either not used in the furtherance of any crime or that the owner did not know of the property’s illegal use.²

At first, and for many years, the courts were willing to allow civil forfeiture proponents some room to work around the constitutional

1. Tamara R. Piety, Note, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916 (1991).

2. *Id.* at 913 n.15.

claims of the property owners.³ This willingness was based, in part, on policy concerns in favor of aiding the fight against drugs. As the anecdotes of abuses of civil forfeiture mounted, however, the policy concerns began to swing in the other direction. One such policy concern that the courts have given increasing weight is the sanctity of the right of property, especially as it pertains to a person's home.

In 1992, the Supreme Court of Florida, in the case of *Butterworth v. Caggiano*,⁴ held that the homestead exemption written into the Florida Constitution as Article X, Section 4, protects homestead property from state civil and criminal forfeiture laws. The court based its holding on its interpretation of the homestead exemption and what it called "the constitutional sanctity of the home."⁵ Florida is one of several states recently interpreting its homestead exemption to forbid civil forfeiture.⁶ In Florida, at least, it appears that homestead property is safe from civil forfeiture.

In 1993, the United States Supreme Court held that in cases of civil forfeiture of real property under federal law the Due Process clause of the Fifth Amendment mandates that the property owner must be given notice of the preseizure hearing and an opportunity to be heard.⁷ This decision was predicated in large part on the concern over the fundamental right of property and that right's heightened due process considerations.

Also in 1993, the United States Supreme Court held that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7).⁸ This holding was based on the Court's finding that forfeiture must be construed, at least in some cases, as punishment, and thus is limited by the Eighth Amendment.⁹ *Austin* reflects a realistic view of the nature of civil forfeiture actions, as opposed to the traditional fictions underlying such actions.¹⁰

This Comment will explore the extent to which both Florida state civil forfeiture actions and federal civil forfeiture actions are and should be increasingly limited by the courts based on Constitutional and policy concerns regarding the sanctity of one's property rights in his home. Section II of this Comment will briefly examine the history of the use of both civil forfeiture as a weapon against crime and homestead exemp-

3. See *id.* at 926.

4. 605 So. 2d 56 (Fla. 1992).

5. *Id.* at 61.

6. See *infra* part IV.A-B.

7. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

8. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

9. *Id.* at 2812.

10. See *infra* text accompanying notes 11-16.

tions to forced judicial sale orders. This will help place these two concepts in the context of their original purposes and current uses. Section III will then examine the recent holdings of *Caggiano*, *James Daniel Good Real Property*, and *Austin*. An attempt will be made to place these decisions within the larger context of increasing court disgust with the use of civil forfeiture. Section IV will examine how these decisions are affecting the courts as they attempt to deal with civil forfeiture. Finally, Section V will offer an argument to combine these holdings into a strengthened defense against civil forfeiture actions. This argument will be based on the strong policy considerations present in the sacred right of property as it pertains to the home and on increasing distrust of civil forfeiture as a weapon against crime.

II. THE HISTORICAL AND CURRENT USES OF CIVIL FORFEITURE AND HOMESTEAD EXEMPTIONS

A. *Civil Forfeiture*

The history of civil forfeiture is long and ignominious. Key to the practice is an ancient legal fiction¹¹—that property can itself be guilty and subject to government retribution. In her article, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*,¹² Tamara Piety tracked the “demon” of civil forfeiture “to its original contextual ‘lair.’”¹³ She described the personification fiction as both cumbersome and humorous.¹⁴ The fiction, by viewing property as a guilty person, enables the government to seize the offending property in order to cleanse it of its evil nature, and then convey the property to a new owner, reaping the proceeds for the government’s treasury.¹⁵

The fiction is a useful way for the government to shift the focus away from the property owner, in an attempt to circumvent the normal protections attaching to a person but not to property. Because the *res* is

11. Piety, *supra* note 1, at 918-19.

12. Piety, *supra* note 1.

13. *Id.* at 927 (quoting Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 258 (1973)). Her historical examination of the subject of civil forfeiture is quite complete and readers interested in a more in-depth treatment of that subject are encouraged to look to her article. Because this Comment will concentrate on the recent trends in civil forfeiture practice and the increasing use of the homestead exemption defense, a thorough exploration of the history of civil forfeiture is not provided.

14. *Id.* at 916 n.22.

15. *Id.* at 917 n.31. The Department of Justice created the National Assets Seizure and Forfeiture Fund in 1985. Since that time, yearly drug-forfeiture proceeds have grown from \$27 million to almost \$500 million in 1990, with over a billion dollars worth of seized property awaiting forfeiture. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 *J. OF CRIM. L. & CRIMINOLOGY* 274, 274-75 (1992).

the offending party, the government need not prove that the property owner has committed any violation of the law.¹⁶ Furthermore, because the *res* is not a person under the Constitution, many of the sacred Constitutional safeguards on which the American system of justice is based are not applicable.¹⁷ If this were not the result of a transparent fiction, it might not seem quite so repugnant.

Looking through this device to the government's real purpose, civil forfeiture can only be viewed as a scam on the property owner, the government's real target. The true purpose of civil forfeiture is undoubtedly crime deterrence and punishment.¹⁸ Congress intended to allow prosecutors to fight racketeering and drug trafficking by "attack[ing] . . . the economic aspects of these crimes."¹⁹

The two statutes under which most civil forfeiture actions against real property are undertaken are 21 U.S.C. § 881(a) (1988)²⁰ and 18 U.S.C. § 1955 (1988).²¹ The seizure statutes provide the property owner with few of the procedural safeguards at the heart of the traditional criminal justice system.²² To seize allegedly offending property:

the government need only show probable cause to believe that the property was used for a specified illegal purpose. Probable cause to forfeit requires only a "reasonable ground for belief of guilt[,] supported by less than prima facie proof but more than mere suspicion" that the property is subject to forfeiture.²³

To meet its burden, the government may rely on circumstantial evidence or facts learned after the seizure.²⁴ Once the property has been seized, it is then the property owner's burden to come into court to defend his property, and therefore himself, against the government's

16. Piety, *supra* note 1, at 916.

17. *See id.* at 921-24.

18. *Id.* at 920.

19. S. REP. No. 225, 98th Cong., 2d Sess. 191 (1982), reprinted in 1984 U.S.C.C.A.N. 3182, 3374.

20. Section 881(a)(7) reads:

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

. . . .

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

21. *See, e.g.*, *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1495 (11th Cir. 1994).

22. Stahl, *supra* note 15, at 278.

23. *United States v. 28 Emery St.*, 914 F.2d 1, 3 (1st Cir. 1990) (citation omitted) (alteration in original), quoted in Stahl, *supra* note 15, at 285.

24. Stahl, *supra* note 15, at 285-86.

case.²⁵ The property owner must prove by a preponderance of the evidence either that the property was not used in the furtherance of any crime or that he was an "innocent owner."²⁶ There is thus a great temptation for the government to bring an action for civil forfeiture even in borderline cases, because the property owner faces the almost impossible task of proving a negative—that he did not know about the illegal use of the property.²⁷

The history of civil forfeiture has not been pretty. Over the last fourteen years, the period of the so-called drug war, a genuine hysteria has prompted the government to use civil forfeiture in a manner that would make even a proponent of firm crime control tactics think twice. The record of questionable uses, if not outright abuse, is simply too extensive. Consider the words of Joseph A. Eustace, Jr.:

As an experienced federal criminal practitioner, I have seen pre-indictment and conviction seizures of homesteads with only slight connections to criminal activity, and seen the threat of homestead forfeiture used as a bargaining chip with defendants and witnesses alike. Such practices are occurring in an ever-expanding number of prosecutions.²⁸

One must question whether the valid policy goals of fighting drugs and organized crime are worth compromising the values expressed in the Bill of Rights.²⁹

B. *Homestead Exemptions*

Homestead exemptions have a long history in America from the English common law to a statute passed by the Republic of Texas in 1839.³⁰ Today, virtually every state has adopted its own version of the homestead exemption.³¹ Such exemptions are designed primarily to

25. This procedural burden was the sorry state of affairs for all civil forfeiture actions prior to *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), which at least in forfeiture actions against real property requires the government to provide a preseizure hearing at which the property owner can argue against the seizure order before the property is seized. See *infra* part III.B.

26. Stahl, *supra* note 15, at 286-87.

27. Piety, *supra* note 1, at 914 n.16. The property owner's burden is somewhat lessened by the recent case of *United States v. 6960 Miraflores Avenue* in which the Eleventh Circuit held that the property owner should prevail if there is a showing of his lack of actual knowledge of the property's taint, reversing the district court which allowed the government to prevail on the theory that the owner should have known of the taint. 995 F.2d 1558, 1564-65 (11th Cir. 1993).

28. Joseph A. Eustace, Jr., *The Purist View Prevails: Butterworth v. Caggiano Prohibits Homestead Forfeiture*, 22 STETSON L. REV. 1111, 1131 (1993).

29. Piety, *supra* note 1, at 977.

30. George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950).

31. Carolyn S. Bratt, *Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?*, 76 KY. L.J. 387, 391 (1988).

protect the security of home ownership as well as the security of the home owner and his family.³² These exemptions undeniably single out home ownership for special consideration. Indeed, most such exemptions protect homes directly and do not merely exempt a certain dollar amount of property from creditors' claims.³³ Further, the homestead exemption is available to all homeowners and is not limited by policy concerns regarding the particular financial condition of the person claiming protection.³⁴ Clearly, homestead exemptions reflect a unique concern with the sanctity of one's home.

Florida's homestead exemption is quite generous. First created in 1868, it was enacted into the Florida Constitution in 1968.³⁵ In its present form, Article X, Section 4 of the Florida Constitution reads:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereof, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereon, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family

A 1985 amendment to the provision expanded the class of those able to claim the protection, changing the language so that the exemption would be available, not just to the "head of a family" but to any "natural person."³⁶ This amendment focuses the purposes of the exemption on the home owner's property right itself, and away from concerns centering only around protecting families. Though humanitarian concerns for the family remain in the cases applying the exemption,³⁷ the amendment must be understood as emphasizing the broader purpose of protecting the home *qua* home from forced judicial sale.

Given the state and federal governments' zealous use of civil forfeiture and the strong individual interest in the sanctity of the home, the stage was set for a showdown.

32. *Id.* at 391; Haskins, *supra* note 30, at 1289, 1290.

33. Bratt, *supra* note 31, at 391.

34. *Id.* at 392.

35. Stephen H. Price, Note, *Florida's Homestead Exemption: Racketeers Should Not Leave Home Without It*, 21 STETSON L. REV. 681, 683 (1992).

36. *Id.* at 684.

37. *See id.*

III. *CAGGIANO, JAMES DANIEL GOOD REAL PROPERTY, and AUSTIN*A. *Butterworth v. Caggiano*³⁸

In 1992, the Florida Supreme Court settled a conflict among the Florida district courts of appeal and decided that Florida's homestead exemption prohibited state civil or criminal forfeiture of homestead property.³⁹ This section will examine this decision and the case law upon which it was based.

In 1986, Louis A. Caggiano was convicted of one count of racketeering in violation of the Florida Racketeer Influenced and Corrupt Organization Act ("Florida RICO Act"),⁴⁰ and fifteen counts of bookmaking.⁴¹ Three of the bookmaking counts were found to have taken place at Caggiano's residence.⁴² Accordingly, the State later began forfeiture proceedings under the Florida RICO Act⁴³ on the grounds that the property was used in the course of racketeering activity in violation of section 895.05(2)(a) of the Act.⁴⁴ The trial court held that the homestead exemption in Article X, Section 4 of the Florida Constitution did not protect Caggiano's residence from RICO forfeiture, relying on *DeRuyter v. Florida*.⁴⁵ On appeal, Florida's Second District Court of Appeal reversed, holding that the homestead exemption did protect Caggiano's residence.⁴⁶ Noting conflict with the Fifth District Court of Appeal, the Second District certified the issue to the Florida Supreme Court.⁴⁷

In an opinion by Chief Justice Barkett, the court stated that the words and terms of the Florida Constitution are to be interpreted in light of their natural and popular meaning as understood by the people who have adopted them.⁴⁸ The court then stated that the homestead exemption's usual liberal construction was particularly appropriate in the context of civil forfeiture, a practice "historically disfavored in law and

38. 605 So. 2d 56 (Fla. 1992).

39. *Id.* at 61.

40. *Id.* at 57; see FLA. STAT. ch. 895 (1983 & Supp. 1984).

41. *Caggiano*, 605 So. 2d at 57; FLA. STAT. ch. 849 (1983 & Supp. 1984).

42. *Caggiano*, 605 So. 2d at 57.

43. Chapter 895.05(2)(a), FLA. STAT. (1989), reads: "All property, real or personal, including money, used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of a provision of ss. 895.01-895.05 is subject to civil forfeiture to the state."

Chapter 895.02(9), FLA. STAT. (1989), defines "real property" as: "any real property or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property."

44. *Caggiano*, 605 So. 2d at 57.

45. *Caggiano*, 605 So. 2d at 57 (citing *DeRuyter v. Florida*, 521 So. 2d 135 (Fla. 5th DCA 1988)).

46. *Id.* at 57.

47. *Id.* at 57-58.

48. *Id.* at 58 (citing *City of Jacksonville v. Continental Can Co.*, 151 So. 488, 489-90 (1933)).

equity.”⁴⁹ Accordingly, the court held that the word “sale” as used in Article X, Section 4, was intended to be interpreted in its broad, non-technical sense.⁵⁰ “[I]t appears that the homestead exemption uses broad, nonlegal terminology that was intended simply to guarantee that the homestead would be preserved against any involuntary divestiture by the courts, without regard to the technicalities of how that divestiture would be accomplished.”⁵¹

In this interpretation, the court was guided by the Iowa Supreme Court’s holding in *In re Property Seized from Bly*.⁵² In that case, police acting on a valid search warrant found, in the home of John Joseph Bly and Judy Ann Bly, numerous items indicating drug trafficking, including cocaine, methamphetamine, marijuana, and assorted drug paraphernalia.⁵³ Six days later, the State served and filed notice of forfeiture of the Bly’s home, on the ground that the property was used in violation of Iowa Code section 809.1(2)(b).⁵⁴ The Blys filed an application for return of their home on the ground, inter alia, that homestead property is exempt from forfeiture.⁵⁵ Although the forfeiture statute makes no distinction between real and personal property, the court noted that Iowa Code section 561.16 exempts homestead property from forced “judicial sale where there is no special declaration of statute to the contrary.”⁵⁶ The court stated that homestead statutes are to be liberally and broadly construed in light of the policy considerations “not only ‘for the benefit of the family, but for the public welfare and social benefit which accrues to the state by having families secure in their homes.’”⁵⁷ Thus, the court held that the term “judicial sale” as used in the exemption was intended to include “any judicially compelled disposition of the homestead, whether denominated a ‘sale’ or not.”⁵⁸ The Iowa court noted that no other jurisdiction had yet considered whether a homestead may be forfeited under a statute providing for forfeiture of real property.⁵⁹

The Florida Supreme Court was persuaded by this reasoning and noted that, in Florida, this argument was even more persuasive because

49. *Id.* at 58.

50. *Id.* at 59.

51. *Id.*

52. *Id.* at 59 (citing *In re Property Seized from Bly*, 456 N.W.2d 195 (Iowa 1990)).

53. *In re Bly*, 456 N.W.2d at 196.

54. *Id.* Iowa Code section 809.1(2)(b) defines “[f]orfeitable property” as: “Property which has been used or is intended to be used to facilitate the commission of a criminal offense or to avoid detection or apprehension of a person committing a criminal offense.”

55. *In re Bly*, 456 N.W.2d at 196.

56. *Id.* at 197, 198.

57. *Id.* at 199 (quoting *In re Estate of McClain*, 262 N.W. 666, 669 (Iowa 1935)).

58. *Id.* at 199.

59. *Id.* at 197 n.4.

the exemption was a constitutional right rather than a mere statutory exemption.⁶⁰ The court found that Article X, Section 4 provided for three exceptions to the exemption (regarding tax liens and certain statutory liens) and that forfeiture was not one of them.⁶¹ Thus, the court concluded:

in light of the historical prejudice against forfeiture, the constitutional sanctity of the home, and the rules of construction requiring a liberal, nontechnical interpretation of the homestead exemption and a strict construction of the exceptions to that exemption, we hold that article X, section 4 of the Florida Constitution prohibits civil or criminal forfeiture of homestead property.⁶²

Justice Grimes, in dissent, argued that the court had incorrectly applied the homestead exemption beyond its original scope of protecting families against economic misfortune.⁶³ He asserted that the purpose of the homestead exemption was to protect the family home from forced sale to repay the debts of the owner, and that the court has not applied the exemption to protect homestead property from forced sale arising out of fraud.⁶⁴ Justice Grimes noted the policy against allowing the property owner to use the exemption to protect his home when he was guilty of fraud and argued that similar policy concerns weigh in favor of denying such protection in cases arising out of criminal conduct.⁶⁵ "While the majority refers to the 'historical prejudice against forfeiture,'" he responded, "there is an even greater historical prejudice against crime."⁶⁶

The Florida Supreme Court compared the policy against the disfavored practice of forfeiture, based upon the sanctity of the home, with the interests of crime control. Forfeiture doctrine forces just this sort of balancing act. The fictions involved in portraying forfeiture as an action against the property inevitably focus forfeiture debates on the property rights of the owner. The thinly disguised crime control purpose of forfeiture actions only serves to heighten the constitutional considerations regarding the property owner's due process rights. These conflicting considerations were finally addressed by the United States Supreme Court in *United States v. James Daniel Good Real Property*.⁶⁷

60. *Butterworth v. Caggiano*, 605 So. 2d 56, 59-60 (Fla. 1992).

61. *Id.* at 60.

62. *Id.* at 61.

63. *Id.* at 61 (Grimes, J., dissenting).

64. *Id.* (quoting *Tullis v. Tullis*, 360 So. 2d 375, 377 (Fla. 1978)).

65. *Id.* at 61.

66. *Id.* at 62.

67. 114 S. Ct. 492 (1993).

B. United States v. James Daniel Good Real Property

On January 31, 1985, police executed a search warrant at the home of James Daniel Good and discovered 89 lbs. of marijuana, marijuana seeds, vials containing hashish oil, and drug paraphernalia.⁶⁸ Good pleaded guilty to promoting a harmful drug in violation of Section 712-1245(1)(b) of the Hawaii Revised Statutes.⁶⁹ He was sentenced to one year in jail, five years of probation, was fined \$1000, and was required to forfeit to the State \$3187 in cash found at the premises.⁷⁰

On August 8, 1989, the United States filed an in rem forfeiture action in the United States District Court for the District of Hawaii against Good's house and the surrounding four-acre parcel of land on which the house was situated.⁷¹ This action was brought under 21 U.S.C. § 881(a)(7)⁷² on the ground that the property had been used to commit or facilitate the commission of a federal drug offense.⁷³ At an ex parte hearing held on August 18, 1989, a United States magistrate found that the Government had established probable cause to believe that Good's property was subject to forfeiture under § 881(a)(7), based on Good's drug conviction and the evidence discovered during the 1985 search of Good's home.⁷⁴ On August 21, 1989, the Government seized the property without prior notice to Good or an adversary hearing.⁷⁵ Good filed a claim for the property and an answer to the Government's complaint, alleging, inter alia, that the seizure deprived him of his property without due process of law.⁷⁶ The United States Court of Appeals for the Ninth Circuit unanimously held that the seizure of Good's property without prior notice and a hearing violated the Due Process Clause

68. *Id.* at 497.

69. *Id.*

70. *Id.*

71. *Id.*

72. 21 U.S.C. Sec. 881(a)(7) provides:

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

.....

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

73. *Good Real Property*, 114 S. Ct. at 497.

74. *Id.*

75. *Id.* at 498.

76. *Id.*

of the Fifth Amendment.⁷⁷ The United States Supreme Court granted certiorari to resolve a conflict among the circuits regarding the constitutional question of “whether, in the absence of exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard.”⁷⁸ In an opinion by Justice Kennedy, the Court ruled that it did.⁷⁹

The Government argued that, in forfeiture cases, the Fourth Amendment defines the scope of due process.⁸⁰ This argument, ironically, is based on the characterization of civil forfeiture as serving a “‘law enforcement purpos[e].’”⁸¹ Where this admission is when the action’s basic fiction is employed is anyone’s guess. The Court rejected the idea that one constitutional amendment could control this question to the exclusion of all other amendments.⁸²

The Court distinguished *Gerstein v. Pugh*,⁸³ on which the Government relied, by stating that *Gerstein* concerned the arrest and detention of criminal suspects, for which the Fourth Amendment was explicitly tailored, and that the protections afforded a suspect during arrest and initial detention are “only the *first* stage of an elaborate system” in which the suspect is afforded many safeguards.⁸⁴ Accordingly, the Court held that such a rule was not appropriate in the civil forfeiture context and instead applied the three-part test found in *Mathews v. Eldridge*.⁸⁵ The Court reasoned that where, as here, the Government seizes property “not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself,” the Government must comply with the Due Process Clause of the Fifth Amendment, or the Fourteenth Amendment in the case of seizure by a state.⁸⁶

Explaining why the Court’s approval of the *ex parte* seizure practice upheld in *Calero-Toledo v. Pearson Yacht Leasing Co.*⁸⁷ was not dispositive of this case, the Court stated that a distinction must be made

77. *Good Real Property*, 114 S. Ct. at 498. The Fifth Amendment to the United States Constitution reads in relevant part: “No person shall . . . be deprived of life, liberty, or property, without due process of law . . .” The Ninth Circuit’s decision is reported as *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1384 (9th Cir. 1992).

78. *Good Real Property*, 114 S. Ct. at 497, 498.

79. *Id.* at 505.

80. *Id.* at 499.

81. *Id.* (quoting Brief for United States at 13).

82. *Id.*

83. 420 U.S. 103 (1975).

84. *Good Real Property*, 114 S. Ct. at 499 (quoting *Gerstein*, 420 U.S. at 125 n.27).

85. *Id.* at 501 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

86. *Id.* at 500.

87. 416 U.S. 663 (1974).

between real and personal property.⁸⁸ Noting that the property at stake in *Calero-Toledo* was personal property (a yacht), the Court explained that "the fact that a yacht was the 'sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given,' " was central to its analysis.⁸⁹ Section 881(a)(7) of Title 21 was not amended to authorize forfeiture of real property until ten years after the *Calero-Toledo* decision.⁹⁰

The Court stated that the central requirements of due process are prior notice and an opportunity to be heard at a pre-seizure hearing.⁹¹ These requirements protect the individual and his property rights from arbitrary government action.⁹² Only "extraordinary situations where some valid governmental interest is at stake" justify the avoidance of the pre-seizure adversarial hearing.⁹³

The Court employed the three-part test set forth in *Mathews v. Eldridge* to judge the interests at stake.⁹⁴

The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.⁹⁵

Good had a substantial interest at stake. The Court declared that "Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance."⁹⁶ The Court considered the property forfeiture in this case to affect significant personal interests.

The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment. It gives the Government not only the right to prohibit sale, but also the right to evict occupants, to modify the property, to condition occupancy, to receive rents, and to supersede the owner in all rights pertaining to the use, possession, and enjoyment of the property.⁹⁷

Thus, as to the first prong of the *Mathews* analysis, the Court found that

88. *Good Real Property*, 114 S. Ct. at 500.

89. *Id.* (quoting *Calero-Toledo*, 416 U.S. at 679) (alteration in original).

90. *Id.*

91. *Id.*

92. *Id.* at 500-01 (citing *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)).

93. *Id.* at 501 (quoting *Fuentes*, 407 U.S. at 82 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971))).

94. *Id.*

95. *Id.* (citing *Mathews*, 424 U.S. 319, 335 (1976)).

96. *Id.*

97. *Id.*

the private interests at stake weighed heavily in the balance.⁹⁸

As to the second prong of the *Mathews* test, the Court found that the practice of ex parte seizure "creates an unacceptable risk of error."⁹⁹ The Court discussed the scant protections given to the innocent owner, noting that the government is not required to offer any evidence as to the owner's guilt or possible defenses.¹⁰⁰ "And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, 'would not cure the temporary deprivation that an earlier hearing might have prevented.'"¹⁰¹

Finally, addressing the third prong of the *Mathews* test, the Court examined the government's interest to see whether some pressing need for prompt action was called for in the context of civil forfeiture actions against real property.¹⁰² Distinguishing *Calero-Toledo*, the Court found no need for pre-hearing seizure of real property either to preserve jurisdiction over the *res* or to prevent loss of the *res*.¹⁰³ The Court stated that the legitimate government interests in forfeiture proceedings to prevent sale, destruction, or further illegal use of the property can all be secured without a pre-hearing seizure.¹⁰⁴

The Court explained that previous cases justified pre-hearing seizures due to the exigent circumstances of war-time or the government's need to collect tax revenues.¹⁰⁵ These circumstances do not exist in the context of real property forfeitures, and in light of the significant property interest at stake, the Court found that "any harm that results from delay is minimal in comparison to the injury occasioned by erroneous seizure."¹⁰⁶

The Court extended its requirement of a pre-seizure hearing to all real property, not only to residences.¹⁰⁷ Nevertheless, the Court noted that in the context of residences, as in this case, an "essential principle" is illustrated.¹⁰⁸ "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within

98. *Id.*

99. *Id.*

100. *Id.* at 502.

101. *Id.* (quoting *Connecticut v. Doehr*, 501 U.S. 1, 3 (1991)).

102. *Id.*

103. *Id.* at 502-03.

104. *Id.* at 503.

105. *Id.* at 504.

106. *Id.*

107. *Id.* at 505.

108. *Id.*

it."¹⁰⁹

Chief Justice Rehnquist questioned the Court's holding considering that no such pre-seizure hearing is required when a criminal defendant's liberty is at stake.¹¹⁰ He was satisfied with relying on the Fourth Amendment to determine what process was due.¹¹¹ The Chief Justice asserted that the strong interest in fighting the drug war was sufficient to tip the balance in the Government's favor.¹¹²

Justice O'Connor disputed the majority's holding on the ground that she found no distinction between the interest at stake in real property as opposed to personal property.¹¹³ Although recognizing a significant property interest was at stake, O'Connor argued that the "sanctity of the home" was embodied in the home owner's privacy and possessory interests and was as such addressed by the Fourth Amendment.¹¹⁴ Where the issue is instead deprivation of property interests, the Due Process Clause of the Fifth Amendment controls, she asserted, and in the context of the Due Process Clause there ought to be no difference between real and personal property.¹¹⁵

Justice Thomas agreed with the Court's desire to protect real property rights and the Court's distrust of the Government's "aggressive use of broad civil forfeiture statutes," but was unable to agree that Good was deprived of due process in this case.¹¹⁶ Thomas, in fact, made an impassioned defense of real property rights and the danger posed by civil forfeiture statutes. He stated that the Court "has not always placed sufficient stress upon the protection of individuals' traditional rights in real property."¹¹⁷ Sympathizing with the Court's focus on real property rights, rights which he called "central to our heritage," Thomas referred to passages in the past cases of *Payton v. New York*, "[R]espect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic," and *Entick v. Carrington*, "The great end, for which men entered into society, was to secure their property."¹¹⁸

Justice Thomas then questioned the justifications behind civil forfeiture, saying that he was disturbed by its breadth.¹¹⁹ He stated, "it is

109. *Id.*

110. *Id.* at 507 (Rehnquist, C.J., concurring and dissenting).

111. *Id.* at 509.

112. *Id.* at 510.

113. *Id.* at 511 (O'Connor, J., concurring and dissenting).

114. *Id.* at 513.

115. *Id.*

116. *Id.* at 515 (Thomas, J., concurring and dissenting).

117. *Id.*

118. *Id.* (quoting *Payton*, 445 U.S. 573, 601 (1980), and *Entick*, 19 How. St. Tr. 1029, 1066 (C.P. 1765)).

119. *Id.*

unclear whether the central theory behind *in rem* forfeiture, the fiction 'that the thing is primarily considered the offender,' can fully justify the immense scope of § 881(a)(7)."¹²⁰ In fact, Thomas suggested that in an appropriate case it may be necessary for the Court to reevaluate its "generally deferential approach to legislative judgments in this area of civil forfeiture."¹²¹ Nevertheless, Thomas argued that this was not an appropriate case, because Good was not in fact an innocent owner as he had already been convicted of drug offenses involving the property.¹²²

In *Good Real Property*, the Court recognized the fundamental nature of real property rights, particularly in one's home. Significantly, this recognition was not based on any positively enacted homestead exemption. The only textual reference to the sanctity of the home, or any real property right, was the Due Process Clauses of the Fifth and Fourteenth Amendments. Yet, as Justice Thomas's opinion suggests, the fundamental sanctity of the home owes as much to the traditions and purposes of society as it does to any textual reference.¹²³ Section V of this Comment will address the possible scope of this, perhaps, natural right in homestead property and its effect on civil forfeiture in light of cases such as *Caggiano*, *Good Real Property*, and *Austin*.

C. Austin v. United States

In *Austin v. United States*,¹²⁴ the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment¹²⁵ applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7).¹²⁶

After being convicted of one count of possessing cocaine with intent to distribute and sentenced by a state court to seven years' imprisonment, Richard Lyle Austin then faced an *in rem* action in the United States district court brought by the United States seeking forfeiture of his home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7).¹²⁷ In support of its action, the government offered the affidavit of Sioux Falls Police Officer Donald Satterlee which stated that Austin had met with a man at the body shop, and that Austin agreed to sell the man cocaine.¹²⁸ Austin then went to his home to obtain the drugs and

120. *Id.* (citation omitted).

121. *Id.* Thomas suggested that *Austin v. United States*, 113 S. Ct. 2801 (1993), discussed below, may be such an appropriate case. *Id.* at 515 n.2.

122. *Good Real Property*, 114 S. Ct. at 516 (Thomas, J., concurring and dissenting).

123. *See supra* note 118 and accompanying text.

124. 113 S. Ct. 2801 (1993).

125. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

126. *Austin*, 113 S. Ct. at 2803.

127. *Id.*

128. *Id.*

returned to the shop to complete the sale.¹²⁹ A search of the home and shop, pursuant to a warrant, uncovered small amounts of marijuana, a small gun, drug paraphernalia, and some cash.¹³⁰ Austin defended against the civil forfeiture action on the grounds that it violated the Excessive Fines Clause of the Eighth Amendment.¹³¹

Justice Blackmun, writing for the Court, traced the purposes of the Eighth Amendment. He stated that "the Eighth Amendment and § 10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent the government from abusing its power to punish."¹³² The issue then became "not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment."¹³³ The Court employed a test which was based on the idea that " 'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' "¹³⁴

In examining the theories underlying civil forfeiture, the Court stated that concepts of the property's guilt rest upon a belief in the owner's misuse of the property or negligence in allowing the property to be misused.¹³⁵ This is illustrated, the Court noted, by the fact that if forfeiture was not intended to punish the owner there would be no need for the innocent owner defense.¹³⁶ Thus, the Court concluded that in rem forfeiture was, at least in part, punishment.¹³⁷ The punitive nature of forfeiture under § 881 was confirmed in the Court's eyes by the legislative history tying forfeiture to the commission of drug offenses.¹³⁸

Because civil forfeiture is punishment, the Court held that it could be limited by the Excessive Fines Clause of the Eighth Amendment.¹³⁹ Significantly, the Court declined to fashion a test to determine when civil forfeiture violates the Eighth Amendment, instead leaving that for the lower courts to consider.¹⁴⁰

Justice Scalia wrote a concurring opinion in which he offered a standard by which to weigh the proportional punishment of the forfei-

129. *Id.*

130. *Id.*

131. *Id.* at 2804.

132. *Id.*

133. *Id.* at 2806.

134. *Id.* at 2806 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

135. *Id.* at 2808.

136. *Id.* at 2809.

137. *Id.* at 2810.

138. *Id.* at 2811.

139. *Id.* at 2812.

140. *Id.*

ture. "The question," according to Scalia, "is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense."¹⁴¹ Scalia argued that the monetary value of the seized property was not important; he illustrated the point by explaining that scales used to measure illegal drugs would be seized whether made of gold or base metals.¹⁴²

Scalia's discussion of the extent of the taint of unlawful use is consistent with past civil forfeiture doctrine;¹⁴³ however, it fails to address the difference between real and personal property. While he is correct that the monetary value of the property is not the issue, the nature of the property and the claimant's interest in it may be. To illustrate the point, whether the property is a mansion or a simple family house may not be relevant, but whether the property is expensive chemical manufacturing equipment or equally valuable homestead property may be. The effect of recent homestead property decisions on state civil forfeiture actions as well as attempts to use state homestead exemptions as a defense against federal civil forfeiture will be discussed in the next section.

IV. WHERE THE LAW STANDS

A. *State Homestead Exemptions as a Defense to State Civil Forfeiture*

Florida followed Iowa in holding that its homestead exemption precluded civil forfeiture of homestead property.¹⁴⁴ Several other states have also considered whether their homestead provisions similarly limit civil forfeiture, but the results are mixed.

In recent years, although before *Caggiano*, both Arizona and Colorado courts held that their respective homestead exemptions did not preclude civil forfeiture of homestead property. In *Colorado v. Allen*,¹⁴⁵ a Colorado appeals court examined Colorado's statutory homestead exemption. It held that the law only protected homestead property from seizure "arising from any debt, contract, or civil obligation."¹⁴⁶ In that case, the claimant's home had already been declared a public nuisance because of its use in criminal activity.¹⁴⁷ Because the forfeiture

141. *Id.* at 2812, 2815 (Scalia, J., concurring).

142. *Id.* at 2815.

143. *See id.* Such a discussion is typical of the legal fiction regarding the property's guilt. *See supra* notes 11-15 and accompanying text.

144. *See supra* text accompanying note 52.

145. 767 P.2d 798 (Colo. Ct. App. 1988).

146. *Id.* at 800 (quoting COLO. REV. STAT. § 38-41-201 (1982)).

147. *Id.* This characterization of the action against the premises seems to correspond with the federal concept of civil forfeiture as an in rem action against a guilty property. *See supra* text accompanying notes 11-15.

did not arise from a debt obligation, the court held that the exemption did not apply.¹⁴⁸

An Arizona court of appeals considered the question in *In re 1632 North Santa Rita*.¹⁴⁹ Also considering a statutory homestead exemption, the court stated that the policy behind the Arizona exemption was limited to protecting the family from forfeitures arising from debts incurred by the owner, despite the fact that the statute contained no such language.¹⁵⁰ The court reasoned that to use the exemption to protect property from forfeiture due to the illegal uses to which the property was put would violate the policies behind the exemption.¹⁵¹

In addition to Florida and Iowa, two states have recently held that their homestead exemptions do protect homestead property from civil forfeiture. In *Oklahoma ex rel. McCoy v. 1844 Burnt Oak Drive*,¹⁵² an Oklahoma court of appeals adopted the reasoning of *In re Bly*, and held that because its statutory exemption contained no language limiting it to seizure arising from debts, it protected the claimants homestead property from civil forfeiture arising from that property's use in the commission of a crime.¹⁵³

In *Kansas ex rel. Braun v. 918 North County Line Road*,¹⁵⁴ the Supreme Court of Kansas held that its constitutional homestead exemption did protect homestead property from civil forfeiture. The court reasoned that because civil forfeiture was not one of the specific exceptions to the homestead exemption, it was not immune from the exemption's protections.¹⁵⁵ This holding was predicated in large part on Kansas's policy of "zealously" protecting homestead property rights.¹⁵⁶

One explanation for the split among the states is that courts have not protected homesteads from civil forfeiture when the homestead exemptions are merely statutory or expressly limited to debt situations, while courts have protected homesteads from civil forfeiture when the exemptions are constitutional or not expressly limited to debt situations.¹⁵⁷ Thus, when the exemption is worded to indicate a broad policy consideration in favor of the importance of the home, or when the importance of the homestead interest is emphasized by its inclusion in a

148. *Allen*, 767 P.2d at 800.

149. 801 P.2d 432 (Ariz. Ct. App. 1990).

150. *Id.* at 437.

151. *Id.*

152. 831 P.2d 1008 (Okla. Ct. App. 1992).

153. *Id.* at 1010; *see supra* text accompanying note 58.

154. 840 P.2d 453 (Kan. 1992).

155. *Id.* at 455.

156. *Id.*

157. *See Eustace, supra* note 28, at 1129.

state's constitution, courts seem willing to use the exemption to protect homestead property from state civil forfeiture.

B. *State Homestead Exemptions as a Defense to Federal Civil Forfeiture*

Once the state courts determined that state homestead exemptions protect homestead property from state civil forfeiture, it became necessary to determine what effect these state homestead exemptions have on federal civil forfeiture. To date, only the Eighth and Eleventh Circuits have addressed the issue, and each has ruled that federal civil forfeiture statutes preempt state homestead exemptions.¹⁵⁸

In *United States v. 1606 Butterfield Road*,¹⁵⁹ a case arising out of the same circumstances as *In re Bly*,¹⁶⁰ the Bly's tried to argue that the state homestead exemption blocked federal civil forfeiture as it did state civil forfeiture.¹⁶¹ The United States District Court for the Northern District of Iowa rejected this defense, finding that the Supremacy Clause of the United States Constitution requires that federal law applies whenever a conflict between state and federal law exists.¹⁶² The only way to apply the state and federal statutes consistently, the court stated, was to apply the state homestead exemption only to state civil forfeiture proceedings.¹⁶³ Although property interests are defined by the states, the court reasoned, "[t]he issue is whether the property interest is subject to forfeiture and not whether a property interest exists."¹⁶⁴ Thus, the court held that 21 U.S.C. § 881, as written by Congress, applies to all property; therefore, the state homestead exemption does not preclude federal forfeiture.¹⁶⁵

In a case arising out of Iowa, the Eighth Circuit addressed the question of preemption in *United States v. Curtis*.¹⁶⁶ The court held that a uniform application of the federal statute required that the federal law preempt Iowa's homestead exemption.¹⁶⁷

In a case before the United States District Court for the Southern District of Florida, property owners raised Florida's homestead exemp-

158. See *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1498 (11th Cir. 1994); *United States v. Curtis*, 965 F.2d 610, 616 (8th Cir. 1992).

159. 786 F. Supp. 1497 (N.D. Iowa 1991).

160. 456 N.W.2d 195 (Iowa 1990) (holding that Iowa's homestead exemption precluded forfeiture of the Bly's homestead property under a state civil forfeiture statute).

161. *1606 Butterfield Rd.*, 786 F. Supp. at 1503.

162. *Id.* at 1504 (citing U.S. CONST. art. VI, cl. 2).

163. *Id.*

164. *Id.* at 1505.

165. See *id.*

166. 965 F.2d 610 (8th Cir. 1992).

167. *Id.* at 616.

tion as a defense to federal civil forfeiture.¹⁶⁸ The court found that although state law defines the interests of the owner, and federal law protects the interests of an innocent owner, there was no basis for holding that federal law protected homestead property.¹⁶⁹ In fact, the court held that prohibiting the forfeiture of homestead property would violate the intent of Congress; thus, the federal law preempted the contrary state homestead exemption.¹⁷⁰

In *United States v. 18755 North Bay Road*,¹⁷¹ the Eleventh Circuit addressed many of the issues that have been discussed in this Comment. This in rem civil forfeiture action was initiated by the Government against the single family residence of Emilio and Yolanda Delio after a search pursuant to warrant uncovered gambling records, poker tables, poker chips, decks of cards, and cash.¹⁷² The evidence of gambling, consisting of a Wednesday night poker game, resulted in Emilio's conviction for conducting an illegal gambling operation.¹⁷³ Yolanda was not a party to the criminal case.¹⁷⁴

Addressing the Delios' defense regarding Florida's homestead exemption, the court noted that "state constitutional provisions cannot obstruct the uniform national enforcement of federal criminal statutes or those federal forfeiture laws intended to have uniform application throughout the nation."¹⁷⁵ The Delios argued that 18 U.S.C. § 1955, pursuant to which the Government sought forfeiture, defined its application by incorporating state gambling laws; therefore, the state homestead exemption should be incorporated as a limit to the possible penalties for violating the statute.¹⁷⁶ The court disagreed and held that the federal statute borrowed state law only to the extent of defining the illegal activity, and that there was no indication that Congress intended to incorporate state law as a limit to forfeiture.¹⁷⁷ Because the statute served a national purpose (fighting illegal gambling), the federal law preempted the state homestead exemption.

Thus far, the federal courts have not accepted a state homestead exemption as a defense to a federal civil forfeiture action. These hold-

168. *United States v. 212 Airport Rd.*, 771 F. Supp. 1214, 1215 (1991).

169. *Id.* at 1215-16.

170. *Id.* at 1216.

171. 13 F.3d 1493 (11th Cir. 1994).

172. *Id.* at 1494.

173. *Id.* at 1495.

174. *Id.* Yolanda's separate innocent owner defense raised important issues regarding collateral estoppel and tenancy by the entireties. *Id.* at 1496-98. Although these issues are unfortunately beyond the scope of this Comment, they certainly merit further discussion.

175. *Id.* at 1497.

176. *Id.*

177. *Id.*

ings were all based on preemption doctrine; and on that issue, those claiming the application of a state homestead exemption against a federal statute will certainly fail. A better defense to federal civil forfeiture might be that the fundamental sanctity of the home raises the stakes for any proportionality determination under *Austin*.

C. *Excessive Fines Analyses After Austin*

Although there is still no consensus among the lower courts as to the appropriate test for civil forfeiture challenges based upon the Eighth Amendment, there is some indication that Justice Scalia's "substantial relation" test¹⁷⁸ is gaining acceptance.¹⁷⁹ Only the Fourth Circuit has enunciated a clear statement of its test, what it calls an "instrumentality test."

In *United States v. Chandler*,¹⁸⁰ the United States Court of Appeals for the Fourth Circuit addressed the question of whether the civil forfeiture of a 33 acre farm due to its involvement in drug transactions constituted an excessive fine under the Eighth Amendment in light of the Supreme Court's decision in *Austin*.¹⁸¹ Before the trial court, the Government had introduced evidence that the property owner's employees had been paid in quantities of illegal narcotics for their work on the property.¹⁸² Further, witnesses testified to seeing multiple drug transactions consummated in the kitchen, garage, and basement of the farm house.¹⁸³

Noting the ambiguity of the previous approaches to Eighth Amendment analysis,¹⁸⁴ the Fourth Circuit announced a clear three-part test that measures: "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder."¹⁸⁵

178. See *supra* text accompanying note 141.

179. See *United States v. 2408 Parliament*, 859 F. Supp. 1075 (E.D. Mich. 1994); *United States v. Shelly's Riverside Hgts., Lot X*, 859 F. Supp. 150 (M.D. Pa. 1994); *United States v. 2828 N. 54th St.*, 829 F. Supp. 1071, 1073 (E.D. Wis. 1993). Nonetheless, there has not been complete agreement amongst the lower courts. For example, the Northern District of New York has refused to follow Justice Scalia's approach. *United States v. 835 Seventh St.*, 832 F. Supp. 43, 48 (N.D.N.Y. 1993). See also *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994), in which the Eighth Circuit offered a version of Justice Scalia's substantial relation test in which other factors such as the quantum of property forfeited and the owner's monetary interest in the criminal enterprise are taken into account. *Id.* at 1236 n.2, 1236-37.

180. No. 93-2064, 1994 U.S. App. LEXIS 27049 (4th Cir. Sept. 27, 1994).

181. *Id.* at *1.

182. *Id.* at *4.

183. *Id.* at *4-5.

184. See *id.* at *11-12.

185. *Id.* at *18-19.

In applying this test, the Fourth Circuit stated that a court should examine the role the property played in the offense, i.e. its instrumentality.¹⁸⁶ In the case at issue, the court noted that the farm house had served as the site of over 130 drug transactions, and that the secluded location of the property was vital to the drug activity.¹⁸⁷ Further, the drug activity occurred throughout the house, and the property itself was maintained with payments made in drugs.¹⁸⁸ Because the property owner was directly involved in these transactions, and he had failed to offer evidence as to how tainted portions of the property could be distinguished or separated from untainted portions,¹⁸⁹ the court held that forfeiture of the entire 33 acre property did not violate the Excessive Fines Clause.¹⁹⁰ It seems that by focusing on the relationship of the property to the offense, the Fourth Circuit has embraced Justice Scalia's substantial relation test.

In a concurring opinion, Circuit Judge Wilkinson asserted that the announced test was appropriate because it bore a close relation to the type of analysis employed in the underlying forfeiture proceeding.¹⁹¹ Once the culpability of the property is established below, he argued, the appeals court would have little difficulty finding that the three-part test was met.¹⁹²

The troubling aspect of Justice Scalia's approach, though, is its seeming reliance on the personification fiction. How can a piece of property be said to bear a substantial relation to the crime? If, for example, a property owner uses the garage attached to his house as a storage site for illegal drugs, one could say that the house was substantially related to the crime and therefore subject to forfeiture. However, despite this characterization, would it not be more realistic to state that the owner had used the house in an illegal manner and thus must, according to forfeiture doctrine, lose his rights in the house? This articulation of the theory illustrates the truly punitive nature of civil forfeiture, which implicated the Eighth Amendment question in the first place. Justice

186. *Id.* at *16-17.

187. *Id.* at *23.

188. *Id.* at *23-24.

189. One must wonder how the court would employ this aspect of the test in other circumstances. For instance, how could this prong be applied logically in a case where drug activity was confined to a single room in a vast estate? It seems that this part of the test relies on quirks of architecture rather than on a more careful examination of the property interests at stake.

190. *Chandler*, 1994 U.S. App. LEXIS 27049.

191. *Id.* at *30 (Wilkinson, J., concurring).

192. *Id.* at *32. What seems to Judge Wilkinson to be the tests's strength, might also be considered a fatal flaw. The Supreme Court's decision in *Austin* seemed to call for a more careful and distinct analysis of the scope of the forfeiture, once the rightness of the forfeiture order itself was settled. Judge Wilkinson seems content to let almost any decision by a trial court stand, once the initial forfeiture decision is validated.

Scalia's test, it seems, is neither as clear cut, nor as removed from the increasingly discredited forfeiture fiction, as one would hope. A better approach may be to address the various interests at stake directly without resorting to fictions.

V. THE SANCTITY OF THE HOME AS A FACTOR IN PROPORTIONALITY

A recognition of the fundamental importance of the individual's property right in the home should provide courts, already distrustful of the government's use of civil forfeiture, with a doctrinal approach to halt the government's excesses. Courts have clearly begun to question the wisdom and legality of civil forfeiture.¹⁹³ The danger to homestead property rights is equally clear. Joseph A. Eustace Jr., in analyzing possible responses to the *Caggiano* decision, stated that any attempt to limit the application of homestead exemptions "would substantially erode the security in one's home which is the cornerstone of the homestead exemption's purpose."¹⁹⁴ The answer is for courts, already leery of civil forfeiture, to use the renewed recognition of the sacred homestead property right to block overzealous prosecutors' use of civil forfeiture on both a state and federal level.

A problem may arise from the lack of uniformity among state and federal enactments regarding homestead protections. This problem is solved if one accepts that the sacred homestead property right is not a creature of any positive law, but rather is inherent, either in common law history and tradition or in natural law. Such a recognition should not be considered too controversial. Consider the language of the Supreme Court in *United States v. James Daniel Good Real Property*.¹⁹⁵ "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and the privacy of

193. See, e.g., *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 515 n.1 (1993) (Thomas, J., concurring and dissenting) (quoting the Second Circuit as being "enormously troubled by the government's increasing and virtually unchecked use of civil forfeiture," *United States v. All Assets of Statewide Auto Parts, Inc.* 971 F.2d 896, 905 (2d Cir. 1992), and citing an Eighth Circuit opinion questioning the breadth of the government's seizure powers, *United States v. One Parcel of Property*, 964 F.2d 814, 818 (8th Cir. 1992)); see also *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1298 (7th Cir. 1990) (Cudahy, J., concurring) (stating that a broad construction of 18 U.S.C. § 1955 "if seriously espoused—could raise significant constitutional questions"); Eustace, *supra* note 28, at 1131 (He states that "[e]xperience has shown that law enforcement officials have zealously pursued forfeiture at almost every available opportunity." Eustace further offered his personal observations from his tenure as a federal prosecutor when he saw "pre-indictment and conviction seizures of homesteads with only slight connections to criminal activity, and . . . the threat of homestead forfeiture used as a bargaining chip with defendants and witnesses alike.").

194. Eustace, *supra* note 28, at 1131.

195. 114 S. Ct. 492 (1993).

the home and those who take shelter within it.”¹⁹⁶ Consider, too, Justice Thomas’s separate opinion in which he referred to property rights as “central to our heritage,” and the sanctity of the home as “embedded in our traditions since the origins of the Republic.”¹⁹⁷ The fundamental importance of homestead property rights was not born full grown out of the heads of the Florida legislators. It stems from the deeper philosophy and traditions of individual freedom. The sanctity of the home, therefore, should be taken into account by courts at all levels and in all jurisdictions whether or not there is an applicable homestead exemption provision.

Positive enactments of homestead exemptions, as in Florida, must be seen as legislative attempts to recognize and accommodate the inherent sanctity of the home. Such enactments should be given full effect by the courts of the jurisdiction. Thus, the Florida Constitution, for example, precludes all state civil forfeiture. Though the fundamental homestead property right exists with or without the provisions of Article X, Section 4 of the Florida Constitution, its inclusion therein reinforces the power of Florida courts to prohibit all attempts at civil forfeiture under state statutes.

What then to do with forfeiture actions in states without a constitutional or broad-based statutory homestead exemption, or in civil forfeiture actions by the federal government? In those cases, the inherent homestead property right must be asserted. The courts on all levels should give this fundamental property interest heavy weight in future proportionality determinations. Instead of applying Justice Scalia’s substantial relation test, courts ought to balance the government’s interest in stripping an alleged wrong-doer of his unlawfully employed property against the property owner’s strong property interest in his home. This test would force the government to establish the property owner’s misuse of the property and to establish a crime control purpose sufficient to overcome the owner’s inherent rights in his home. In contrast to Scalia’s test in which the only factor is the extent to which the property was used in the crime, this proposed test requires the courts to factor in the enormity of the alleged crime and the property interest at stake. It may seem that this test gives greater protection to the property than is afforded to the property owner if he were facing criminal sentencing. While it is true that a person convicted of a drug offense may face stiff penalties even for small amounts of drugs, a criminal defendant is entitled to far greater protection than is a piece of property subjected to

196. *Id.* at 505.

197. *Id.* at 515 (Thomas, J., concurring and dissenting) (citations omitted).

forfeiture proceedings.¹⁹⁸

The Eleventh Circuit, in the case of Yolanda and Emilio Delio, reached a similar holding when examining the proportionality question raised by *Austin*.¹⁹⁹ The court stated:

[e]xamining this case through the lens of *Austin*, and accepting the fact that Emilio Delio used his home for a gambling operation in violation of 18 U.S.C. § 1955, we conclude, under the particular facts of this case, that the forfeiture of his home, of an arguable value of \$150,000.00, is an imposition of a disproportionate penalty.²⁰⁰

For the court to have held otherwise would have violated the spirit and language of the Eighth Amendment as characterized by the Supreme Court in *Austin*.²⁰¹ Such a holding could not be based on Florida's homestead exemption; that provision is preempted by federal law. Rather, the ruling should be viewed in light of the fundamental importance of homestead property rights in this country.

Contrast this result with the facts of *United States v. Chandler*.²⁰² Under the analysis proposed in this Comment, the government's interest in curtailing large scale and continuing drug transactions and in preventing a property owner from maintaining and securing his property through the drug trade would easily outweigh the property owner's interest in the homestead property. The *owner's* interest would be diminished by *his* activity and its connection to the property.

The balancing test proposed in this Comment, in which homestead rights are given special weight, could help the courts reign in overzealous attempts by the government to use civil forfeiture in its war on crime, and yet preserve civil forfeiture as a tool to combat crime when the interests at stake legitimately call for the seizure.

VI. CONCLUSION

The government's war on drugs and crime is important and should be fought with diligence. Efforts on this behalf, however, must not lead the government into sacrificing the bedrock rights and freedoms inherent in the society it is trying to protect. When the government wishes to seize property allegedly employed by its owners in illegal ventures, the government must take care to follow the procedural and philosophical safeguards required by this country's laws, Constitution, and ideals. So

198. See *supra* notes 16-27 and accompanying text.

199. See *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1498 (11th Cir. 1994).

200. *Id.*

201. *Supra* text accompanying notes 132-134.

202. No. 93-2064, 1994 U.S. App. LEXIS 27049 (4th Cir. Sept. 27, 1994); see *supra* notes 180-92 and accompanying text.

long as the government may seize a person's home on mere probable cause, no one's home is a castle. The government must fight its wars without arbitrarily pillaging the people in whose name it acts. Now that civil forfeiture is beginning to be put in its proper place by the courts, it is time for the sanctity of the homestead property right to be recognized and addressed. *Austin* gives the courts this opportunity, and it must be heeded.

JONATHAN D. COLAN