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Reconciling Federal Asset Forfeitures and Drug Offense Sentencing

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I. INTRODUCTION

On June 13, 1990, Richard Lyle Austin met a police agent at Austin's auto body shop. The two men agreed that Austin would sell the agent some cocaine. Austin walked from the shop to his mobile home and returned with two grams of cocaine that he intended to sell to the agent. Austin was arrested. The next day, law enforcement authorities searched the mobile home and auto body shop and recovered "small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700 in cash."[1]

Until the "war on drugs" reforms of the 1980s, this offender would have faced only moderately serious punishment.[2] These facts do not suggest that Austin was a "drug kingpin" or even a mid-level trafficker. By all accounts, Austin was a small-time, street-level dealer. For his criminal misdeeds, a South Dakota state court convicted Austin of possession with intent to sell cocaine and sentenced him to seven years incarceration.[3] In other

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1. Austin v. United States, 113 S. Ct. 2801, 2803 (1993). Although police found a revolver in the home, *id.*, there is no indication in either the Supreme Court or Eighth Circuit cases that Austin was considered dangerous. *Id.*; United States v. 508 Depot Street, 964 F.2d 814 (8th Cir. 1992).

2. The Anti-Drug Abuse Act of 1986 prescribed some of the the harshest drug offense penalties to date. Pub. L. No. 99-570, 100 Stat. 3207 (1986); *see* Steven Wisotski, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HAST. L.J. 889, 904 (1987).

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

words, the sentencing court determined that seven years was adequate punishment for the crime. Yet after his conviction, the federal government also initiated civil forfeiture proceedings in order to seize both his mobile home and his auto body shop on the ground that these properties "facilitated" the drug deal.[4] Thus, in addition to a seven-year prison term, the federal government deprived Austin of virtually all of his assets.

During the October 1992 term, the Supreme Court heard Austin's case. The Court determined that the seizure of his home and his legitimate business enterprise constituted punishment for a crime and therefore should be subject to the constraints of the Eighth Amendment's prohibition on "excessive fines."[5] This case and four others the Court heard during the same term limit the reach of federal drug asset forfeitures.[6] The *Austin* case in particular indicates the Court's apparent view that the cumulative effect of criminal and civil punishments on drug offenders deserves reassessment.

The present movement to reform drug sentencing focuses exclusively on criminal sentencing provisions. Some federal district court judges and other observers have loudly protested the harshness of the mandatory prison sentences that drug offenders receive.[7] For its part, the Justice Department has demon-

4. *Id.* Federal asset forfeiture laws permit the government to seize properties that "facilitate" a drug law violation. 21 U.S.C. § 881(a)(7) (1988); *see also infra* notes 40-49 and accompanying text (addressing punitive nature of various provisions of § 881).

5. *Austin*, 113 S. Ct. at 2812.

6. The Supreme Court ruled against the government in four of the five forfeiture cases decided this term. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 495 (1993) (holding that "[absent exigent circumstances, the Due Process Clause requires the Government to afford notice and an opportunity to be heard before seizing real property subject to civil forfeiture"); Austin v. United States, 113 S. Ct. 2801, 2803 (1993) (holding that Eighth Amendment's Excessive Fines Clause applies to civil forfeiture penalties); United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1131-34 (1993) (concluding that owner's ignorance of the source of the funds she used to purchase real property is a defense to a civil forfeiture proceeding against that property); Republic Nat'l Bank v. United States, 113 S. Ct. 554, 562 (1992) (holding that government cannot deprive the appellate court of jurisdiction by transferring proceeds from forfeited property out of judicial district). The fifth case, *Alexander v. United States*, is a criminal forfeiture case in which the Court remanded for further proceedings consistent with its decision in *Austin*. 113 S. Ct. 2766, 2776 (1993).

7. Of course, many judges resent their loss of discretion in sentencing. *See, e.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 924-25 (1991) (discussing how some judges defy the guidelines); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J.

strated a new willingness to reconsider federal drug policies.[8] Yet the dialogue of sentencing reform omits any consideration of the use of civil asset forfeitures as a means of punishing drug offenders. A complete assessment of drug sentencing must take into account the full extent of drug offense punishment by including both traditional criminal sentences and the civil forfeiture of assets such as homes and businesses.

The civil forfeiture process, upon which federal prosecutors heavily rely, offers numerous procedural and financial benefits to law enforcement over criminal sentencing.[9] In fact, the gov-

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1681, 1685 (1992) (noting that the "guidelines have provoked dismay and evasion in the federal courts and the bar"). Many judges complain specifically about the harshness of sentences under the guidelines and, in particular, the harshness of drug sentences. *See* U.S. District Senior Judge Whitman Knapp, The War on Drugs, Address Before the Merchants Club in New York City (Mar. 24, 1993), *in* 5 FED. SENTENCING REP., Mar./Apr. 1993, at 294-97 (discussing the futility of the drug war and its "terrible judicial result" on sentencing); Memorandum from Jack B. Weinstein, U.S. District Senior Judge for the Eastern District of New York, to the Judges and Magistrates of the Eastern District of New York (Apr. 12, 1993), *in* 5 FED. SENTENCING REP., Mar./Apr. 1993, at 298 (removing himself, as has Judge Knapp, from sentencing in drug cases); *see also Sentencing Commission's Symposium on Drugs and Violence Puts Emphasis on Prevention*, 53 CRIM. L. REP. (BNA) No. 12, at 1265 (June 23, 1993) (summarizing discussions by symposium speakers criticizing federal mandatory minimum sentences for drug offenses); Cris Carmody, *Revolt to Sentencing Is Gaining Momentum*, NAT'L L.J., May 17, 1993, at 10 (reporting that Judges Knapp and Weinstein refuse to take drug cases because they believe the Federal Sentencing Guidelines are too harsh); David Margolick, *Full Spectrum of Judicial Critics Assail Prison Sentencing Guides; 5-Year Effort Is Called Hobgoblin of U.S. Courts*, N.Y. TIMES, Apr. 12, 1992, at A1 (discussing widespread judicial criticism of the guidelines); Jonathan M. Moses, *Many Judges Skirt Sentencing Guidelines*, WALL ST. J., May 7, 1993, at B-12 (reporting some judges' reluctance to apply stiff sentences that the guidelines require in drug cases); Deborah Young, *Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENTENCING REP., Sept./Oct. 1990, at 63 (noting several federal judges who have publicly complained about the harshness of the guidelines and one who resigned in protest).

8. The change in attitude may simply reflect the changing of the guard that occurred when the new administration appointed a new Attorney General, Janet Reno. She announced as one of her first policy statements that she will reconsider the way in which minor drug offenders are sentenced in federal court. Stephen Labaton, *Reno Moving to Reverse Stiff Sentencing Rule for Minor Drug Crimes*, N.Y. TIMES, May 5, 1993, at A19; *see also* Joseph B. Treaster, *Clinton Altering Nation's Tactics in Drug Battle*, N.Y. TIMES, Oct. 21, 1993, at A1 (reporting that President Clinton planned to focus national drug strategy on treatment for hard-core drug users and social programs rather than on interdiction of drugs).

9. *See* William P. Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1313-32 (1992) (concluding the civil forfeiture process not only provides monetary incentives for law enforce-

ernment's advantages so overwhelm property owners that commentators have long criticized the perceived constitutional and policy shortcomings of civil forfeiture.[10] Drug offenders, how-

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ment but also enables the government to take advantage of a lower evidentiary standard and broad civil discovery rules); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof And the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 279-86 (1992) (outlining briefly the procedural steps for affecting a forfeiture).

The Justice Department strongly advocates the use of the civil asset forfeiture process and encourages states to develop similar statutes for reasons of expediency. *See* 1991 ANN. REP. OF THE DEP'T OF JUSTICE ASSET FORFEITURE PROGRAM 12 (hereinafter 1991 ANN. REP.) ("[States] should allow the use of civil proceedings, so that prosecutors need not wait for the conclusion of an often lengthy criminal trial before forfeiting assets obviously derived from or connected with the drug trade."); *see also* part II.C (addressing the government's advantages and interests in civil forfeiture of drug assets).

10. For a discussion of civil forfeiture, see generally Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254 (1989) (proposing legislative reform of forfeiture laws to better protect the rights of third parties); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1 (1991) (arguing that amending RICO to give the courts discretion in forfeiture cases would avoid Eighth Amendment concerns); Stahl, *supra* note 9 (arguing that forfeiture constitutes criminal punishment and that the government must therefore prove its case beyond a reasonable doubt); Alok Ahuja, *Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment*, 5 YALE L. & POL'Y REV. 428 (1987) (advocating strict application of Fourth Amendment standards in the context of civil forfeiture); Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990) (advocating a narrower construction of the relation-back doctrine and an amendment to the innocent-ownership defense to promote consistent and fair application of forfeiture laws); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471 (1989) (encouraging consistent treatment by suggesting a broad interpretation of the innocent owner defense); Nelson, *supra* note 9 (suggesting a rule that would prohibit the forfeiture of assets taken in violation of the Fourth Amendment); Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 UNIV. MIAMI L. REV. 911 (1991) (endorsing the proposition that "draconian" civil forfeiture laws violate defendants' due process rights); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217 (1992) (discussing need for a forfeiture proposal that would balance the interests of the both the government and the innocent owners of forfeited property); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990) (arguing that drug forfeiture statutes are criminal and proposing reform that provides adequate due process and reduces harsh results); Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303 (1988) (defending expansive interpretation of federal forfeiture provisions against Eighth Amendment challenges); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165 (1990) (finding constitutional need to narrow the

ever, also face stiff criminal penalties. In effect, Congress has created parallel systems for the disposition of drug cases: one civil and one criminal. The civil forfeiture process serves as an adjunct or as an alternative to the criminal justice system. In some cases, the government may pursue both civil forfeiture and criminal prosecution. By pursuing both civil and criminal actions, the government may inflict punishment on drug offenders twice because criminal courts do not factor into the sentencing calculus the loss suffered from the forfeiture action.[11]

Changes in the operation of the civil forfeiture process, such as those required by *Austin*, may make that process, standing alone, more fair because courts will measure the value of forfeited properties against the severity of the offense. Such changes, however, will not promote rational, fair treatment of drug offenders overall. The relationship between the dual criminal and civil sources of punishment for drug offenders has evaded scrutiny because, until *Austin*, courts did not consider civil forfeitures as punishment, but merely as remedial measures. By structuring the forfeiture process as a civil action, Congress created a system that courts treat as distinct and ostensibly unrelated to the criminal sentencing system.

This Article urges Congress and courts to reconsider and reconcile the dual measures employed against drug offenders. Civil forfeiture practice may be a legitimate and necessary response in some cases, such as when the drug offender is outside the jurisdictional reach of the government, which was the original purpose of civil asset forfeiture,[12] or to recover contraband, instrumentalities, or ill-gotten gains. When the government reaches beyond this limited set of cases, however, it moves into the realm of punishment for crime. As such, Congress and courts should factor this punishment into the sentencing decision to promote rational and proportional sentencing.[13]

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scope of drug forfeiture); Jack Yoskowitz, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J. L. & SOC. PROBS. 567 (1992) (arguing that the in rem nature of civil forfeiture is a legal fiction that should be abolished).

11. For a discussion of the Fifth Amendment double jeopardy implications of punitive forfeitures followed by criminal sentences, see *infra* notes 182-196 and accompanying text.

12. Originally, the civil asset forfeiture process developed in admiralty law was intended to exact punishment on, and recover restitution for victims from, foreign owners of ships who could not be brought into court. *See infra* notes 169-174 and accompanying text (discussing early forfeiture statutes).

13. For a discussion of proportionality as a goal at sentencing, see *infra* part II.B.

Ideally, Congress should abolish the practice of imposing punitive forfeitures in civil forfeiture actions. Alternatively, the United States Sentencing Commission could amend the Federal Sentencing Guidelines provisions on fines and forfeitures to require judges to factor the consequences of civil forfeiture actions into their sentencing decisions. Finally, even without action by Congress or the Commission, individual sentencing judges could exercise their authority to depart downward from Guidelines sentences on account of punitive civil forfeitures, and they could utilize criminal forfeitures as a means of tempering prison sentences.

By acknowledging that punitive forfeitures are part of criminal sentences, criminal courts would accomplish two important goals. They would be able to better tailor the criminal sentences to fit the crimes. A sentencing judge probably would not find that a small-time dealer like Austin deserves to be deprived of all his assets. Criminal courts also would be able to reduce their reliance on imprisonment as a primary form of punishment. Instead, courts could impose financial penalties and punitive forfeitures in combination with shorter prison sentences. As drug offenses are the most vigorously prosecuted offenses, these changes would have a significant impact on the administration of criminal justice in federal courts.[14]

Part II of this Article examines the parallel systems for punishing drug offenders by criminal sentencing as well as the civil forfeiture process. This section describes the civil forfeiture process and examines its advantages to prosecution and law enforcement. Part III of this Article highlights two significant recent decisions that signal a change in the Court's previously supportive view of civil forfeiture: *Austin v. United States*[15] and *United States v. 92 Buena Vista Ave.*[16] These cases focus on two fundamental penological limiting principles: the mental element of a criminal act and proportionality in sentencing. Neither principle previously has played a part in the civil forfei-

14. A number of measures reflect the high priority the federal government has placed on the prosecution of drug offenses since 1980. The Bureau of Justice Statistics reports that between 1980 and 1990, the number of drug offenders convicted in federal courts more than tripled, while the number of non-drug convictions rose by only 32%. Douglas C. McDonald et al., *Federal Sentencing in Transition, 1986-90*, BUREAU OF JUSTICE STATISTICS SPECIAL REP. 4 (1992). Of the 37,725 offenders receiving prison sentences in federal courts in 1992, 15,544 were convicted of drug trafficking. 1992 U.S. SENTENCING COMM'N ANN. REP. app. B.

15. 113 S. Ct. 2801 (1993).

16. 113 S. Ct. 1126 (1993).

ture process. The judicial pronouncements will work some basic changes in the civil forfeiture process that will reshape it to better conform to the criminal process paradigm. Yet these adjustments are insufficient if the goal is to rationalize drug offense sentencing. Even if the civil process can protect drug offenders from excessive or arbitrary punishment, imposition of punishment through the combination of civil and criminal actions can produce a package of punishments that may far exceed that which is justified by the severity of the infraction.

In Part IV, this Article suggests some statutory reforms that would consolidate the punishment of drug offenders into a single, comprehensive criminal sentencing proceeding. Purely remedial forfeitures could continue to be brought in civil actions, but punitive forfeitures would best be sought after conviction in a criminal proceeding. This section attempts to balance the interests of law enforcement in obtaining asset forfeitures against the sentencing concerns that current civil forfeiture practices raise. This Article concludes that some aspects of the civil system can be transferred to the criminal system without jeopardizing law enforcement's ability to investigate and disable complex drug operations. Overall, the legitimate and pressing needs of law enforcement and the goals of fair sentencing can both be satisfied.

II. THE EMERGENCE OF CIVIL ASSET FORFEITURE AS A PARALLEL SYSTEM OF PUNISHMENT

Traditionally, the State has brought its power to bear against individuals who violate the penal laws of the jurisdiction.[17] Upon conviction, courts sentence individuals to a punishment—involving a deprivation of life, liberty, or property—consistent with various factors that courts have long considered relevant to the sentencing decision.[18] In most cases, this process

17. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968) (discussing the philosophy of penal law); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) (describing the rationale, procedure, and limitations of criminal law); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958) (pointing out the complexities and competing principles within criminal law).

18. Under the traditional indeterminate sentencing system that federal judges used until the late 1980s, courts had broad discretion in deciding whether certain factors were relevant to the sentencing decision and how much weight to accord them. Most courts agreed that the severity of the offense was extremely significant. *See, e.g.*, Williams v. New York, 337 U.S. 241, 247 (1949) (noting that indeterminate sentencing requires courts to look at "the fullest information possible concerning the defendant's life and characteristics"). Of-

works well in the sense that it permits society to pursue the goals of the criminal justice system by publicly sanctioning the individuals responsible for the violations.

In other cases, this process does not work well, namely, in those cases in which law enforcement cannot bring individuals to justice because it cannot bring them into the jurisdiction. Originally, the creation of civil in rem forfeitures gave the government a tool to punish individuals over whom courts could not obtain in personam jurisdiction, but whose property was found within the jurisdiction.[19] In the earliest forfeiture cases involving admiralty issues, courts determined that the arrest and punishment of the individuals on the vessel would be ineffectual as a deterrent to smuggling because the vessel, if returned to its foreign owners, would simply make its way back into the country with a new crew.[20] The need to confiscate the contraband as well as the offending vessel was manifest if the government intended to sanction the foreign owners.

Over the years, Congress expanded the scope of civil in rem forfeitures beyond that which is justified by its original purpose.

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fense severity, however, varied according to the circumstances. A man who intentionally killed his wife to collect life insurance and marry another woman would be considered the worst type of killer. On the other hand, a man who intentionally killed his wife because she had a terminal illness and was suffering greatly would be treated with compassion by most judges. Courts also considered offender characteristics such as family background, employment, age, and education. These characteristics were generally considered relevant to an offender's potential to be rehabilitated. *See id.* at 247-50.

For an insightful analysis of federal district court decision-making in a study of white collar criminal cases prior to the enactment of determinate sentencing via the Federal Sentencing Guidelines, see STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988). For a discussion of post-guidelines sentencing factors, see Barbara S. Meierhoffer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367 (1992) (evaluating the results of a study of drug offenders sentenced from January 1984 through 1990).

19. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." Shaffer v. Heitner, 433 U.S. 186, 199 (1977). The state in which the property is located has exclusive sovereignty over that property. *Id.* at 200. In rem actions will proceed regardless of the owner's location. *Id.* at 199-200. In in rem actions, courts follow the guidelines of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Under this standard, courts must evaluate all assertions of state jurisdiction according to "traditional notions of fair play and substantial justice" and the complainant must have at least "minimum contacts" with the forum state. *Id.* at 316-19; *see also infra* part IV.A.2 (discussing lack of in personam jurisdiction).

20. The Department of Justice uses this example in its discussion of the need for asset forfeitures. 1991 ANN. REP., *supra* note 9, at 7. The report, however, does not offer a theoretical justification for civil forfeitures in cases in which the government can bring individuals into custody.

Congress has adapted this expanded form of civil in rem forfeiture to fight the drug industry by permitting forfeiture for any felony violation of federal drug laws.[21] In effect, Congress has chosen to resort to a parallel system for punishing drug offenders: criminal sentencing of the individual and a civil forfeiture process by which a person can be dispossessed of any property involved in the drug offense.[22]

In retrospect, one can understand why asset forfeitures became a central focus of law enforcement activities in the drug war. Students of drug crimes have long recognized that, unlike most criminals, drug offenders are part of a profit-making "industry."[23] The lifeblood of the industry is the money that it generates. How better, then, to deal with drug offenders than to deprive them, and their associates, of the fruits of their labor. It was only a matter of time before Congress sought to attack the economic base of the drug industry.[24]

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21. The growth of federal drug laws has expanded the reach of the forfeiture laws. With the Anti-Drug Abuse Act of 1988, Congress dramatically increased the scope of activity that federal criminal law covers. Pub. L. No. 100-690, 102 Stat. 4181 (1988). Much of the activity encompassed by the 1988 statute had previously been addressed at the state level and has no obvious federal interest. The provision making it a federal crime to possess even a small amount of a controlled substance provides a stark example. 21 U.S.C. § 844(a) (1988); *see also* Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 257 (1992) (providing examples of harsh drug penalties). Federal drug law now also doubles and triples the penalities for drug offenders if their crimes involve youths or pregnant women. 21 U.S.C. § 845b(d), (f) (1988). The statute reaches the distribution of a controlled substance to persons under 21 years of age, 21 U.S.C. § 845 (1988), and the distribution or manufacture of a controlled substance within one thousand feet of any school—public or private, grade school through university level—or within one hundred feet of any playground, public or private youth center, public swimming pool, or video arcade facility. 21 U.S.C. § 845a(a) (1988).

22. Although a criminal forfeiture process also exists, 21 U.S.C. § 853 (1988), the government uses it less. *See infra* notes 51-62 and accompanying text (discussing the government's preference of civil over criminal forfeiture).

23. *See, e.g.*, Gerald T. McLaughlin, *Cocaine: The History and Regulation of a Dangerous Drug*, 58 CORNELL L. REV. 537, 547-549 (1973) (addressing the distribution and sale of heroin and cocaine arriving from sources abroad into the United States); James E. Gierach, *An Economic Attack on Illicit Drugs*, A.B.A. J., May 1993, at 95 (encouraging an economic and medically based national drug policy).

24. At the same time that Congress enacted provisions to deprive drug traders of their profits, the legislature also enacted a similar provision to attack the economic base of organized crime, the Organized Crime Control Act of 1970 (the progenitor to the Racketeer Influenced and Corrupt Organizations ("RICO") statute). Pub. L. No. 91-452, § 901, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992)).

Having determined that financial penalties, even more than deprivations of liberty, would work most effectively to deter the drug trade, Congress could have proceeded in at least three ways: it might have opted to stiffen the fine provisions of the Federal Sentencing Guidelines applicable to drug offenses; it might have created a sweeping criminal forfeiture process; or it might have adopted a process separate and apart from the criminal process altogether, such as the in rem civil forfeiture action. Either of the first two options—fines or criminal forfeiture—could be imposed only after a criminal conviction as part of the sentence for the crime. Apparently, these options were less attractive than the civil forfeiture action, which requires neither a criminal conviction nor, until recently, financial deprivation limited by an assessment of the severity of the offense.[25]

At the time of sentencing for a criminal offense, courts need not take into account the value of the assets the government has seized or plans to seize through forfeiture. Sentencing may proceed as though this fact were irrelevant to the sentencing determination. The sentencing court may decide, by means of strict sentencing guidelines,[26] what punishment is proportional to the seriousness of the offense, without decreasing the criminal punishment by the amount of punishment the defendant will face in the forfeiture action. Although many have criticized the legal fiction that in rem civil forfeiture cases use to treat property as the guilty party, an even more significant legal fiction is that which allows courts to ignore the fact of forfeiture as if it was not one of the punitive measures taken against the individual. Assuming arguendo that some civil forfeitures constitute punishment, a criminal sentence imposed without regard to the

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Over time, however, the motivation behind forfeitures shifted from attacking the most powerful drug dealers to amassing the greatest revenues for law enforcement coffers, no matter how insignificant the alleged drug deal. For a thorough discussion of law enforcement goals in pursuing asset forfeitures, see Nelson, *supra* note 9 at 1324-1333; *see also infra* notes 73-83 and accompanying text.

25. *See infra* part III.B (discussing the *Austin* decision's proportionality requirement).

26. The Federal Sentencing Guidelines, adopted in 1987, place limits on federal courts' discretion in sentencing. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1993) [hereinafter U.S.S.G.]. The adoption of the Guidelines has radically changed federal sentencing practice from the indeterminate sentencing model that preceded it. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988) (providing historical analysis of the guidelines and the changes in sentencing they have created).

punishment inflicted through civil forfeiture is a fortiori excessive and disproportionate to the offense.

It is to this set of cases—those in which the government prosecutes an individual in criminal court for the same conduct that resulted in forfeiture—that reformers should focus their attention. To promote the Federal Sentencing Guideline's goals of proportionality and fairness, the extent of punishment inflicted through forfeiture should mitigate the criminal sentence.[27] This country has never considered any crime so outrageous as to obviate the need for limits on the severity of punishment in proportion to the severity of the crime.

A. History of Civil Asset Forfeitures As Punishment

In general, law enforcement authorities have long pursued civil asset forfeitures for many types of offenses because of the advantages the process offers. Civil forfeiture actions give the government the authority to seize and dispose of property involved in a criminal offense and retain the proceeds from the sale of the asset for government use.[28] Civil forfeiture actions proceed against properties, based on the fiction that the assets

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27. Indeed, forfeiture actions themselves were not designed to mete out criminal sentences. Until *Austin*, the forfeiture process did not include a proportionality requirement. The *Austin* decision now requires courts to weigh the value of assets forfeited against the seriousness of the criminal offense alleged, as they would in a sentencing proceeding, but *Austin* does nothing to remedy the double punishment problem when the government both forfeits property and exacts a sentence in criminal court as well. *See infra* part III.B (analyzing the *Austin* decision).

28. Federal law provides for the forfeiture of assets resulting from a variety of other crimes besides drug offenses. *See, e.g.*, 1991 Ann. Rep., *supra* note 9, at 29 (noting the Immigration and Naturalization Service forfeits vehicles seized at the border due to immigration law violations). The thrust of the federal asset forfeiture programs, however, is aimed at drug offenders and racketeering activity. Commonly used forfeiture statutes include the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 803, 84 Stat. 922, 937 (codified at 18 U.S.C. § 1955 (1988)) (civil forfeiture for gambling violations); the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 922, 943 (codified as amended at 18 U.S.C. § 1963 (1988 & Supp. IV 1992)) (criminal forfeiture for RICO violations); the Money and Finance Act, Pub. L. No. 97-258, § 5317, 96 Stat. 877, 998 (codified as amended at 31 U.S.C. § 5317 (1988 & Supp. IV 1992)) (civil forfeiture for money laundering violations); and the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207-35 (codified as amended at 18 U.S.C. § 981 (1988 & Supp. IV 1992) (civil forfeiture for money laundering violations and felony drug violations against foreign nations); *see also* 1991 Ann. Rep., *supra* note 9, at 107 app I. For a thorough discussion of the range of government imposed punitive civil sanctions, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992).

in question are themselves "guilty,"[29] and as if the owners had no interest in their disposition. Actions are thus styled as "United States v. A Certain Piece of Property," not as "United States v. An Individual." Deeming inanimate property to be a party to a lawsuit allows the government to avoid providing property owners with many of the protections the Constitution affords to individuals charged with crimes.[30]

Of course, contraband, drug proceeds, and genuine "instrumentalities" such as weapons or drug equipment, should be civilly forfeitable. The civil forfeiture process gives the government the means to expeditiously dispossess suspected criminals of illegal, illegally-used, or illegally-obtained items. Courts, however, have a long history of imposing civil forfeiture even in cases in which the property cannot be characterized as contraband, instrumentality, or criminal proceeds. In such cases, the government stands on shaky ground if the argument for an expeditious process is one of necessity. When the government goes beyond dispossessing criminals of illegal or dangerous substances or criminal proceeds, it moves into the realm of punishment of crime.

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29. The rule was first enunciated in United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844). The Court stated that, "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *Id.* at 233. This legal fiction persists in civil forfeiture law to date. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-684 (1974); *see also* 1991 ANN. REP., *supra* note 9, at 7-8; Terrance G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, POL'Y ANALYSIS (CATO Inst., Washington, D.C.), Sept. 29, 1992, at 3, 6-7 (discussing the fiction of proceeding against property).

30. *See generally* Stahl, *supra* note 9 (arguing that the government's burden of proof violates the Due Process Clause); Ahuja, *supra* note 10, (discussing the inadequate protection that courts afford to Fourth Amendment rights); Nelson, *supra* note 9 (same); Schecter, *supra* note 10 (concluding that civil forfeitures violate the Due Process Clause); Yoskowitz, *supra* note 10 (asserting that civil forfeitures violate the Due Process Clause and the Eighth Amendment).

The Sixth Amendment does not apply to civil forfeiture proceedings. Even in criminal forfeitures, the Supreme Court has held that the Sixth Amendment right to counsel does not bar forfeiture of assets that would be used to pay bona fide attorney's fees. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989); *see also* Morgan Cloud, *Government Intrusions Into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L. J. 817 (1987) (discussing the Sixth Amendment Right to Counsel in the context of fee forfeitures); Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1 (1987) (same).

The constitutionality of using a civil process to punish for crimes is considered well settled, although upon closer scrutiny the historical basis for punitive forfeitures seems less obvious. An important early forfeiture case, *Miller v. United States*,[31] that the Court later ignored, squarely addressed the constitutionality of civil forfeiture to punish crimes against the sovereign. In this case, the government initiated an action to forfeit property of a Northern rebel during the Civil War. The nature of the disagreement between the majority and the dissenting Justices lay not in whether the Constitution permits forfeitures to be used to punish for crimes but rather in the source of Congress's authority to permit forfeiture for treason. The majority contended that Congress had exercised its war powers in enacting the forfeiture statute at issue.[32] Justice Field's dissenting opinion urged that the statute did no more than to punish the crime of treason, an exercise of Congress's municipal (or police) power.[33]

Both the majority and the dissenters agreed on the more important issue for present purposes, that is, whether a civil forfeiture process that merely serves as an alternative form of criminal prosecution violates the Constitution.[34] Justice Strong wrote for the majority:

> The [plaintiff's] objection starts with the assumption that the purpose of the acts was to punish offences against the sovereignty of the United States, and that they are merely statutes against crimes. If this were a correct assumption, if the act of 1861, and the fifth, sixth, and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the Constitution.[35]

In light of this passage, one might have expected the Court to reject, or at least carefully analyze, forfeiture laws applied for the sole purpose of punishing a crime. Instead, in *Dobbins's Distillery v. United States*,[36] the Court subsequently upheld the constitutionality of a forfeiture law against a claim that the action was of a criminal nature and thus could not be executed except upon conviction. In a formalistic analysis, the Court found the proceeding to be of a civil nature in that it "d[id] not involve the personal conviction of the wrong-doer for the offense charged . . . [and] the conviction of the wrong-doer [had to] be ob-

31. 78 U.S. (11 Wall.) 268 (1871).
32. *Id.* at 305.
33. *Id.* at 314-321 (Field, J., dissenting).
34. *Id.* at 304.
35. *Id.*
36. 96 U.S. 395 (1877).

tained, if at all, in another and wholly independent proceeding."[37]

Since *Dobbin's Distillery*, the Supreme Court has not seriously questioned the constitutionality of civil forfeiture statutes that aim to punish for criminal wrongdoing. In a number of decisions the Court wavered, recognizing the criminal nature of forfeiture actions and applying certain constitutional provisions to them.[38] In most cases, however, the Court has maintained the fiction that the action is civil and proceeds against "guilty" property.[39]

B. Section 881 Forfeitures As Punishment

When Congress enacted the civil drug asset forfeiture law, 21 U.S.C. § 881, as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[40] the law made assets of both a remedial and punitive nature civilly forfeitable. Section 881 allowed the forfeiture of contraband, containers, and conveyances used to transport the contraband.[41] Contraband forfeitures are clearly remedial in that they "remove[ ] dangerous or illegal items from society."[42] The government should not need to obtain a criminal conviction to confiscate contraband because a

37. *Id.* at 399; *see also* Goldsmith-Grant v. United States, 254 U.S. 505, 511 (1921) ("[W]hether the reason for [civil forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced.").

38. *See* Boyd v. United States, 116 U.S. 616, 634 (1886) (declaring that forfeitures for criminal offenses are of a "quasi-criminal nature," and the Fourth Amendment and Fifth Amendment privilege against self-incrimination should apply); United States v. $8,850 in United States Currency, 461 U.S. 555, 556 (1983) (Fifth Amendment speedy trial guarantee); United States v. United States Coin & Currency, 401 U.S. 715, 722 (1971) (Fifth Amendment privilege against self-incrimination); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965) (Fourth Amendment); *see also* Stahl, *supra* note 9, at 294-301 (discussing the historical distinction between civil and criminal forfeitures); Schecter, *supra* note 10, at 1159 (discussing the Court's inconsistency in recognizing the criminal nature of forfeiture actions).

39. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684-85 (1974) (citing cases involving "guilty" property); Goldsmith-Grant v. United States, 254 U.S. 505, 510 (1921) ("Congress . . . ascrib[es] to the property a certain personality . . . .").

40. Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 881 (1988 & Supp. IV 1992)); *see also* Nelson, *supra* note 9, at 1314-17 (discussing the development of civil forfeiture statute § 881).

41. 21 U.S.C. § 881(a).

42. Austin v. United States, 113 S. Ct. 2801, 2811 (1993) (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984)).

drug dealer should not be allowed to retain it under any circumstances.

The same is true for the forfeiture of proceeds of drug activity made forfeitable under § 881(a)(6).[43] The forfeiture of money or assets traceable to drug transactions should not be considered punishment because the drug offender was never entitled to them in the first place. Forfeiture of drug proceeds merely puts criminals in the same place they would have been had they not committed the crime. If the government can establish that drug proceeds are illegitimately acquired, the person possessing them has no standing to complain of unfair punishment if the funds are forfeited; their removal is not punishment.[44]

If forfeiture was limited to seizing the instrumentalities or "ill-gotten gains" of notorious drug dealers, the theoretical juxtaposition of civil process and the criminal justice system would attract little criticism. The law, however, places no such restriction on law enforcement. Given the long historical practice of seizing conveyances,[45] it is not surprising that such a provision appeared in the earliest version of § 881. As the Court affirmed in *Austin*, the forfeiture of conveyances that transport contraband, such as cars, trucks, and yachts, is punitive, not remedial.[46]

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43. In 1978 Congress extended the reach of the law by authorizing the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished . . . in exchange for a controlled substance . . . or intended to be used to facilitate any violation . . . ." Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a), 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)).

Approving the use of a civil process for the forfeiture of these proceeds does not preclude an assessment of the process used. In particular, many authors have criticized the burdens of proof and other constitutional issues relating to the civil forfeiture process. For a sampling of these criticisms, see *supra* notes 9-10.

44. This provision would not allow forfeiture of drug proceeds that an innocent merchant possessed, such as one who sold something to a drug dealer without knowing the source of the buyer's money. In that situation, the government could seize the thing that the drug dealer had purchased, but not the money that he had given to the innocent seller. Indeed, even if the innocent person had received the money as a gift, the money is not forfeitable if the person did not have knowledge of its source. *See infra* part III.A (discussing the innocent owner defense).

45. From its inception in admiralty, forfeitures have reached instruments of conveyance such as ships, and at a later point in history, automobiles and airplanes. *See infra* notes 169-174 and accompanying text (discussing the seizure of conveyances used to transport contraband).

46. *Austin*, 113 S. Ct. at 2811 (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)) (reasoning that because "instruments" of

In 1984 Congress greatly increased the possibilities for punishment by making forfeitable "[a]ll real property . . . in the whole of any lot or tract of land . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of, a [controlled substance] violation . . . ."[47] A broad reading of this provision has enabled law enforcement to take property based on even the most tenuous connection to a drug transaction, such as property that serves as the location of a drug deal. Prior to the *Austin* decision, the government often took large tracts of land, buildings including homes, and legitimate business enterprises, on the ground that a drug transaction took place on the property.[48] The value of the property seized bore no relation to the level of culpability.

In response to numerous reports of abuse,[49] Congress enacted a recent amendment that provides a defense to property owners who do not know their property was used to facilitate a drug offense.[50] Remarkably, this is a novel defense not traditionally provided. Further changes are in order, but efforts at reform would be deficient if reformers do not carefully examine the interests of prosecutors and law enforcement agencies in pursuing civil forfeitures as a weapon in fighting drug crime.

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drug trade are not necessarily themselves contraband, their forfeiture must be punitive).

47. Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1988)). As the statute clearly states, the value of the property is not considered in relation to the seriousness of the particular violation committed, rather all of the property is subject to forfeiture for any violation. *Id.*

Property found in other countries may also be subject to civil forfeiture if the foreign country is willing to transfer the property to the United States. This practice is rapidly growing. *See* 1991 ANN. REP., *supra* note 9, at 43-47.

48. *See* Nelson, *supra* note 9, at 1314-17; Stahl, *supra* note 9, at 278.

49. Many articles and editorials have criticized the abuses of the forfeiture program. *See, e.g.*, Cris Carmody et al., *Congress Hears Charges of Forfeiture Abuse*, NAT'L L.J., Oct. 12, 1992, at 5 (reporting alleged abuses in the Justice Department's Asset Forfeiture Program); Stephen Labaton, *Seized Property in Crime Cases Causes Concern*, N.Y. TIMES, May 31, 1993, at A1 ("[t]he seizing of suspects' property . . . is out of control"); Terrance G. Reed, *Forfeiture Run Amok: Some Officials Are Using Legal Tactic as a Tool of Social Engineering*, L.A. DAILY J., Nov. 17, 1992, at 6 ("[F]orfeiture law has quickly become the darling of law enforcement . . . ."); *Drug Bust: Federal Asset-Forfeiture Law Abused, Needs Reform*, HOUS. POST, Sept. 7, 1992, at A32 (arguing that federal forfeiture law needs reform).

50. *See infra* part III.A (discussing the innocent owner defense).

C. The Government's Advantages and Interests

The government enjoys a number of advantages in civil asset forfeiture that make it more attractive to prosecutors than its rarely-used criminal forfeiture counterpart.[51] Of utmost significance is the fact that, unlike criminal forfeiture,[52] civil forfeiture does not require a criminal conviction.[53] This difference is important because in some cases illegitimate properties could

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51. A criminal forfeiture process is authorized at 21 U.S.C. § 853 (1988):

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
> (2) any other person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise. The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Id.

The Federal Sentencing Guidelines do not add anything to the criminal forfeiture provisions of § 853. The criminal forfeiture section of the guidelines merely states that forfeiture of a defendant's property may occur "as provided by statute." U.S.S.G., *supra* note 26, at § 5E1.4. An additional criminal drug forfeiture provision, under § 848, provides for the forfeiture of the property of one who engages in a "continuing criminal enterprise" (CCE). One engages in a continuing criminal enterprise if he leads five or more other persons in committing a continuing series of federal drug felonies which produce substantial income. 21 U.S.C. § 848(c) (1988).

52. Criminal forfeiture may only occur after conviction and only upon proof beyond a reasonable doubt. 21 U.S.C. § 853(a) (1988).

53. One of the earliest forfeiture cases, The Palmyra, 25 U.S. (12 Wheat.) 1 (1827), makes clear that since the earliest days, civil in rem forfeiture actions have not depended on criminal proceedings in personam. Justice Story wrote for the court: "[T]he practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *Id.* at 15 (italics in original). Even at this early date, forfeiture was often used in lieu of or in addition to criminal prosecution: "Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty." *Id.* at 14-15 (italics in original).

not be forfeited if a conviction were required.[54] In addition, the government must show only probable cause, not proof beyond a reasonable doubt as criminal forfeiture requires, that the property is subject to forfeiture because of its illegal nature or its use in an unlawful manner.[55] Once the government establishes probable cause in a civil forfeiture, the burden shifts to the person claiming an ownership interest in the property to prove by a preponderance of the evidence that the property was not used or intended to be used to commit or facilitate a drug violation.[56]

Until recently, § 881 also offered the advantage to the government of permitting the seizure of property before holding a hearing on the propriety of the forfeiture and without giving notice to the owner.[57] The law still permits pre-conviction seizure, however, the Supreme Court's decision in *United States v. James Daniel Good Real Property* held that the due process clauses of the Fifth and Fourteenth Amendments require pre-seizure notice and an adversary hearing to precede forfeiture of all real property.[58] The Court did not limit its ruling to residential properties,[59] as had some lower courts.[60] In contrast, the exceptions for pre-conviction seizure of property under criminal forfeiture law are narrow.[61] Thus, the civil forfeiture process

54. *See infra* notes 160-165 and accompanying text.

55. For a thorough discussion of burden of proof issues in civil drug asset forfeitures, see Stahl, *supra* note 9, at 284-85, 291-94.

56. *See* United States v. Parcels of Real Property with Building, 913 F.2d 1 (1st Cir. 1990); *see also* Stahl, *supra* note 9, at 284-85 (discussing the burdens of proof under § 881).

57. For a discussion of the seizure procedures of § 881, see Stahl, *supra* note 9, at 279-81. Stahl's article, however, predates the Supreme Court's decision in United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993), and the procedures will have to be modified in light of the Court's decision. *See infra* notes 58-59.

58. *James Daniel Good Real Property*, 114 S. Ct. at 505.

59. *Id.*

60. *See* Stahl, *supra* note 9, at 281 n.34 (citing cases).

61. The procedures for seizure of forfeitable assets under § 853 are more cumbersome for prosecutors and give defendants an opportunity to transfer or hide assets prior to sentencing. Unlike the civil forfeiture process, assets may not be seized prior to the issuance of a judicial forfeiture order. A restraining order or injunction may be obtained by the government to preserve the property for forfeiture. This may occur, however, only upon the filing of an indictment or information, or prior to such a filing if the government meets the high burden of demonstrating the necessity of the seizure. 21 U.S.C. § 853(e) (1988). A restraining order or injunction may be ordered if a court finds the following:

> (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

closes the window of opportunity for an accused drug dealer to hide or transfer valuable assets during the time after indictment but prior to conviction, while the criminal forfeiture provision offers few such advantages.[62]

An added benefit existed for prosecutors until the Supreme Court's recent decision in *Republic National Bank v. United States*.[63] In light of the in rem nature of civil forfeiture jurisdiction, some lower courts held that the government could divest them of jurisdiction to hear appeals from forfeiture decisions by selling or transferring the res, or asset.[64] Justice Blackmun,

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(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

21 U.S.C. § 853(e)(1)(B)(i)-(ii) (1988).

The property owner must receive notice and the opportunity for a hearing prior to seizure. 21 U.S.C. § 853(e)(1)(B). Except in cases in which the government files an indictment or information, a restraining order shall only be effective for 90 days unless the government seeks an extension by showing good cause. *Id.* Alternatively, a temporary restraining order may be obtained in cases in which "provision of notice will jeopardize the availability of the property for forfeiture," but these orders are valid for only ten days. 21 U.S.C. § 853(e)(2). A showing of good cause may extend a temporary restraining order, as may consent of the party against whom it is entered. Under this provision, the court must hold a hearing at the "earliest possible time and prior to the expiration of the temporary order." *Id.* In contrast, the civil forfeiture process allows the government to seize property prior to conviction and without the necessity of obtaining a conviction. *See supra* notes 52-53 and accompanying text. Thus, persons suspected of crimes do not have the time to find ways to remove the assets from the government's reach.

62. The only advantage of criminal forfeiture is that it gives the court jurisdiction over all properties, not just those located within the territorial jurisdiction of the court. Jurisdiction in criminal cases is predicated on the location of the offense. *See* FED. R. CRIM. P. 18. Courts hearing civil forfeiture actions may only exercise jurisdiction over assets located or brought within their territorial jurisdiction. *See* 28 U.S.C. § 1395(b), (c). *But see* 21 U.S.C. § 881(j) (1988) (authorizing additional civil forfeiture venue in the district where the defendant is found or where the criminal prosecution is brought if the defendant is the owner of the subject property).

63. 113 S. Ct. 554 (1992).

64. In addition to the Eleventh Circuit's decision in this case, United States v. 6960 Miraflores Ave., 932 F.2d 1433 (11th Cir. 1991), *rev'd sub nom.* Republic Nat'l Bank v. United States, 113 S. Ct. 554, see United States v. Tit's Cocktail Lounge, 873 F.2d 141 (7th Cir. 1989). Other Circuit Courts have rejected this jurisdictional rule. United States v. $12,390.00, 956 F.2d 801 (8th Cir. 1992); United States v. $1,322,242.58, 938 F.2d 433 (3rd Cir. 1991); United States v. $29,959.00 U.S. Currency, 931 F.2d 549 (9th Cir. 1991); United States v. $95,945.18, U.S. Currency, 913 F.2d 1106 (4th Cir. 1990); *see also* Karen L. Fisher, *Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Prevention and Control Act*, 26 IND. L. REV. 657 (1993) (advocating a modern rule of jurisdiction for civil forfeiture appeals).

writing for the majority, abolished this jurisdictional rule in the strongest terms: "The rule's illusory nature obviates the need for such inquiries [into its usefulness], however, and a lack of justification undermines any argument for its creation."[65]

The procedural advantages of civil forfeiture have enabled the Justice Department to pursue two objectives besides punishment of drug offenders, both of which have garnered wide support from law enforcement agencies. The Justice Department lists as secondary and tertiary concerns the encouragement of multi-jurisdictional cooperation among law enforcement and the creation of new revenues for law enforcement.[66] For purposes of this analysis, it is not necessary to question the validity of these objectives because the proposed changes in the forfeiture program should not affect the ability of law enforcement to pursue them.[67]

The success of the drug war, the federal government maintains, depends in large part on the ability of federal law enforcement, principally the Drug Enforcement Administration (DEA), to attract the cooperation of all levels of law enforcement.[68] Non-federal law enforcement agencies provide a large pool of additional personnel with street-level intelligence about drug activity,[69] a highly valuable resource to the federal effort. Thus, since the advent of the anti-drug crusade, the federal government has endeavored to entice state and local agencies to enter into joint operations.[70] The two main programs for interagency cooperation in law enforcement are the DEA State and Local

65. *Republic Nat'l Bank*, 113 S. Ct. at 559.

66. 1991 ANN. REP. *supra* note 9, at 1. Professors Zimring and Hawkins provide an insightful policy analysis of the multi-jurisdictional nature of drug law enforcement in their recent book. FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL 158-176 (1992). The authors cite countervailing advantages and disadvantages from the heightened involvement of the federal government in drug policing. *Id.* at 162-64.

67. *See infra* Part IV.

68. 1991 ANN. REP., *supra* note 9, at 1.

69. *See* JAN CHAIKEN ET AL., U.S. DEP'T OF JUSTICE, MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 48 (1990).

70. Although federal agency cooperation with state and local police has existed in some form since the mid-1960s, the interaction took on new dimensions in the mid-1980s. *Id.* at 45-47. The drug control strategy transformed the federal-state-local relationship from one that is largely informal and ad hoc to one that is formal and ongoing. *Id.* at 45.

Task Forces (DEA-SL Task Forces)[71] and the Organized Crime Drug Enforcement Task Forces (OCDETFs).[72]

The promotion of multi-jurisdictional cooperation was effectively put into motion by the enactment of a 1984 provision that allows the direct transfer of seized assets from drug dealers to the law enforcement agencies that seized the assets, rather than transferring them to the general fund of the United States Treasury as previous forfeiture statutes required.[73] For the first time in our history, Congress created a profit incentive for law

71. The DEA-SL Task Forces date back to 1973 and were created on the heels of a 1972 White House announcement of an anti-drug crusade. *Id.* at 44. Asset forfeiture benefits, however, did not commence until the 1980s. *Id.* From 1991 to 1992, the number of DEA-SL Task Forces grew to 86 from 71, and now exist in 40 states. OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 118 (1992). The Administration planned to request a budget of $61.9 million for the DEA-SL Task Forces in fiscal year 1993. *Id.*

72. *See id.* at 86. In 1982, President Reagan announced a new federal drug control initiative, and Congress appropriated funds to create the Organized Crime Drug Enforcement Task Force (OCDETF) program. OFFICE OF THE ATT'Y GEN., REPORT ON THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE PROGRAM 2 (1989-1990). The federal agencies involved included the Bureau of Alcohol, Tobacco, and Firearms; the Drug Enforcement Administration; the Federal Bureau of Investigations; the Internal Revenue Service; the U.S. Attorneys' Offices; the U.S. Coast Guard; the U.S. Customs Service; the U.S. Marshall's Service; and the Immigration and Naturalization Service. *Id.* The heads of these agencies along with senior officials of the Departments of Justice and Treasury form the Executive Review Board of the program. *Id.* The task forces were comprised of federal, state, and local agencies, and are coordinated by the U.S. Attorneys' offices in 13 "core" cities. OFFICE OF NAT'L DRUG CONTROL POLICY, *supra* note 71, at 86. The OCDETF program targets high-level drug traffickers, including large-scale money laundering organizations, by achieving collaboration between law enforcement at all levels. *Id.* at 85-86.

In addition, the Anti-Drug Abuse Act of 1988 authorized the designation of certain areas as "High Intensity Drug Trafficking Areas" (HIDTAs). *Id.* at 131. The areas identified as HIDTAs are New York, Miami, Houston, Los Angeles and the southwest border. *Id.* The designation entitles the regions to additional federal money that funds federal, state, and local law enforcement initiatives. *Id.* Of the $86 million budget for fiscal year 1992, $36 million was distributed to state and local governments operating programs in the designated HIDTAs. *Id.* at 134.

73. The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund to collect the proceeds of forfeited assets, Pub. L. No. 98-473, § 310, 98 Stat. 1837, 2052 (codified at 28 U.S.C. § 524(c)(1) (1988 & Supp. IV 1992)). Congress amended § 881(e)(1)(A) to provide for this transferred property to go directly to law enforcement:

> Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—
> (A) retain the property for official use or . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property. . . .

enforcement. Since the 1980s, participation in asset forfeiture has enabled states and localities to collect assets from drug dealers through the "equitable sharing" component of the federal asset forfeiture program.[74] Given their financially-strapped budgets,[75] the incentive to pursue forfeitures must have been even stronger for state and local agencies than for federal law enforcement.[76] In fact, the financial incentives became so compelling that the asset forfeiture process came to be used in some cases to punish drug dealers to the exclusion of the criminal justice system.[77] In exchange for the work of non-federal police officers, the federal government has transferred forfeited assets valued at over one billion dollars to state and local governments since 1986,[78] most of it in the last two years.[79]

Congress's enthusiasm for asset forfeiture seems to reflect the desire to create new sources of revenue for law enforcement without increasing taxes.[80] In 1991 alone, federal asset forfeitures netted over two billion dollars.[81] As a political matter, forfeitures please everyone—law enforcement agencies, legislators,

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21 U.S.C. § 881(e)(1)(A) (1988). Previously the statute required transfer to "the general fund of the United States Treasury." *Id.* app. § 881.

74. Participants in joint task forces share most federal forfeiture funds. *See generally supra* notes 71-72 and accompanying text (discussing task forces). Equitable sharing gives each participating agency the opportunity to receive an equitable share of forfeited assets based on its level of participation in the investigation yielding the forfeited assets. In 1991, the DEA recommended the sharing of over $230 million dollars with state and local law enforcement agencies. *See* 1991 ANN. REP., *supra* note 9, at 26. The United States government also shares with foreign countries the proceeds of forfeited assets in exchange for international cooperation pursuant to 1986 and 1988 amendments to the forfeiture laws. *See* 18 U.S.C. § 981(a)(1)(B) (1988); 21 U.S.C. § 881(e)(1)(E) (1988 & Supp. IV 1992); *see also* 1991 ANN. REP., *supra* note 9, at 46.

75. State budgets have suffered enormous strain from the effects of recession and rising health care costs. The cost of corrections has also risen sharply, while voters have shown increasing reluctance to accept higher taxes to pay for institutions like prisons. *See* Michael de Courcy Hinds, *Study Sees Pain Ahead in States' Budgets*, N.Y. TIMES, July 27, 1993, at A6.

76. *See* Nelson, *supra* note 9, at 1325-33.

77. *Id.*

78. 1992 ATT'Y GEN. ANN. REP. 44-46.

79. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, *supra* note 71, at 86; 1992 ATT'Y GEN. ANN. REP. 26-27. In addition, the DEA assumes the costs of investigative overtime for non-federal personnel, which could reach hundreds of thousands of dollars annually. CHAIKEN ET AL., *supra* note 69, at 45.

80. 1991 ANN. REP., *supra* note 9, at 2. The Justice Department gave revenue raising as a third reason for the program, *see supra* text accompanying note 66, but one author suggests this rationale has no basis in the legislative history of asset forfeiture. *See* Reed, *supra* note 29, at 15.

81. Labaton, *supra* note 49, at A1.

and the public. Indeed, the drive to raise revenues may have superseded the other stated goals of asset forfeiture.[82]

Interagency cooperation and creating new sources of revenue to fund drug law enforcement, no matter how highly valued, should nonetheless be secondary to fundamental fairness in individual cases. In fact, these interests should not conflict. Encouraging multi-jurisdictional cooperation by providing financial incentives can be accomplished through the equitable sharing program for assets forfeited through the criminal process in addition to a scaled down civil forfeiture program.[83]

III. THE APPARENT REFORMATION OF CIVIL DRUG ASSET FORFEITURES

The parallel system for punishing drug offenders resulted in such extreme punishment, upon some relatively minor participants, and, until recently, even upon some completely innocent people, that both Congress and the Supreme Court have apparently begun to take a harder look at the concept of punishment by civil forfeiture. In the rush to punish drug offenders as severely as possible and fill law enforcement coffers without tapping government revenues, Congress overlooked two basic penological principles that normally guide and limit the use of state power against individuals: mens rea and proportionality in sentencing.

The overall effect of the Court's decisions and Congress's reforms is to reshape the civil forfeiture process so that, standing alone, it more justly metes out punishment for drug offenses. In particular, the *Austin* case draws a sharp distinction between remedial and punitive forfeitures, suggesting that punitive forfeitures will be treated as criminal sentences. As discussed *infra*, however, the new restrictions on the government's power to punish drug offenders through the civil forfeiture system fall

82. One commentator points to several internal memoranda circulated by Attorney General Dick Thornburgh and acting Deputy Attorney General Edward S.G. Dennis, Jr. in which they strongly urged federal prosecutors to make every effort to increase forfeiture revenues in order to meet budget projections. *Id.* at A10. Michael Zeldin, a former Justice Department official responsible for the asset forfeiture office, recently affirmed that, "the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law enforcement objectives." *Id.*; *see also* Nelson, *supra* note 9, at 1325-33 (discussing law enforcement goals in pursuing asset forfeiture).

83. *See infra* Part IV (advocating factoring forfeiture into sentencing).

short of ensuring fair treatment of drug offenders.[84] As long as civil forfeiture can be used in addition to criminal punishment, reformation of civil forfeiture will not eliminate the possibility of excessive punishment of offenders.

A. Incorporating a Mens Rea Requirement: The Innocent Owner Defense

The mental element of criminal conduct, or "mens rea," long considered the bedrock justification for criminal punishment,[85] had no place in forfeiture jurisprudence until late in our history. In 1974, the Supreme Court held that a legislature could authorize the forfeiture of illegally-used property even if the owner of the property was not the wrongdoer and had no knowledge of the wrongdoing.[86] The fiction that the forfeiture action proceeded against the "guilty" property rendered the owner's interests virtually irrelevant.[87]

The Supreme Court rejected a challenge to the forfeiture of a leasing company's property when the company's only wrongdoing had been to lease a yacht. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[88] the government of Puerto Rico seized a pleasure yacht that Pearson Yacht Leasing leased to two Puerto Rican residents who possessed one marijuana cigarette.[89] Pearson Yacht argued that the forfeiture amounted to a government taking without just compensation because it was an innocent owner.[90] Justice Brennan, writing for the majority, relied on a historically-based rationale in concluding that the forfeiture of property from the leasing company did not violate the Fifth Amendment.[91] The earlier decisions on which *Pearson Yacht*

84. *See infra* part IV.

85. For a discussion of the importance of mens rea in criminal law compared to its relative insignificance in civil law, see Mann, *supra* note 28, at 1805-06.

86. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 664-65, 679-80 (1974).

87. *See supra* notes 28-30 and accompanying text (discussing the fiction of "guilty" property).

88. 416 U.S. 663 (1974).

89. *Id.* at 665, 693 (Douglas, J., dissenting in part).

90. The Fifth Amendment prohibits "private property [to] be taken for public use, without just compensation." U.S. Const. amend. V.

91. *Id.* at 670-90. The Court relied on the line of cases upholding the constitutionality of civil forfeitures used to punish for criminal activity, without reconsidering the validity of those prior decisions. Early cases upheld the forfeiture of properties and conveyances notwithstanding the innocence of the owners. *See* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); Dobbins's Distillery v. United States, 96 U.S. 395 (1877).

rested indicate that the reason for punishing owners without regard to their actual knowledge of wrongdoing rested on notions of negligence.[92] In effect, the law imposed a burden on property owners to take every possible precaution to prevent illegal use of the property.

The Court did allow a defense for truly innocent owners whose situations "give rise to serious constitutional questions."[93] The Court distinguished between owners who had no knowledge of the wrongdoing but exercised control in entrusting the property to others, and property owners who had no such control. The Court identified two types of truly innocent owners: those whose property had been taken "without his privity or consent,"[94] and those who "had done all that reasonably could be expected to prevent the proscribed use."[95]

Interestingly, the *Pearson Yacht* case relied on the 1921 *Goldsmith-Grant* case in which the Supreme Court found it unnecessary to address the contention that the law might allow "an ocean steamer [to] be condemned to confiscation if a package of . . . liquor be innocently received and transported by it," reasoning that law "ha[d] not yet received such amplitude of application."[96] Yet, in *Pearson Yacht*, the Court upheld this very result—forfeiture of a yacht from an innocent owner because a lessee transported a small amount of contraband—without even acknowledging that the law had arrived at such "amplitude of application."[97] Although conveyances had long been subject to forfeiture without regard to the culpability of the owners,[98] the inherent unfairness of forfeiture in cases in which the property owner could prove innocence attracted little public attention until the government's "zero tolerance" campaign.[99] This campaign drew attention to the forfeitures of valuable yachts because someone on board possessed a tiny amount of mari-

92. *See Goldsmith-Grant*, 254 U.S. at 511-12; *Dobbin's Distillery*, 96 U.S. at 399.

93. *Pearson Yacht*, 416 U.S. at 689; *see also* Austin v. United States, 113 S. Ct. 2801, 2808-2810 (1993) (relying on notion that owner was negligent in allowing his property to be misused).

94. *Pearson Yacht*, 416 U.S. at 689.

95. *Id.*

96. *Goldsmith-Grant*, 254 U.S. at 512.

97. *Pearson Yacht*, 416 U.S. at 685-90.

98. *See Goldsmith-Grant*, 254 U.S. at 512.

99. Under the Justice Department's "zero tolerance" policy, the government expressed unequivocally its intent to "seize *any* conveyance containing illegal drugs, no matter how small the quantity of drugs or how valuable the conveyance." *See* Goldsmith & Linderman, *supra* note 10, at 1272.

juana.[100] When Congress expanded the forfeiture law in 1978 to reach drug proceeds, it included an innocent owner defense.[101] It included similar defenses in the provisions for real property in 1984,[102] and conveyances in 1988.[103] This long overdue and fundamental change in forfeiture law recognizes and adjusts for its penal nature. The "innocent owner" defenses incorporate a mens rea requirement; the government may not seize property unless a person has knowingly committed or facilitated a violation of the criminal laws.[104]

The Supreme Court's recent embrace of this defense in *United States v. 92 Buena Vista Ave.*,[105] indicates an uneasiness with the government's ability to deprive innocent people of their property rights.[106] The decision severely restricts the government's ability to go behind sham transactions in which owners claim to be innocent but are in reality in business with the drug offender. Given the perceived ideological leanings of many of

100. The media has reported a number of instances in which the government seized yachts and other large vessels because they found a minute amount of marijuana on board. The *Los Angeles Times*, for example, reported that agents seized the premier ship of the U.S. oceanographic research fleet after finding 1/100th of an ounce of marijuana in a crewman's shaving kit, and confiscated the luxury yacht Monkey Business after discovering 1/28th of an ounce of marijuana aboard. *See* Goldsmith & Linderman, *supra* note 10, at 1272, 1273 n.89 (citing Savage & Fritsch, *U.S. Eases Rule on Drug Linked Ship Seizures*, L.A. TIMES, May 21, 1988, § 2 at 1).

101. 21 U.S.C. § 881(a)(6) (1988), authorizes the forfeiture of all proceeds traceable to a drug offense with the following exception: "no property shall be forfeited under this paragraph, to the extent of the 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."

102. The innocent owner defense in § 881(a)(7) real property forfeitures is worded identically to the drug proceeds defense. *See* 21 U.S.C. § 881(a)(7) (1984); *see supra* note 99 (discussing drug proceeds).

103. Section 881(a)(4)(c) reads: "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(c) (1988).

104. For a discussion of lower court interpretations of the scienter requirements of the innocent owner defenses, see Loomba, *supra* note 10, at 478-91.

105. 113 S. Ct. 1126 (1993).

106. Numerous commentators have analyzed the shortcomings of the asset forfeiture provisions in protecting the rights of innocent owners or other third parties, such as joint tenants, tenants in common, lienholders or mortgagors, and multiple owners. *See generally* Goldsmith & Linderman, *supra* note 10; Jankowski, *supra* note 10; Loomba, *supra* note 10; Saltzburg, *supra* note 10.

the members of the Court and the suspicious nature of the facts involved, this case may well have been decided the other way.[107]

The property owner in *92 Buena Vista* received $240,000 from a man with whom she had "maintained an intimate personal relationship" for six years.[108] She purchased a home for herself and her three children with the money. The government established that there was probable cause to believe the funds she used to buy the house were proceeds of illegal drug trafficking.[109] Despite her close, long-term relationship with the alleged drug dealer, the property owner claimed to have no knowledge of the illegal source of the money.[110]

The District Court ruled against the home owner on two grounds. First, the court ruled that the protection for "owners" applied only to bona fide purchasers for value.[111] The court accepted the government's contention that although § 881(a)(6) makes no explicit reference to "bona fide purchasers for value," courts should nonetheless read the restriction into the definition of the term.[112] The government argued that any other reading would make it easy for drug dealers to set up sham transfers by means of gift.[113] Because the owner in this case received the

107. *See, e.g.*, Linda Greenhouse, *The Year the Court Turned Right; Reagan's Choices Tip the Balance*, N.Y. TIMES, July 7, 1989, at A1 (commenting that "for the first time in a generation, a conservative majority was in a position to control the outcome on most important issues"); Stuart Taylor, Jr., *Shaping the Court: Reagan is Not the First President Thwarted by Unpredictability of Issues, and Minds*, N.Y. TIMES, July 1, 1988, at A1 (citing evidence that Chief Justice Rehnquist and three Reagan appointees are moving the Court in a conservative direction, although not as conservative as Reagan may have wished); Tom Wicker, *In the Nation; This Radical Court*, N.Y. TIMES, June 29, 1991, at A23 (noting that conservative justices showed a lack of judicial restraint in overturning constitutional precedents).

108. *92 Buena Vista*, 113 S. Ct. at 1130.

109. *Id.*

110. *Id.* The forfeiture involved real property, yet the claim arises under § 881(a)(6) because the government contended that the property was purchased with tainted proceeds. A claim arising under § 881(a)(7) would apply if the property had been used to commit or facilitate the commission of a drug transaction. *Compare* 21 U.S.C. § 881(a)(6) (1988) *with* § 881(a)(7).

111. *92 Buena Vista*, 113 S. Ct. at 1130.

112. *Id.* at 1130 n.5. The government did not dispute the broader interpretation of the term "owner," but argued the respondent was not an owner because of the operation of the relation-back doctrine. *Id.* at 1134; *see also infra* notes 118-127 and accompanying text.

113. *92 Buena Vista*, 113 S. Ct. at 1137; *see also Text of the New 'Relation Back Doctrine'*, 2 DOJ ALERT, Aug. 1992, at 9 (reprinting the text of a memo outlining the Department of Justice's policy on the innocent owner defense and the relation back doctrine written by Cary Copeland, the Director and Chief Counsel of the Office for Asset Forfeiture).

proceeds used to purchase the home as a gift, she was not considered a bona fide purchaser for value.[114]

The Supreme Court handily disposed of this point by affirming the Third Circuit's decision to reject the limitation to bona fide purchasers for value. The Court could not find support for this reading in the text of the statute which says nothing about bona fide purchasers for value.[115] Indeed, the Third Circuit found evidence of legislative intent not to limit innocent owner protection in the fact that the criminal forfeiture statute contains this restriction,[116] while Congress omitted similar language in § 881.[117]

A second issue arose from the conflict between two provisions in § 881: the innocent owner defense and the "relation back" or "taint" doctrine.[118] The relation back doctrine is codified at § 881(h): "All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section."[119] Under this doctrine, title to property passes to the government at the time of the illegal act.[120] Because the owner purchased the property at a point in time after the illegal acts—the purchase proceeds were derived from drug trade—the government had constructively taken ownership of the proceeds

114. *92 Buena Vista*, 113 S. Ct. at 1130.

115. *Id.* at 1134.

116. 21 U.S.C. § 853(c) (1988).

117. *92 Buena Vista*, 113 S. Ct. at 1131 n.8. The government favored the rule in the criminal forfeiture provision, § 853(c), that gives protection only to bona fide purchasers for value and disallows the operation of the relation back doctrine to this group. *See Text of the New 'Relation Back Doctrine', supra* note 113. Such a rule gives full protection to the type of owners that are truly innocent and would not have notice that the assets might be forfeitable. *Id.* Because Congress did not write § 881 in this way, the government found itself in the position of arguing that the doctrine bars an innocent owner defense for anyone who obtains proceeds after an illegal transaction. *92 Buena Vista*, 113 S. Ct. at 1135 n.18.

118. *Id.* at 1134-37; 21 U.S.C. § 881(h) (1988); *see also* Gene R. Nichol, Jr., Note, *Tempering the Relation Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990) (arguing that courts should narrowly construe the relation back doctrine).

119. 21 U.S.C. § 881(h) (1988). The statutory rule did not go into effect until two years after respondent had acquired the property in issue. Therefore, the government had to rely on both the § 881(h) provision enacted in 1984 as an amendment to the civil forfeiture statute, and on the common law rule. *92 Buena Vista*, 113 S. Ct. at 1134-35.

120. This common law doctrine is also codified in other criminal and civil forfeiture statutes. *See, e.g.*, 18 U.S.C. §§ 2253(b), 2254(g) (1988) (sexual exploitation of minors); 18 U.S.C. § 981(f) (1988) (money laundering, FIRREA violations).

prior to their being used to purchase the house. Thus, title to the house passed to the government at the time of the purchase with the tainted money.[121]

The district court applied the relation back doctrine to trump the respondent's innocent owner defense.[122] The issue was whether the court should read the relation back doctrine to effectively nullify the innocent owner defense for owners of drug proceeds.[123] The Third Circuit and Supreme Court rejected this interpretation.[124] The Supreme Court reasoned that because the assets in question are proceeds of a drug transaction, by definition they cannot come into an owner's possession until after the illegal act.[125] Thus, "the Government's submission would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited."[126] The Court refused to accept an interpretation of the relation back provision that had the effect of rendering the innocent owner defense meaningless.[127] Congress scaled back the reach of civil forfeitures by providing protection for innocent parties, and the Supreme Court has given that protection the fullest coverage possible.

B. Incorporating Proportionality Review: The Excessive Fines Clause of the Eighth Amendment

Austin v. United States[128] may become a landmark case because in it the Supreme Court developed a previously unexplored area of constitutional law. In a unanimous decision with two concurring opinions,[129] the Court found that a valid issue existed under the Eighth Amendment's Excessive Fines

121. *92 Buena Vista*, 113 S. Ct. at 1134-35.

122. *Id.* at 1130.

123. *Id.* at 1134-37.

124. *Id.*

125. *Id.* at 1135.

126. *Id.*

127. The Court said, "It seems unlikely that Congress would create a meaningless defense." *Id.* The decision also rejected the government's argument that the common law relation-back rule vested perfected title to property in the government at the time of the illegal act without the requirement of a judicial condemnation. The Court found that the common law rule required a judicial determination for title to pass. *Id.* at 1135-37.

128. 113 S. Ct. 2801 (1993).

129. Justice Scalia wrote one concurring opinion; Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, wrote the second. *Id.* at 2812, 2815.

Clause.[130] Every other lower court that considered disproportionality claims in forfeiture cases assumed that if the Eighth Amendment did apply, the cruel and unusual punishment test of *Solem v. Helm* should control.[131] The few cases that mentioned the Excessive Fines Clause merely recited it in the same breath as the Cruel and Unusual Punishment Clause without formulating a different test than that under *Solem*.[132] The Supreme Court in *Austin*, on the other hand, clearly rested its decision exclusively on the Excessive Fines Clause, making no reference to the Cruel and Unusual Punishment Clause, nor explaining whether or why different treatment is in order.[133]

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130. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend VIII. Remarkably, the Court considered the Excessive Fines Clause only once before. Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 259-60 (1989) (holding the Excessive Fines Clause does not limit punitive damages award to private party). *Browning-Ferris* explicitly left open the question of whether the Eighth Amendment Excessive Fines Clause applied only in criminal cases. *Id.* at 263-64.

131. Solem v. Helm, 463 U.S. 277, 290-92 (1983). *See, e.g.*, United States v. 38 Whalers Cove Drive, 954 F.2d 29, 38-39 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992) (holding that forfeiture of home does not violate the Cruel and Unusual Punishment Clause).

Most courts held that the Eighth Amendment did not apply to civil in rem forfeiture actions because the Amendment only applies in criminal cases. These cases generally do not distinguish between particular clauses of the Amendment. *See generally* United States v. 508 Depot Street, 964 F.2d 814 (8th Cir. 1992) (this case became the *Austin* case); United States v. One Parcel of Real Property, 960 F.2d 200, 206-207 (1st Cir. 1992); United States v. On Leong Chinese Merchants Ass'n Bldg., 918 F.2d 1289, 1296 (7th Cir. 1990); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989); United States v. Tax Lot 1500, 861 F.2d 232, 234-35 (9th Cir. 1988), *cert. denied sub nom.* Jaffe v. United States, 110 S. Ct. 364 (1989).

With respect to criminal forfeitures, courts also applied *Solem*'s Cruel and Unusual Punishment test. *See, e.g.*, United States v. Sarbello, 985 F.2d 716, 721-24 (3rd Cir. 1993); United States v. Vriner, 921 F.2d 710, 712-13 (7th Cir. 1991); United States v. Harris, 903 F.2d 770, 772 (10th Cir. 1990); United States v. Busher, 817 F.2d 1409, 1413-16 (9th Cir. 1987).

132. *See, e.g.*, *supra* note 131 (citing *38 Whalers Cove Drive*).

133. One interpretation of the Court's chosen path would ascribe to it result-oriented considerations. If the Court believed that forfeitures should be subjected to meaningful proportionality review, the cruel and unusual punishment jurisprudence provided no support. With respect to sentences of imprisonment, the Court's most recent decision interpreting the Cruel and Unusual Punishment Clause, Harmelin v. Michigan, 111 S. Ct. 2680 (1991), held that the Eighth Amendment's Cruel and Unusual Punishment Clause contains only limited protection against disproportionate punishment. *Id.* at 2701-02. The *Harmelin* decision upheld a mandatory sentence of life without possibility of parole for a first-time offender who had possessed 672 grams of cocaine. *Id.* at 2716 (White, J., dissenting). No other state had imposed such a harsh mandatory sentence for a drug offense of this severity level. *Id.* at 2718-19.

In *Austin*, the defendant challenged the forfeiture of his properties as a punishment disproportionate to the severity of his offense, arguing that the Excessive Fines Clause should apply.[134] The government argued that the Eighth Amendment applies only in criminal cases and that civil asset forfeitures should not be characterized as criminal.[135] The Court rejected the government's Eighth Amendment interpretation.[136]

The question of whether courts should reclassify civil forfeitures as criminal in light of their punitive nature has been the

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The Court refused to extend the requirement in capital cases that courts must consider mitigating circumstances to cases involving mandatory life sentences without possibility of parole, maintaining the bright-line distinction between death sentences and all other types of punishment. *Id.* at 2701-02. Chief Justice Rehnquist and Justice Scalia found no proportionality guarantee at all. *Id.* at 2686.

Even prior to *Harmelin*, lower courts applying the *Solem* test have shown a disinclination to find gross disproportionality in forfeiture cases, even in cases that would strike most observers as extreme. *See, e.g.*, United States v. 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir. 1992) (upholding forfeiture of defendant's interest in residence that was "close to three hundred times the total value of cocaine sold inside it").

134. Austin v. United States, 113 S. Ct. 2801, 2804 (1993).

135. *Id.* at 2804. The government argued that the Eighth Amendment should only apply if the Court reclassified civil asset forfeitures as criminal under the test set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and United States v. Ward, 448 U.S. 242 (1980). *Austin*, 113 S. Ct. at 2804. In *Ward*, the Court fashioned a two-part test for distinguishing civil and criminal statutes. The first step is to determine whether Congress intended the statute to be criminal or civil. If Congress labeled the statute civil, the second step is to inquire "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Ward*, 448 U.S. at 248-49. The *Mendoza-Martinez* decision lists seven factors that courts should consider in making the civil-criminal determination:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . . .

Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted) (emphasis in original).

Applying these tests, the Court previously determined that another civil forfeiture statute was indeed a "civil" provision. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984). For a thorough discussion of the application of the *Ward* test and the *Mendoza-Martinez* factors to § 881 forfeitures, see Stahl, *supra* note 9, at 306-37.

136. *Austin*, 113 S. Ct. at 2806.

focus of much discussion.[137] If courts deem civil forfeitures criminal, they would need to provide all the constitutional protections available to criminal defendants to property owners in civil forfeiture cases as well. It is argued that the task of punishing criminals, particularly the most serious offenders, is the essential role of the criminal justice system. In the simplest terms, however, the unique function of the civil legal system is to provide a remedy to private parties who have suffered a harm. Under the current structure, civil drug asset forfeitures lie in the "middleground" between civil and criminal law, and courts mete out criminal punishment within the construct of a civil action.[138]

137. For arguments that civil asset forfeitures under § 881 should be considered criminal proceedings, see Stahl, *supra* note 9, at 301-37; Schecter, *supra* note 10, at 1157-64; Yoskowitz, *supra* note 10, at 582-92.

138. A number of authors have explored the general theoretical distinction between the civil and criminal systems. Most recently, Professor Kenneth Mann explored the use of "punitive civil sanctions," in other words, the use of civil law to inflict punishment, a purpose normally associated with criminal law. *See* Mann, *supra* note 28, at 1738. Professor Mann refers to a large body of laws that depart from the paradigmatic criminal and civil law models of law to form what he calls a "middleground." *Id.* at 1796-99. He advocates the development of this middleground as an efficient means of handling less serious criminal offenses. *Id.* at 1861-62.

Professor Mann includes forfeiture statutes in his discussion of middleground legislation. *Id.* at 1797-98 (citing property forfeited under the Comprehensive Forfeiture Act of 1988, penalties sought under the False Claims Act, and punitive damages awarded under common law tort principles as examples of punitive civil penalties). Forfeiture provisions, however, do not have the same attributes as the other punitive civil sanctions he addresses.

Of singular importance, at least until *Austin*, forfeiture statutes did not inflict punishment against individuals to a level that any legal body—be it a judge, jury, legislature, or administrative agency—had determined to be commensurate with the legal infraction. As a consequence of the in rem nature of the action, the forfeiture was not structured as a penalty against an individual that varied according to the seriousness of the offense. Property owners could lose property, no matter how valuable, upon a finding of a drug violation, no matter how insignificant. Any violation "taints" any property. *See supra* notes 47-48 and accompanying text.

In contrast, other "middleground" jurisprudence indicates that courts may impose multiple damages or money penalties to the extent necessary to inflict sufficient punishment. *See* Mann, *supra* note 28, at 1814-15 (discussing the principle of "more-than-compensatory monetary sanctions"). Professor Zimring argues that civil forfeiture statutes are intended to "add more punishment and deterrence to that imposed in the criminal process and give law enforcers a second chance at punishment if the criminal prosecution misses its mark." Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901, 1905 (1992). He is probably correct in concluding that "[a]ny diversion from criminal prosecution would disappoint" the supporters of forfeiture statutes. *Id.*; *see also* Stahl, *supra* note 9, at 335 (noting survey that found parallel criminal charges filed in only 20% percent of § 881 cases).

The Court declined to reconsider the "civil" label attached to civil asset forfeitures, finding such reconsideration unnecessary because the Eighth Amendment contains no limitation restricting its application to criminal cases.[139] The Court instead stated that the decisive issue was whether civil forfeitures constitute "punishment" or whether they are "remedial" measures.[140] The government argued that civil forfeitures are primarily "remedial" in nature in that they serve to "remove the 'instruments' of the drug trade" and to "compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade."[141]

The Court flatly rejected these arguments and articulated a new approach to the remedial-punitive dichotomy. The *Austin* approach examines the type of asset seized to determine whether it is properly characterized as contraband or an instrumentality.[142] The Court previously rejected the characteriza-

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For two critiques of Professor Mann's proposal to use punitive civil sanctions to scale back the range of criminal law cases, see John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Zimring, *supra*; *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (arguing that criminal-civil law distinction leads to inadequate protection of constitutional rights).

139. *Austin*, 113 S. Ct. at 2804-06. This interpretation of the Eighth Amendment is not inconsistent with the Court's earlier decision in Ingraham v. Wright, 430 U.S. 651 (1977), which found the Eighth Amendment only applicable "to limit the power of those entrusted with the criminal-law function of government." *Id.* at 664. In *Ingraham*, the Court held the Eighth Amendment inapplicable to disciplinary corporal punishment in public schools. *Id.*; *see also* Irene M. Rosenberg, Ingraham v. Wright: *The Supreme Court's Whipping Boy*, 78 COL. L. REV. 75 (1978) (finding the Court's Eighth Amendment holding based upon "ambiguous history and dubious precedent"). The application of the Eighth Amendment to civil drug asset forfeitures, but not to public school disciplinary methods, makes sense because the former, not the latter, is premised on criminal conduct and prosecuted by government prosecutors.

140. *Austin*, 113 S. Ct. at 2805-06.

141. *Id.* at 2811. This argument seems inconsistent with the Justice Department's stated primary objective in pursuing drug asset forfeitures: "to punish and deter criminal activity." 1991 ANN. REP., *supra* note 9, at 1. The Court noted in *Austin* that the government's argument also omitted reference to the legislative history of the civil forfeiture statute in which Congress recognized the penal nature of civil forfeiture, although it quoted the same passage with approval in its brief in the earlier case that term, United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), *cited in Austin*, 113 S. Ct. at 2811 n.13.

142. The *Austin* approach appears to differ from that of United States v. Halper, 490 U.S. 435 (1989). The two situations, however, are also different. In

tion of a conveyance as a remedial forfeiture of "contraband" in *One 1958 Plymouth Sedan v. Pennsylvania*, reasoning that, "[t]here is nothing even remotely criminal in possessing an automobile."[143] In *Austin*, the Court similarly refused to characterize the defendant's home and auto body shop as "instruments."[144] In other words, it found that real properties that "facilitate" drug offenses by serving as the location of a transaction are not "instrumentalities"; their forfeiture is punishment plain and simple.[145]

The *Austin* Court rejected the theory that the civil forfeitures at issue are remedial because the forfeiture of property under § 881 bears no relation to the costs of enforcing the law in each case.[146] To the extent the lower courts attempt to factor in the enforcement costs, the Court dismissed the government's theory of general compensation for costs associated with drug crimes such as "urban blight" and "drug addiction."[147] Indeed, the Court rejected any claims by the government for remedial compensation by means of real property and conveyance forfeitures.[148]

Halper, the statute created a fixed fine structure intended to serve a purely remedial purpose. Its application to an offender who committed many small violations, however, resulted in a fine far exceeding the government's costs and damages, qualifying it as "punishment." *Id.* at 449. The Court found that the defendant was entitled to an accounting from the government. *Id.* at 449-50. The majority held that any fine beyond that which is necessary to make the government whole would violate the Double Jeopardy Clause of the Fifth Amendment. *Id.*; *see also infra* part IV.B.1 (discussing double jeopardy in civil forfeiture cases).

The pivotal distinction between *Halper* and *Austin* is that in *Austin*, the Court found the forfeitures to serve primarily a punitive purpose. The majority stated that the "dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut" any argument that these constitute a form of liquidated damages. *Austin*, 113 S. Ct. at 2811-12. Thus, the fact that they may also serve "some remedial purpose" became irrelevant. *Id.* at 2812. The Court relied on the following language in *Halper*: "[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." *Id.* (citation omitted) (emphasis in original). Thus, the Court made no allowance for an accounting by the government of its costs and damages. *Id.*

143. *Austin*, 113 S. Ct. at 2811 (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).

144. *Id.* at 2811.

145. As such, the Court held that the Eighth Amendment's proscription against excessive fines required courts to limit the value of the assets forfeited according to the crime's severity. *Id.* at 2811-12.

146. *Id.*

147. *Id.*

148. *Id.*

Because civil forfeitures of real property and conveyances should be viewed as "payment to a sovereign as punishment for some offense,"[149] the Court held that these are "subject to the limitations of the Eighth Amendment's Excessive Fines Clause."[150] The Court remanded this case, and a second case decided that day,[151] to the lower courts to consider exactly what limits the Constitution places on the government's power to punish criminal offenders by means of financial penalties, in cash or in kind.[152]

The long overdue recognition that the government's use of punitive civil forfeiture should be limited in proportion to the severity of the offense, however, does not rationalize the punishment of drug offenders in the federal system. The *Austin* case does nothing that explicitly factors forfeiture punishment into the sentencing decision-making process; *Austin* only requires that punishment imposed by means of civil forfeiture be limited in accordance with the Excessive Fines Clause.

IV. FACTORING FORFEITURES INTO THE SENTENCING CALCULUS

Federal drug laws authorize the government to file civil actions to seize property while also filing criminal charges. At sentencing for criminal drug offenses, courts need not formally factor any civil forfeitures into the decision-making process. Consequently, criminal sentences for drug offenders that do not take into account civil forfeitures are per se too harsh and may violate the Double Jeopardy Clause.[153] The following sections

149. *Id.* at 2812 (citing Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

150. *Id.*

151. Alexander v. United States, 113 S. Ct. 2766 (1993).

152. Justice Scalia's concurrence in *Austin* suggests an excessiveness test that would undercut the desire to achieve proportionality. His position is that civil forfeitures should be treated differently from monetary fines or criminal forfeitures, relying on the time-worn fiction that the property is the guilty party. *Austin*, 113 S. Ct. at 2814-15 (Scalia, J., concurring). Rather than consider the value of the property, Justice Scalia stated that, "[t]he relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?" *Id.* at 2815.

The majority responded to Justice Scalia's proposal in a footnote: "We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive." *Id.* at 2812 n.15.

153. *See infra* notes 182-196 (discussing double jeopardy concerns).

propose reforms that would begin to harmonize fairness concerns with the government's interest in pursuing an aggressive campaign against drug offenders.

A. Limiting Civil Forfeitures to Cases of Necessity

In general, a rule of necessity should define the scope of civil asset forfeitures. Ideally, Congress should limit civil forfeitures to the cases in which an expedient civil forfeiture process is necessary: remedial forfeitures and those in which the government cannot obtain in personam jurisdiction over the suspected drug offender. These limitations preserve the important interests of law enforcement in reaching illegitimate assets that would otherwise be beyond their reach and assuring fairness to the wrongdoer. In contrast, punitive forfeitures should be left to criminal courts in the exercise of their sentencing authority. As less satisfactory alternatives, the Sentencing Commission could amend the Federal Sentencing Guidelines fine provisions to factor punitive civil forfeitures into their sentencing decisions,[154] or, if that change is not made, individual sentencing courts should make it a practice to consider the value of punitive civil forfeitures when deciding on the appropriate criminal forfeiture or fine and prison sentence.[155]

1. Distinguishing Remedial and Punitive Forfeitures

The *Austin* decision identifies two types of punitive civil forfeitures: forfeitures of conveyances and forfeitures of real properties that facilitate drug offenses.[156] As such, these assets should be forfeitable only as part of a criminal sentence.[157] This

154. The Federal Sentencing Guidelines include a requirement that courts consider the consequences of civil actions in sentencing organizations. *See* U.S.S.G., *supra* note 26, at § 8C2.8(a)(3).

155. Federal courts have the authority to depart from the sentence range specified by the Guidelines if they find that, "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988); *see also* U.S.S.G., *supra* note 26, at 5-6 (discussing the sentencing ranges specified by the Guidelines).

156. 113 S. Ct. at 2812.

157. It is worth mention that the Supreme Court rejected the argument that civil forfeiture of conveyances and real properties served to compensate the government for the costs of law enforcement. To be considered remedial, a civil forfeiture must serve a purely remedial purpose. As Congress designed these forfeitures in part as punitive measures, they could not be characterized as remedial. *Austin*, 113 S. Ct., at 2811-12; *see also supra* note 141 (discussing this aspect of the *Austin* decision). Thus, the government may no longer rely on this

change would require Congress to abolish §§ 881(a)(4) and (a)(7). These properties would instead be forfeited through the criminal forfeiture provision found in 21 U.S.C. § 853. This provision already allows for the forfeiture of any property that facilitates a drug offense upon conviction for the offense. In order to prevent the transfer or hiding of these assets, Congress should amend the seizure provisions of § 853 to give prosecutors greater leeway to take possession of properties prior to conviction.[158]

In contrast, the civil procedure for the forfeiture of contraband, the instrumentalities of drug manufacturing and distribution, serves a purely remedial purpose and should be maintained.[159] It is beyond peradventure that law enforcement should not be hindered in its removal of drugs or other illegal substances and equipment. Officers should not have to wait until after a conviction to seize cocaine found in a car or the equipment used to make LSD found in a factory.

As a matter of necessity as well as principle, civil forfeitures of traceable proceeds should also be permitted.[160] Drug profits do not legitimately belong to the person who possesses them. Their forfeiture is purely remedial, has no sentencing implications, and thus does not raise Eighth Amendment concerns.[161] Moreover, the forfeiture of proceeds would often elude law enforcement if the civil process is not available. In many airport cases, for example, federal law enforcement officers will discover a passenger carrying a large sum of cash who they believe is involved in the drug trade.[162] The cash will often be subjected to

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theory in seizing these types of properties. *See, e.g.*, United States v. 835 Seventh Street, 832 F. Supp. 43, 48-49 (N.D.N.Y. 1993) (holding that an unconstitutionally excessive civil forfeiture may not be saved by selling the subject premises and then remitting only a portion of the proceeds to the government).

158. *See supra* notes 51-62 and accompanying text (discussing the shortfalls of § 853).

159. *See* 21 U.S.C. §§ 881(a)(1)-(3) (controlled substances, raw materials, equipment and containers); (a)(5) (books and records); (a)(8)-(9) (controlled substances and listed chemicals). 21 U.S.C. § 881 (1988).

160. *See* 21 U.S.C. § 881(a)(6) (1988).

161. *See supra* notes 128-152 and accompanying text (discussing the Eighth Amendement).

162. The DEA has developed "drug courier profiles" for use in interdiction efforts in airports and train stations. If a passenger fits a particular profile, officers will stop the person to ask about the person's itinerary, to see identification, and to ask for consent to search the person's belongings and sometimes the person's body. In addition to profiles, officers rely on information provided by airlines or railway companies such as whether a passenger purchases tickets with cash or whether the person is travelling from a "source city." *See, e.g.*, Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance,*

a drug-detecting dog sniff, and in many cases the dog will react positively to traces of some narcotic substance.[163]

The officers can establish probable cause that the money was derived from drug transactions to meet the burden of proof for civil forfeiture.[164] The totality of the circumstances often gives a court sufficient reason to believe that the cash was not legitimately earned.[165] In a civil forfeiture proceeding, the traveler would be given the opportunity to establish the legitimate source of the money if one exists. For one who holds the money legitimately—perhaps by inheritance, by earning it through a legitimate profession, or by winning a lottery—evidence to prove the money's source should be easy to obtain and, if shown, would surely be conclusive. Thus, the interests of innocent owners are sufficiently protected in the civil forfeiture context.

If the officers are required to proceed through the criminal process, forfeiting the money only after conviction, their efforts will be frustrated in airport drug proceeds cases. The officers cannot charge the individual with a crime even if they have reason to believe the person is involved in the drug trade. Possession of the cash is not a crime per se, nor will the officers be able to establish that a particular drug transaction took place or who was involved.

When drug proceeds are used to purchase assets such as real property or conveyances, the forfeiture of those assets presents different considerations than the forfeiture of the proceeds themselves, but in the final analysis, these assets should also be civilly forfeitable. The seizure of homes, however, can cause extreme hardship by depriving owners of essential assets. The fact that the process can produce such hardship creates a need for safeguards against erroneous seizure to protect inno-

82 J. CRIM. L. & CRIMINOLOGY 1109, 1118-21 (1992) (describing DEA drug courier profile operations).

163. For a discussion of the use of narcotics detection dogs, see *id.* at 1150-55.

164. *See* United States v. $37,780 in United States Currency, 920 F.2d 159, 164 (2d Cir. 1990) (holding falsity of traveler's statements and evidence of extensive involvement in drugs established probable cause to believe forfeiture action could be maintained); United States v. $91,960.00, 897 F.2d 1457, 1462 (8th Cir. 1990) (holding a "large sum of money, unexplained and in conjunction with the presence of drug paraphernalia, may constitute evidence of probable cause"); United States v. $38,600.00 in U.S. Currency, 784 F.2d 694, 698 (5th Cir. 1986 (same); *cf.* United States v. Sokolow, 490 U.S. 1, 3 (1989) (holding DEA agents had "reasonable suspicion" to stop an airport passenger who had large sum of money and behaved in other suspicious ways).

165. In determining whether law enforcement had probable cause, courts must make a situation-specific inquiry. *See, e.g., supra* note 164 (citing cases).

cent occupants from sudden dislocation. Because real estate is the type of asset that cannot easily be removed or transferred, it should be possible to fashion procedural rules to minimize the potential for undue hardship for innocent parties, without frustrating government efforts.

2. Lack of In Personam Jurisdiction

The procedure for seizing and forfeiting the assets of criminals emerged out of the need[166] to permit the government to enforce civil judgments and exact criminal penalties against individuals[167] outside the jurisdictional reach of American courts.[168] This concern continues to the present day and civil forfeiture law should reflect it.

166. As noted by the Supreme Court in 1844, forfeiture of property under admiralty law "is done from the necessity of the case, as the only adequate means of suppressing the [offense] or wrong, or insuring an indemnity to the injured party." United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844).

167. Private parties who were victims of criminal acts of piracy invoked the in rem forfeiture actions developed in admiralty law to obtain restitution. *See, e.g., Malek Adhel*, 43 U.S. (2 How.) at 233 (holding private parties who were victimized could claim property that the government acquired); The Palmyra, 25 U.S. (12 Wheat.) 1, 8 (1827) (in rem proceeding against ship involved in piracy).

168. According to principles of international law and considerations of Fifth Amendment Due Process, a federal court may not hear a criminal action unless the person charged with the crime stands before the court when the trial begins. U.S. CONST. amend. V; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 422(2) (1986) (hereinafter RESTATEMENT). This becomes particularly troublesome when the court is attempting to bring foreign or fugitive drug defendants to trial. A grand jury can indict a non-present defendant, but an arrest warrant can only be served within the United States or by a request for extradition to the asylum country in the case of a defendant found abroad. *Id.* § 422 cmt. c(iii).

Although extradition exists as an option in theory, it is not a convenient procedure in practice. Extradition from an asylum country requires two conditions to be met. First, the United States must have "jurisdiction to prescribe," defined as the authority of a state to make substantive laws applicable to particular people and circumstances. *See* Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 201 n.39 (1983). The government may obtain jurisdiction to prescribe by establishing that any of five types of jurisdiction apply: territorial jurisdiction, national jurisdiction, protective jurisdiction, universal jurisdiction, or passive personality or victim theory jurisdiction. *See generally id.* at 201-03 (describing general principles of jurisdiction under international law.) Most cases arise under territorial jurisdiction. Territorial jurisdiction is established if the individual committed the offense in the United States or if the defendant's extraterritorial actions had an actual or intended effect in the United States. *See generally id.* at 203-04 (describing territorial jurisdiction).

The earliest forfeiture statutes allowed for the forfeiture of foreign ships whose crews were alleged to have smuggled contraband into the United States or to have engaged in piracy.[169] *The Palmyra* case[170] and *United States v. Brig Malek Adhel*[171] involved forfeitures of ships whose crews engaged in piracy. In both cases, the crews of foreign-owned vessels engaged in acts of aggression against American ships.[172] Lacking jurisdiction to

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In addition, the government must satisfy a second requirement, "jurisdiction to enforce," defined as the power to induce or compel compliance with its laws. RESTATEMENT, *supra*, § 401(c). A federal court can only act in the territory of another country with the consent of that country. Treaties establish consent in advance, and commonly list five characteristics that must be met in order to extradite: there must be cause for holding the person for trial, the offense must not be a "political offense", the offense must be within the jurisdiction to prescribe by the requesting state, the offense must be considered a crime in both the requesting and asylum state ("dual criminality"), and extradition must not violate principles of double jeopardy. *Id.* at § 476. Finally, extradition must also meet the concept of "specialty," meaning that a person can only be tried for the crime for which he was extradited. *Id.* at § 477.

Consent can also be obtained on an ad hoc basis. One ad hoc approach is known as "The International Comity of Nations." United States v. Rauscher, 119 U.S. 407, 411-12 (1886). Under this doctrine, a state voluntarily surrenders a fugitive from justice. 31 AM. JUR. 2D *Extradition* § 21 (1989). Today comity is rarely used due to the numerous extradition conventions and treaties to which the United States is a party. *Id.*

The requirements of dual criminality and specialty have posed problems for the United States in seeking extradition from some countries. Other countries, such as Iran and Afghanistan, do not have treaties with the United States. The United States on some occasions has resorted to more expedient methods of apprehension, such as irregular rendition and abduction, but these methods raise a host of other diplomatic problems. *See generally* Sandi R. Murphy, Note, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1294-1300 (1990) (discussing extraordinary methods of apprehension of foreign offenders).

169. The civil forfeiture statutes as we know them today are usually considered to have originated from British admiralty law. In disputes between maritime traders, the owners of the vessels were likely to live abroad and thus outside the jurisdiction of the court. The in rem civil action provided a convenient way to resolve maritime disputes. *See* Stahl, *supra* note 9, at 295; *see also* Austin v. United States, 113 S. Ct. at 2807-08 (stating that of three types of forfeiture used in England, only statutory forfeitures such as those found in the navigation acts and used to enforce revenue or customs laws took hold in this country).

The principle of forfeiture of guilty property has been traced back to biblical times. For a thorough discussion of forfeitures and deodands, see 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 (1973).

170. 25 U.S. (12 Wheat.) 1 (1827).

171. 43 U.S. (2 How.) 210 (1844).

172. Apparently, the private parties who had been victimized could claim the property so acquired by the government. *Malek Adhel*, 43 U.S. (2 How.) at

prosecute the owner of the Palmyra for the actions of the crew,[173] if indeed the government could have shown that the owner had commissioned the crimes, the government brought a civil forfeiture action under the Piracy Act of 1819 instead. Justice Story's majority opinion in *Malek Adhel* comments on the necessity rationale for bringing civil actions in rem:

> It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or [offense] has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the [offense] or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct . . . .[174]

These early cases, then, responded to an otherwise unremediable situation by proceeding against the property of a foreign owner to provide some recompense to American victims of piracy. Similarly, in the smuggling cases, forfeiture of the vessel that transported the contraband provided the only means of punishing and deterring the foreign ship owner from smuggling. There was a need for an extraordinary measure to allow the government to punish a person over whom the government could not obtain personal jurisdiction. The fiction of the in rem proceeding—the action directly against the offending property itself—lent itself to the situation.

As a policy matter, modern civil drug asset forfeitures should continue to be allowed to punish extraterritorial defendants. Congress should address this problem directly, however, by enacting a special provision that would allow the civil forfeiture of any property of a suspected drug offender who is outside the jurisdiction of American courts. Given the international nature of the drug trade, a drug dealer's assets may be located within the United States while the offending owner is abroad or has become a fugitive. Although the government can prove an individual committed a drug offense in the United States, if the individual cannot be found within the United States borders, a civil action against the property of the individual may provide the only practical recourse for the enforcement of the drug laws.[175]

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233. This feature has not been retained in modern civil drug asset forfeitures. *See supra* notes 73-81 and accompanying text.

173. *See supra* note 166.

174. *Malek Adhel*, 43 U.S. (2 How.) at 233.

175. *See supra* note 166.

Civil drug asset forfeiture laws, however, authorize forfeiture in the routine case in which the government will also prosecute a defendant criminally.[176] The authority to entertain a civil drug asset forfeiture action does not turn on the existence of in personam jurisdiction over the alleged criminal. In the routine case, forfeitures should be limited to those involving purely remedial ends.[177] In contrast, both punitive and remedial forfeiture should be allowed in cases of extraterritorial suspects.[178]

These changes should not have any bearing on interagency cooperation.[179] To the extent that future revenues might decrease, any decrease would most likely reflect a correction of previous forfeitures that courts allowed prior to the *Austin* requirement of proportionality review. If the decrease that this correction causes is so drastic as to leave law enforcement inadequately funded, the legislature always has the option of direct federal funding.

B. Reserving Punishment for Criminal Courts

By restricting punitive forfeitures except as criminal sentences,[180] Congress could consolidate the punishment phase for drug offenses into a single sentencing proceeding held in criminal court after conviction. For reasons of judicial economy alone, one might expect the government to prefer a single, consolidated criminal action to determine guilt or innocence and to decide the extent of punishment to be imposed. Consolidation of the punishment phases in one post-conviction sentencing proceeding will allow courts to make better-informed, rational decisions.

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176. In *Austin*, for example, the defendant had already been convicted and sentenced in state criminal court before the federal government initiated a civil forfeiture action against his home and business. Austin v. United States, 113 S. Ct. 2801, 2803 (1993).

177. *See supra* part III.B.

178. Situations may arise in which property is forfeited in a punitive civil case on the ground that the suspect has become a fugitive or is an unextraditable foreign national, and later the government obtains in personam jurisdiction and files a criminal action. Procedures for discounting the criminal sentence by the amount of the punitive forfeiture can be devised, although subsequent prosecution may run afoul of the Fifth Amendment's Double Jeopardy Clause. *See infra* notes 180-196 and accompanying text.

179. *See supra* notes 68-72 and accompanying text.

180. The proposal that this Article sets forth would allow the continued use of punitive forfeiture in cases in which the suspected drug offender is outside the jurisdictional reach of the court or has become a fugitive. *See supra* Part IV.A.

At present, prosecutors in many drug cases seek civil drug asset forfeitures prior to the initiation of criminal proceedings. Because sentencing occurs after the civil forfeiture proceeding, the government has already seized whatever assets the person once owned by the time he or she is sentenced. This eliminates the possibility of imposing any financial penalty as a criminal sentence. At sentencing, the court reviews a Probation Officer's pre-sentence investigation report which frequently reports an "inability to pay" fines, without necessarily indicating to the court that the defendant's poverty is the result of civil forfeiture.[181] The sentencing court then determines the applicable imprisonment range and forgoes any financial penalty or asset forfeiture.

This Article proposes that only criminal courts should impose punitive sanctions. Drug offenders who possess real property or conveyances would face forfeiture of these assets through criminal forfeiture, in addition to the possibility of a monetary fine and prison sentence. Together with consolidating and rationalizing criminal sentencing, this proposal offers two other advantages. First, it avoids the double jeopardy challenges that inevitably will follow from the *Austin* decision that characterizes certain forfeitures as punishment. Furthermore, it provides criminal courts with a new and potentially potent sentencing option that could reduce the need for incarceration. The following sections address these advantages and also consider the costs of overpunishment that society will continue to bear if reform is not forthcoming.

1. Double Jeopardy Considerations

The *Austin* decision may foretell a future Court ruling that the Double Jeopardy Clause permits punishment for a crime to be imposed either at a civil forfeiture proceeding or at sentencing, but not both.[182] The Court noted in *Austin* that the Double Jeopardy Clause had not been applied in civil forfeiture cases,

181. Presentence investigation reports give courts additional information pertinent to the sentencing decision. Probation officers are required to prepare these reports in every case. *See* FED. R. CRIM. P. 32(c); 18 U.S.C. § 3552 (1988 & Supp. IV 1992).

182. The Double Jeopardy Clause provides that, "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In addition, to prohibiting double prosecution, the clause also provides protection against multiple punishments for the same offense. *See* Grady v. Corbin, 495 U.S. 508, 516 (1990) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)), *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993).

and, almost in passing, added, "but only in cases where the forfeiture could properly be characterized as remedial."[183] It follows logically from the Court's finding that the forfeiture of real property and conveyances are punitive, and that civil forfeiture of these items in addition to criminal sentencing violates the Double Jeopardy Clause.[184]

When the government brings both a criminal action and a civil forfeiture action in a drug case,[185] the question is whether the second punishment constitutes multiple punishment for the same offense.[186] Until recently, the test articulated in *United*

183. *Austin*, 113 S. Ct. at 2805 n.4 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984)); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) (per curiam); *see generally* United States v. Halper, 490 U.S. 435, 446-49 (1989) (holding Double Jeopardy Clause prohibits a second sanction that may not fairly be characterized as remedial).

184. It is well established that the Double Jeopardy Clause protects against three types of abuses of prosecutorial power: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *Halper*, 490 U.S. at 440; Illinois v. Vitale, 447 U.S. 410, 415 (1980); Brown v. Ohio, 432 U.S. 161, 165 (1977); *Pearce*, 395 U.S. at 717.

185. It makes no difference for double jeopardy purposes whether the criminal case is brought before the civil case or vice-versa. *See* Philip S. Khinda, *Undesired Results Under* Halper *and* Grady*: Double Jeopardy Bars on Criminal RICO Actions Against Civilly-Sanctioned Defendants*, 25 COLUM. J. L. SOC. PROBS. 117, 148 (1991).

186. Presumably, the civil and criminal cases are predicated on the "same offense." The Supreme Court set forth the approach for interpreting the phrase "same offense" in Blockburger v. United States, 284 U.S. 299 (1932). The *Blockburger* decision states that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)); *see also Brown*, 432 U.S. at 168 (holding that the Double Jeopardy Clause bars prosecution for lesser included offense and greater offense).

Because civil forfeitures are premised on proof of a violation of the criminal drug laws, prosecution for the same criminal law will clearly constitute the same offense. For example, the forfeiture of conveyances requires proof that the vehicles were "used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of controlled substances or the materials used to manufacture or transport them. 21 U.S.C. § 881(a)(4) (1988).

Of course, prosecutors might try to fashion their cases so that two different provisions of Title 21 are the bases for the civil and criminal cases. For example, the prosecutor might premise the civil forfeiture action on the possession of drug manufacturing equipment and might premise the criminal indictment on the drug sale, even though only one transaction is at issue. The Court's decision in Grady v. Corbin, 495 U.S. 508 (1990), eliminated this loophole, but was recently overruled. United States v. Dixon, 113 S. Ct. 2849, 2852 (1993).

In *Grady*, the Court created a second double jeopardy requirement. Even if the offenses satisfied the *Blockburger* test, *Grady* held that, in addition, the Double Jeopardy Clause barred any subsequent prosecution in which the

States v. Ward determined whether a civil sanction constituted a punishment or a remedy.[187] In effect, the *Ward* test makes the Double Jeopardy Clause inapplicable unless a court finds that Congress did not mean what it said when it labeled a statute "civil," a finding courts should be reluctant to make.[188]

The landmark case of *United States v. Halper* discarded this approach and applied the double jeopardy clause to a civil proceeding for the first time.[189] The civil statute in *Halper* could in

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charge requires proof of "conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 521. The decision in *Dixon* again focuses the inquiry on a technical analysis of the elements of the statutes charged, rather than on the actual conduct involved. *See generally* Khinda, *supra* note 185 (criticizing the *Grady* approach and suggesting it results in chilling impracticalities for law enforcement authorities); George C. Thomas, III, *A Modest Proposal to Save the Double Jeopardy Clause*, 69 WASH. U. L.Q. 195 (1991) (proposing to narrow *Grady*'s "same culpability" test); Ramona L. McGee, Note, *Criminal RICO and Double Jeopardy Analysis in the Wake of* Grady v. Corbin*: Is This RICO's Achilles' Heel?*, 77 CORNELL L. REV. 687 (1992) (analyzing the *Grady* test as applied to RICO).

187. 448 U.S. 242 (1980). Two Supreme Court cases examined the application of the Double Jeopardy Clause to civil forfeiture actions brought after acquittals on criminal charges arising from the same offenses. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam).

In *One Lot Emerald Cut Stones*, the Court considered whether the forfeiture constituted a second "criminal punishment." 409 U.S. at 235. Thus, both the criminal and the punitive nature of the statute were at issue. The Court found the statute was serving a remedial purpose in providing "a reasonable form of liquidated damages for violation of the inspection provisions and serv[ing] to reimburse the Government for investigation and enforcement expenses." *Id.* at 237. The second issue was whether the measure of recovery was "so unreasonable or excessive that it transform[ed] what was clearly intended as a civil remedy into a criminal punishment." The court held it was not. *Id.*

By the time the Court decided *One Assortment of 89 Firearms* in 1984, it had developed the *Ward* test for distinguishing civil from criminal statutes, which it found critical to the double jeopardy inquiry. United States v. Ward, 448 U.S. 242, 248-49 (1980); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963) (listing factors relevant to the punitive-remedial analysis). This test does not differ substantially from the *One Lot Emerald Cut Stones* test, although it is somewhat more exacting because it incorporates the seven *Mendoza-Martinez* factors. *See supra* note 135 (listing seven factors).

188. The test requires courts to determine Congress's intent in enacting the law, and if they find the intent was to create a civil remedy, then courts are required to consider whether the statute is "'so punitive . . . as to negate' Congress' intent to establish a civil remedial mechanism." One Assortment of 89 Firearms, 465 U.S. at 365 (citing *Ward*, 448 U.S. at 248-49). The *Ward* test has also been used to determine whether other constitutional provisions were applicable. *See supra* note 135.

189. 490 U.S. 435 (1989).

no way be construed as criminal under the *Ward* test.[190] Yet the particular application of the statute resulted in a fine well in excess of that which would be appropriate to meet the government's remedial purposes.[191] Thus, had the Court applied the *Ward* test in *Halper*, the government would not have been barred from imposing both criminal punishment and the large civil fine, even though the civil fine could only be construed as punitive.

The *Halper* decision frames the "sole question" as "whether the statutory penalty . . . constitutes a second 'punishment' for the purpose of double jeopardy analysis."[192] The Court disposed of prior case law by finding their "relevant teaching" to be "that the Government is entitled to rough remedial justice" and that it may use "imprecise formulas" to fix damages "without being deemed to have imposed a second punishment."[193]

Moreover, the Court rejected the *Ward* approach as "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishment"; thus, "the labels 'criminal' and 'civil' are not of paramount importance."[194] The Court instead applied a "rule of reason":

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[195]

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190. The False Claims Act, 31 U.S.C. §§ 3729-3731, provides a remedy for the filing of false claims and imposes liability for a civil penalty of "not less than $5,000 and not more than $10,000 plus three times the amount of damages the Government sustains because of the act of that person, and costs of the civil action." 31 U.S.C. § 3729 (1988). The Court stated this provision should ordinarily be construed as a civil remedial measure. 490 U.S. at 449 ("Similarly, we have recognized that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole.").

191. As manager of New City Medical Laboratories, Irwin Halper submitted false claims to an insurance company for reimbursement for services rendered on 65 separate occasions. The claims demanded reimbursement in the amount of $12 each, when the actual service only entitled the laboratory to $3 per claim. 490 U.S. at 437. The insurance company passed the overcharges along to the federal Medicare program. The total sum of the overcharges was $585. *Id.* Under the formula for fines of the False Claims Act, Halper was subject to a fine of over $130,000. *Id.* at 438.

192. *Id.* at 441.

193. *Id.* at 446.

194. *Id.* at 447.

195. *Id.* at 449-50.

Applying the *Halper* approach, it follows that the Double Jeopardy Clause would bar the imposition of punitive civil forfeitures in combination with a second punishment in criminal court.[196]

2. Criminal Forfeiture as an Intermediate Punishment

In the ordinary case, the government should bring punitive forfeitures as part of the criminal sentence. Section 853 already requires courts to forfeit a defendant's assets upon conviction for a drug offense, but the current structure does not distinguish between remedial and punitive forfeitures, nor does it give the sentencing court the discretion to fashion sentences consistent with the defendant's ability to bear the financial penalty.[197] Courts should allow punitive forfeitures in criminal court only to the extent that they reflect the severity of the offense, as the *Austin* case implies.[198] Consistent with the Court's determination that the forfeiture of conveyances and real property used to facilitate offenses constitute punishment for crime, Congress should amend § 853 to distinguish between remedial and punitive forfeitures. The sentencing structure should fully incorporate those forfeitures that serve to punish, giving courts much more discretion to choose between types of punishment than the Federal Sentencing Guidelines presently allow.[199] Punitive

196. This conclusion is buttressed by the fact that the Court also ignored the *Ward* test in its excessive fines analysis in *Austin*. *See supra* note 135 and accompanying text. The Court has shown a preference for the punitive-remedial test for judging civil penalties under both the Double Jeopardy Clause and the Excessive Fines Clause. It stands to reason that the Court will apply the same analysis to its double jeopardy analysis of punitive forfeitures.

In cases in which the federal government initiates a punitive forfeiture action and the state court files a criminal action based on the same offense, as was the case in *Austin*, the Court may find that the "dual sovereignty exception" to the Double Jeopardy Clause allows the imposition of the second punishment. Although a thorough exploration of this exception is beyond the scope of this Article, see generally Kenneth M. Murchison, *The Dual Sovereignty Exception To Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986) (analyzing the historical development and contemporary significance of the dual sovereignty exception to double jeopardy).

197. For a description of the scope and operation of the criminal forfeiture provisions of Title 21, see *supra* notes 50-61 and accompanying text.

198. *See supra* part III.B (discussing the *Austin* decision).

199. The guidelines applicable to drug offenses reflect the mandatory minimum sentences that Congress created, which require lengthy prison terms for all drug offenses. *See* Freed, *supra* note 7, at 1690 n.45; Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 86-87 (1993).

criminal forfeitures could serve as intermediate sanctions[200] in the same way that fines could be punishment for crimes.[201]

The suggestion that courts should factor forfeitures into the sentencing decision raises the same equity concerns that have prevented fine programs from being implemented as meaningful intermediate sanctions. The suggested use of financial penalties to punish for crimes is inevitably criticized as unfair to the indigent on the ground that the poor could not benefit from this option and would be subject to incarceration instead. Although a full treatment of this issue is beyond the scope of this Article, Professors Norval Morris and Michael Tonry thoroughly explored and flatly rejected this concern in their book, *Between Prison And Probation*.[202]

Professors Morris and Tonry believe that using financial penalties interchangeably with incarceration does not pose an equity problem.[203] Their sensible proposal would tailor the financial penalty to each offender's means, earning capacity, and financial obligations to dependents, so as to impose "roughly

200. "Intermediate sanctions," sometimes called "alternatives to incarceration," comprise punishment options that lie between the fully incapacitating option of imprisonment and the option of ordinary probation, which is thought to impose few restrictions on an offender's liberty. Intermediate sanctions include fines, community service orders, house arrest, intermittent imprisonment, electronic monitoring, and probation with conditions such as requiring treatment. *See* NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 176-80 (1990) (listing menu of punishment options).

201. The typical understanding of the purpose of fines is to punish and deter crime, not to serve as a means of dispossessing criminals of ill-gotten gains, which would be a purely remedial purpose. *See* SALLY T. HILLSMAN ET AL., U.S. DEP'T OF JUSTICE, FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION 21-28 (Nov. 1984).

202. *See* MORRIS & TONRY, *supra* note 200, at 82-149 (exploring the interchangeablity of punishments and the use of fines as an intermediate punishment).

203. They persuasively argue in favor of the interchangability of punishments both in principle and in practice. MORRIS & TONRY, *supra* note 200, at 35-108.

The Supreme Court has struck down as a violation of the Equal Protection Clause the use of incarceration in lieu of payment of fines by poor people. The Court held such laws worked an invidious discrimination against individuals on the basis of indigency. *See* Bearden v. Georgia, 461 U.S. 660, 674 (1983); Tate v. Short, 401 U.S. 395, 398 (1971); Williams v. Illinois, 399 U.S. 235, 243-44 (1970).

Financial penalties tailored to a person's means, with the alternative of community service for the truly indigent, would avoid the equal protection issues in those cases. *See* Richard Posner, *Optimal Criminal Sanctions*, *in* ECONOMIC ANALYSIS OF LAW 205, 209 (3d ed. 1986) (arguing Supreme Court decisions in *Tate* and *Williams* were incorrect).

comparable financial burdens."[204] As between rich and poor defendants, the dollar amounts of fines or forfeitures may vary even if their criminal histories and offenses of conviction are the same. This inequality is not problematic if our concern is to exact the same amount of punishment. Courts can only impose roughly equivalent financial hardships on rich and poor defendants by making rich defendants pay more than poor ones.[205]

The use of financial penalties to punish poor people poses no practical problems either. Studies of fine collection programs indicate that even relatively poor people pay their fines as ordered.[206] With the addition of criminal forfeiture as an

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204. MORRIS & TONRY, *supra* note 200, at 114, 141. Congress requires the consideration of these and other factors in determining the ability of a defendant to pay a fine. The relevant provision of the Sentencing Reform Act reads as follows:

> In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—
> (1) the defendant's income, earning capacity, and financial resources;
> (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
> (3) any pecuniary loss inflicted upon others as a result of the offense;
> (4) whether restitution is ordered or made and the amount of such restitution;
> (5) the need to deprive the defendant of illegally obtained gains from the offense;
> (6) whether the defendant can pass on to consumers or other persons the expense of the fine; and
> (7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

18 U.S.C. § 3572(a) (1988).

205. We can learn much from the day fine systems of the Swedish and Germans in thinking about structuring a system of financial penalties. As summarized by Morris and Tonry, "[t]he number of day-fine units must be decided first by the sentencing court without regard to the means of the offender; the value of each day-fine unit is them calculated." MORRIS & TONRY, *supra* note 200, at 143. In practice, the Swedish and German systems operate very differently due to the difference in the way they calculate the offender's ability to pay. *Id.* These and other American day fine models should influence the development of an integrated punishment system for drug offenders as well as other types of offenders.

206. Morris and Tonry reject the idea that the poor cannot pay fines, and give numerous examples of successful programs that have calibrated fines according to an offender's ability to pay. *Id.* at 112-15; *see also* SILVIA S.G. CASALE & SALLY T. HILLSMAN, U.S. DEP'T OF JUSTICE, THE ENFORCEMENT OF FINES AS CRIMINAL SANCTIONS: THE ENGLISH EXPERIENCE AND ITS RELEVANCE TO AMERICAN PRACTICE (Nov. 1986) (concluding that fines can be collected from even poor

intermediate sanction, courts would have the option of a financial penalty that would not entail any enforcement problems because they would know about the defendant's assets at sentencing and forfeiture could occur immediately after sentencing. The utterly destitute would not necessarily suffer more severe punishment under this type of system. Even the poorest defendants can have a "fine on time" imposed, such as community service, rather than a financial penalty.[207]

A drug sentence might include a package of punishments such as a period of incarceration, fines, or forfeiture of assets such as cars and other items, and perhaps other intermediate sanctions such as community service. Courts can fashion intermediate sanctions to reflect the seriousness of the offense while reducing reliance on prison sentences to the exclusion of other forms of punishment.[208] Because many drug offenders do not pose a threat of violence requiring incapacitation, this group is appropriately targeted for intermediate sanctions.[209]

The imposition of financial penalties on drug offenders would not change existing policy. Congress has already endorsed the efficacy of financial disincentives for drug offenders when it enacted the civil and criminal forfeiture and criminal

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offenders when set rationally in relation to means based on a study of English courts); HILLSMAN ET. AL., *supra* note 201 (discussing the use of fines in other countries; DOUGLAS C. MCDONALD ET. AL., U.S. DEP'T OF JUSTICE, DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS (Apr. 1992) (reporting results of an experiment using day fines that tailor an offender's fine to his or her ability to pay); George F. Cole, *Fines Can Be Fine—and Collected*, 28 JUDGES' J. at 5 (Winter 1989) (arguing for greater use of fines as sanctions in criminal cases).

207. *See* MORRIS & TONRY, *supra* note 200, at 123-24.

208. Good sense and the Sentencing Reform Act of 1984, which created the Sentencing Commission and charged it with the creation of Guidelines, require these considerations. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984); 28 U.S.C. §§ 991-998 (1988). The Act charges the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." § 994(m). The statute also requires the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" in promulgating guidelines. § 994(g).

209. *See* J. Michael Quinlan, *Intermediate Punishments as Sentencing Options*, 66 S. CAL. L. REV. 217 (1992) (former director of Federal Bureau of Prisons advocating increased reliance on intermediate sanctions for non-violent offenders to redress overcrowding that stiffer laws cause). In Sweden in 1979, courts imposed fines in 734 narcotics cases, and in significant numbers of other serious offenses such as homicide, sexual offenses, and robbery. MORRIS & TONRY, *supra* note 200, at 144.

fine provisions.[210] The changes suggested here would merely acknowledge that punitive forfeitures are punishment for crime in the hopes of encouraging a more comprehensive analysis of drug sentencing.

CONCLUSION

The time is ripe for a comprehensive approach to drug sentencing in federal court. The plethora of recent Supreme Court forfeiture decisions indicates a desire on the Court's part to reexamine the entire civil forfeiture process. The decisions of the October 1992 term, in particular, will work substantial changes in the way drug offense forfeitures operate, specifically the *Austin* requirement of proportionality review. Rather than making piecemeal changes to conform the civil forfeiture process to satisfy the mandates of the Supreme Court, however, Congress should thoroughly investigate the relationship between the criminal sentencing and civil forfeiture processes. Only a single, comprehensive system of punishment will rationalize drug sentencing in federal court.

A few simple changes in the civil forfeiture law would restrict the imposition of punitive forfeitures except as criminal sentences. These changes would consolidate the imposition of punishment into one criminal sentencing forum. This would eliminate the problem of excessive punishment that occurs when drug offenders receive punishment through both the criminal and civil courts for the same offense. These changes would also eliminate the possible double jeopardy dilemma in this arrangement. Congress could easily fashion procedures to protect the

210. The 1986 Act that raised drug offense fines to millions of dollars produced no legislative history on the rationale for the increases. The legislative history of an earlier amendment increasing the drug offense fine provisions, however, suggests that the legislative intent of the increase was to deprive drug offenders of illegitimate profits. In 1984, Congress increased fines for drug offenses from the tens of thousands to the hundreds of thousands for the following purpose:

> Drug trafficking is enormously profitable. Yet current fine levels are, in relation to the illicit profits generated, woefully inadequate. It is not uncommon for a major drug transaction to produce profits in the hundreds of thousands of dollars. However, with the exception of the most recently enacted penalty for domestic distribution of large amounts of marihuana, the maximum fine that may be imposed is $25,000. Part A of Title V provides more realistic fine levels that can serve as appropriate punishments for, and deterrents to, these tremendously lucrative crimes.

S. REP. No. 98-225, 98th Cong., 2nd Sess. 225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3437-38.

properties subject to criminal forfeiture from being transferred or hidden, thereby satisfying an important concern of law enforcement. At the same time, the availability of punitive forfeitures as an intermediate sanction creates another sentencing option that could serve as a means of reducing our reliance on imprisonment.

Impressive advances in the investigation and prosecution of drug crimes by prosecutors and law enforcement officials have gone unnoticed due to all the negative publicity given to cases of forfeiture abuses. Of special significance are the multi-jurisdictional task forces that have effectively coordinated the efforts of law enforcement on all levels of government. These institutional coalitions were born out of a desire to curb the drug trade, but can serve as models for multi-jurisdictional cooperation to attack other pervasive problems. Statutory changes would promote a fairer and more rational system and would allow the public to focus on the positive aspects of drug control in this country.

Most importantly, a comprehensive assessment of the punishment of drug offenders could address the concerns of overpunishment that have resulted in overcrowded federal prisons and numerous other unfortunate consequences. It is not only drug offenders who suffer when the system inflicts excessive punishment. We all pay the price, and we cannot afford to continue on this course. In particular, forfeitures of real property, although not requiring financial outlays, nonetheless have social costs. When legitimate businesses are forfeited to the government, innocent employees lose their jobs. They suffer emotional harm and the financial strain of unemployment, and they may require welfare support. When the homes of drug offenders are forfeited, their families may be left homeless.

The logic of current sentencing practices is analogous to the fallacious belief that if two aspirins will cure a headache in an hour, four aspirins will cure it in half of an hour. No amount of punishment will ever "cure" our drug problem, but one thing is certain: an overdose of punishment does more harm than good.