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# Justice Through Synthesis: The Second Circuit Creates A Nonperpetrator Test For Civil Forfeiture Actions

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# JUSTICE THROUGH SYNTHESIS: THE SECOND CIRCUIT CREATES A NONPERPETRATOR TEST FOR CIVIL FORFEITURE ACTIONS

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## INTRODUCTION

Consider the following two scenarios:

A homeowner in Malibu, California, allows his grown son to continue living with him at home, even though he knows the son has a longstanding problem with drugs.[1] The son had been arrested for dealing drugs ten years before, and had been admitted to a rehabilitation clinic at least once.[2] The father may have reason to know his son is still involved with drugs, perhaps even dealing again, but he does not ask his son to move out.[3] After receiving a tip from an informant, the local police raid the house, finding $15,000.00 worth of cocaine, four and a half grams of psilocybin mushrooms and a three-foot-tall marijuana plant.[4] Both father and son are arrested, but the father is acquitted of all state criminal charges.[5] Now the federal government brings a forfeiture action against the father's home, which has an estimated worth of $925,000.00.[6]

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[1] United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 736 (C.D. Cal. 1994).

[2] *Id.*

[3] *Id.* at 730.

[4] *Id.*

[5] *Id.* at 735.

[6] *Id.* at 730.

The second scenario takes place in upstate New York where a woman also has a grown son with drug problems living at home.[7] He has a special fascination for growing marijuana, storing marijuana-growing supplies in her basement, keeping various drug paraphernalia in his room and displaying on his bookshelf a framed photograph of himself next to a six-foot tall marijuana plant.[8] To get him out of the house, the mother helps him buy an eighty-five-acre tract of land outside of town, and helps him build a farmhouse there "so he can do his farming."[9] The son conveys title to his mother for one dollar, but remains living on the land.[10] When the police later raid the farm, they find 1362 marijuana plants, as well as seeds, scales and a gun.[11] The government institutes a civil forfeiture action against the property, claiming that the mother was well aware of her son's marijuana production, and effectively conspired with him to grow the illegal crop.[12]

These two cases have led to landmark federal court decisions, epitomizing how modern civil forfeiture[13] has collided with the

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[7] United States v. Milbrand, 58 F.3d 841, 843 (2d Cir. 1995).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 842.

[11] *Id.* at 843, 848.

[12] *Id.* at 843.

[13] "Forfeiture" is defined as a "divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting valid right without compensation." BLACK'S LAW DICTIONARY 650 (6th ed. 1990).

State and federal laws utilizing forfeiture can allow for forfeiture of "property used in the commission of a crime . . . as well as property acquired from the proceeds of the crime." *Id.* In *Milbrand*, the federal government sued under the Federal Controlled Substance Act of 1970. 21 U.S.C. § 881(a)(7) (1994).

Criminal forfeiture is an *in personam* action, where the prosecution must prove beyond a reasonable doubt that the property owner used the property in a criminal enterprise. *See* Gary M. Maveal, *Criminalizing Civil Forfeitures*, 74 MICH. B.J. 658, 658 (1995). Usually, the owner retains possession of the property until convicted. *Id.* In civil forfeitures, however, the government need only show by probable cause of criminal conduct before seizing the property. *Id.* Therefore, "the civil option has long been federal prosecutors' tool of choice." *Id.*

Eighth Amendment.[14] Both cases demonstrate how courts since the Supreme Court's decision in *Austin v. United States*[15] have struggled to resolve civil forfeiture actions brought against homeowners who have not committed the underlying offense, but may have known that drug activity was taking place on their property.[16]

*Austin* and its progeny represent a response to a 1984 amendment to the Controlled Substances Act,[17] which amended civil forfeitures to include real property where drug activity was taking place.[18] While the amendment provides for an "innocent owner"

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Subsequently, use of civil forfeiture has resulted in a "blending with criminal sanctions" in order to "complement enforcement of the criminal law." 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, 1327, 1344 (1991).

[14] The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[15] 113 S. Ct. 2801 (1993). The district court in *Austin* allowed forfeiture of the petitioner's body shop and mobile home after he pled guilty to possessing cocaine with intent to distribute under state law. *Id.* at 2803. In affirming the trial court's decision, the Eighth Circuit stated that it had to "reluctantly agree" with the government that current caselaw did not prevent forfeiture, even though the court opined that it was "exacting too high a penalty in relation to the offense committed." United States v. Austin, 954 F.2d 814, 817 (8th Cir. 1992). The Supreme Court reversed, holding unanimously that civil forfeiture based on a property's *facilitation* of criminal activity was considered a punishment for Eighth Amendment purposes, and as such was subject to the Excessive Fines Clause. *Austin,* 113 S. Ct. at 2811. Essentially, *Austin* added a second defense to the federal civil forfeiture statute by allowing the claimant to show that civil forfeiture in that case was constitutionally excessive.

[16] *See, e.g.,* United States v. Milbrand, 58 F.3d. 841 (2d Cir. 1995); United States v. 143-147 East 23rd Street, 888 F.Supp. 580 (S.D.N.Y. 1995) (holding forfeiture also excessive under *Milbrand* multifactor test), *aff'd,* 77 F.3d 648 (2d Cir. 1996); United States v. Zumirez, 845 F. Supp. 725 (C.D. Cal. 1994). Property owners who allow illegal activities to transpire on their property but who do not actually commit the underlying offense in a forfeiture action are referred to as "nonperpetrating owners" throughout this Note.

[17] 21 U.S.C. §§ 801-950 (1994).

[18] 21 U.S.C. § 881(a) (1994). The key 1984 amendment to the Controlled Substances Act (the "Act") was the real property provision, which mandated that:

defense,[19] there are no other statutory safeguards for owners who, as in the two scenarios described above, may have knowingly allowed others to continue illegal activities on their premises.[20]

In *Austin,* the Supreme Court partly remedied this lack of statutory protection by ruling that civil forfeiture constituted punishment for Eighth Amendment purposes.[21] The Court did not,

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

21 U.S.C. § 881(a)(7).

[19] The "innocent owner" statutory defense places the burden of proof on an owner to establish that any drug activity on the premises was committed "without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7).

[20] United States v. 461 Shelby County Road, 857 F. Supp. 935, 938-39 (N.D. Ala. 1994). The court in *Shelby* illustrated the quandary of an owner knowing about limited drug activity on the property and therefore not having any statutory protection:

> simply knowing about a small marijuana deal, while theoretically destroying the "innocence" of the owner for the purpose of exposing his illegally-used real property to forfeiture under 21 U.S.C. §881 (a)(7), does not itself constitute a federal crime. This fact makes it difficult, if not impossible, to determine the degree of such an owner's culpability for the purpose of assessing him a "fine" to appropriately punish him for not having committed a crime but rather for not telling on another for that other's criminal conduct. *This court has not found a statute in the United States Code making it a crime to fail to promptly report a state or federal crime.* There is, of course, the obvious distinction between "aiding and abetting" a crime, on the one hand, and "failing to report a crime," on the other.

*Id.* (emphasis added). Thus, although *Shelby* dealt with a claimant who had perpetrated the underlying offense, the dicta cited above indicated the court's concern for the plight of nonperpetrators who had failed to report crimes on their property. *Id.*

[21] Austin v. United States, 113 S. Ct. 2801, 2812 (1993) (concluding that "forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense,' and as such, is subject to the limitations of the

however, resolve the plight of the nonperpetrating owner, because it split 5-4 over the appropriate legal approach for determining when forfeiture was excessive.[22] In a separate concurrence, Justice Antonin Scalia argued forcefully that lower courts should be required to follow an instrumentality approach,[23] which focuses on the relationship between the property and the offense.[24] For its part, the majority refused to adopt an excessiveness test based solely on instrumentality, opting instead to allow the lower courts to use whatever factors they considered appropriate,[25] including elements of proportionality.[26] Thus, lacking a clear mandate or

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Eighth Amendment's Excessive Fines Clause") (citations omitted).

[22] In *Austin*, the majority included Justices Henry Blackmun, Byron White, John Paul Stevens, Sandra Day O'Connor and David Souter. Justice Anthony Kennedy filed an opinion concurring in part and concurring in the judgment, in which Chief Justice William Rehnquist and Justice Clarence Thomas joined. Justice Antonin Scalia filed a separate opinion concurring in part and concurring in the opinion. *Id.* at 2802.

[23] "Instrumentality" is defined as "[s]omething by which an end is achieved; a means, medium, agency." BLACK'S LAW DICTIONARY 801 (6th ed. 1990). Within the civil forfeiture context, the term derives from the *in rem* nature of the forfeiture action. An instrumentality inquiry determines whether the relationship between the property and the offense is close enough to permit forfeiture. *Austin*, 113 S. Ct. at 2812 (Scalia, J., concurring).

[24] *Austin*, 113 S. Ct. 2814 (Scalia, J., concurring).

[25] *Id.* at 2812 n.15. In *Austin*, the claimant argued that the Court should adopt a "multifactor" test for determining excessiveness. *Id.* at 2812. In his concurrence, Justice Scalia argued that lower courts should judge excessiveness only in terms of how instrumental the property was to the illegal activity, that is, how important the property was to the commission of the underlying crime. *Id.* at 2812 (Scalia, J., concurring). In a separate concurrence, Justices Kennedy, Thomas, and Chief Justice Rehnquist indicated their agreement with Justice Scalia's instrumentalist approach. *Id.* at 2815 (Kennedy, J., concurring). While the majority did not "rule out the possibility that the connection between the property and the offense may be relevant," the Court refused to limit lower courts "from considering other factors in determining whether the forfeiture of [the claimant's] property was excessive." *Id.* at 2812 n.15. Nor did the Court choose to enumerate these possible factors.

[26] "Proportionality" is defined as a "relationship of equivalence between two pairs of quantities, such that the first bears the same relationship to the second as the third does to the fourth." NEW SHORTER OXFORD ENGLISH DICTIONARY 2381 (4th ed. 1993). The legal concept of proportionality stems from the Eighth Amendment's Cruel and Unusual Punishments Clause jurisprudence, where the

articulated test, lower courts have been forced to fashion their own excessiveness tests, using either instrumentality, proportionality, or a synthesis of the two approaches.[27]

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Supreme Court has articulated the concept as "[t]he principle that a punishment should be proportionate to the crime." Solem v. Helm, 103 S. Ct. 3001, 3006 (1983).

In addition to the Cruel and Unusual Punishments Clause, the Court has applied a proportionality analysis to the Eighth Amendment's Excessive Bail Clause, reading "excessive" to require proportionality between the amount of bail and the Government's interest in preventing the defendant's flight. United States v. Salerno, 107 S. Ct. 2095, 2105 (1987); *see also supra* note 14 (quoting the Excessive Bail Clause).

Applying the Excessive Fines Clause to civil forfeiture, federal courts have articulated proportionality as comparing "the nature of the offense with the harshness, monetary or otherwise, of the forfeiture." United States v. 6380 Little Canyon Road, 59 F.3d 974, 983 (9th Cir. 1995); *see also* United States v. RR#1, 14 F.3d 864, 874-75 (3d Cir. 1994); United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 732-33 (C.D. Cal. 1994).

This Note distinguishes two approaches to proportionality. The first approach defines "harshness" of the forfeiture solely in terms of the monetary value of the property. The second holds a broader definition of harshness, including the hardship forfeiture would create on the owner and innocent third parties. *See infra* text accompanying notes 104-11 and 125-44 (comparing proportionality approach based exclusively on monetary terms against multifactor proportionality).

[27] *See, e.g.*, United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) (adopting an instrumentality approach to forfeiture).

For a review of the monetary proportionality approach, see United States v. 429 S. Main Street, 52 F.3d 1416, 1422 (6th Cir. 1995) (affirming forfeiture of home using purely monetary proportionality approach); United States v. 143-147 East 23rd Street, 888 F.Supp. 580, 584 (S.D.N.Y. 1995) (holding that forfeiture of hotel owner's equity interest of $500,000.00 was not excessive when maximum fine against perpetrator was roughly equivalent to owner's equity interest) (holding forfeiture also excessive under *Milbrand* multifactor test), *aff'd*, 77 F.3d 648 (2d Cir. 1996); United States v. 2408 Parliament, 859 F. Supp. 1075, 1078 (E.D. Mich. 1994) (holding that forfeiture of an $87,000.00 residence was not excessive when claimant could have received 2 million dollars in federal fines); United States v. 11869 Westshore Drive, 848 F. Supp. 107, 111 (E.D. Mich. 1994) (holding that forfeiture of a $85,000.00 home was not excessive when claimant could have received $250,000.00 in fines), *aff'd*, 70 F.3d 923, 930 (6th Cir. 1995).

Cases involving courts' use of multifactor tests include United States v. G.P.S. Automotive Corp., 66 F.3d 483, 501 (2d Cir. 1995) (remanding case with

This Note examines an innovative attempt by the Second Circuit to create such a synthesis. In *United States v. Milbrand*,[28] the Second Circuit became the first federal court to approach excessiveness by drawing a legal distinction between owners who committed the underlying offense by possessing or selling drugs on their property, and owners who were nonperpetrators.[29] Part I of this Note provides a brief procedural history of *Milbrand*, and examines the two separate tests adopted by the Second Circuit. Part II traces the origins of *Milbrand's* concepts and language by analyzing recent Supreme Court decisions in Eighth Amendment jurisprudence, particularly the seminal debate over proportionality and instrumentality in *Austin*. Part III surveys the year and a half of federal caselaw between *Austin* and *Milbrand*, a period in which the federal circuits have divided into three loose camps.[30] This section also critiques each of these approaches, and suggests that the *Milbrand* dichotomy represents the most equitable approach for nonperpetrators.

Part IV assesses *Milbrand* and argues three main points. First, by drawing the distinction between perpetrators and nonperpetrators, the Second Circuit has given claimants a greater opportunity to fight off excessive forfeiture in lower courts. Second, through its

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instructions that the lower court make multifactor determination of forfeiture's constitutionality, including level of owner's culpability); United States v. 9638 Chicago Heights, 27 F.3d 327, 330 (8th Cir. 1994) (reversing forfeiture on other grounds, while being highly critical of strict instrumentality approach); *RR # 1*, 14 F.3d at 872-76 (remanding forfeiture action for factual determination of excessiveness, and encouraging lower court to consider other factors besides instrumentality); *Zumirez*, 845 F. Supp. at 731-38 (developing multifactor test for determining excessiveness).

[28] 58 F.3d 841, 848 (2d Cir. 1995).

[29] In mentioning a previous Second Circuit case applying excessive fines analysis to a *perpetrating* owner, the court noted that the "excessiveness inquiry should involve analysis of the amount of the penalty in light of the extensiveness of the convicted owner's criminal activities." *Id.* at 847. In the case at bar, however, where the claimant was "*not* the perpetrator of the crime," the court opined that this new situation required "analysis of the amount of penalty in light of the role and culpability of the [non-perpetrating] owner in the illicit use of her property." *Id.* at 848.

[30] *See infra* part IIIA-D (describing three basic approaches to excessiveness for forfeitures of real property).

nonperpetrator test, the *Milbrand* court has done a better job than most courts thus far in synthesizing elements of instrumentality and proportionality, and producing an articulated test that lower courts can apply fairly. However, this Note also argues that by holding on mechanistically to language of precedent that is unsuitable for civil forfeiture, the *Milbrand* court unfairly taints its nonperpetrator test with the culpability of the criminal offender who committed the underlying offense.

Part V examines *United States v. 6380 Little Canyon Road*,[31] a Ninth Circuit case decided a month after *Milbrand*, which offers a procedural solution that would improve the *Milbrand* nonperpetrator test by clearly separating its instrumentality and proportionality elements, making it even easier for lower courts to apply fairly. Part VI concludes that the other federal circuits should adopt the *Milbrand* perpetrator-nonperpetrator distinction, as well as other innovations like the procedural approach adopted by *Little Canyon Road*. In its final analysis, this Note differs from other commentary[32] in its assertion that by recognizing the distinction between

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[31] 59 F.3d 974 (9th Cir. 1995).

[32] Other commentators have spent considerable length in analyzing *Austin* and its place within the history of civil forfeiture law. Several of these commentators have developed their own remedial solutions. One author eschews the present crisis in governmental abuse and supports Justice Scalia's instrumentality approach based on the "historical fiction" of *in rem* forfeiture actions. Joy Chatman, Note, *Losing the Battle, But Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After* Austin v. United States, 38 St. LOUIS U. L.J. 739, 740 (1994). Other writers prescribe a variety of methods for introducing proportionality concepts to the law. One author proposes a blanket forfeiture statute that would eliminate the "historical fiction" of the defendant property. Stacy J. Pollock, Note, *Proportionality in Civil Forfeiture: Toward a Remedial Solution*, 60 GEO. WASH. L. REV. 194, 197 (1994). Another author prescribes a set of specific factors that courts should use in determining forfeiture. Andrew S. Williams, Comment, Austin v. United States: *Illusory Protection Against In Rem Civil Forfeiture Actions?*, 24 SW. U. L. REV. 251, 256 (1994). All of these approaches propose impractical solutions, however, because they are each divorced from the present trend of courts to blend various factors into a multifactor approach.

perpetrators and nonperpetrators, courts can better develop excessive fines analyses that are logically consistent and just.[33]

## I. *UNITED STATES V. MILBRAND*[34]

### *A. Facts and Procedure*

In August 1990, police raided an eighty-five-acre farm in western New York.[35] Patrolled by guard dogs, they found several fields of marijuana, totaling 1362 plants on or near the property.[36]

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[33] This Note does not, however, argue that there is a clear moral distinction between perpetrators and nonperpetrators in forfeiture actions. Indeed, a review of relevant caselaw indicates that nonperpetrating owners may sometimes hold more culpability than those who have committed an underlying crime. *See, e.g.*, United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995) (finding mother at least willfully blind of son's massive marijuana production). *Cf.* United States v. 429 S. Main Street, 52 F.3d 1416 (6th Cir. 1995) (affirming forfeiture of home where owner sold small amounts of marijuana, but did not instigate sale in home); United States v. 835 Seventh Street, 820 F. Supp. 688 (N.D.N.Y. 1992) (rejecting forfeiture where claimant sold only a few small bags of marijuana to undercover agents, who suggested that the transaction take place inside claimant's home).

The underlying assumption of this Note, however, is that the present legal structure of civil forfeitures for drug offenses is so prone to abuse that it should be dismantled and subsumed into criminal forfeiture law, where seizures of property must be based upon a higher level of proof than mere probable cause. *See* Cheh, *supra* note 13, at 1360 (arguing that sanctions should be criminal only if they are "formally intended to be and [are] denominated as such" by the legislature); *see also* Maveal, *supra* note 13, at 661 (1995) (arguing that "civil forfeiture, with its archaic fictions . . . has not yet become an anachronism, but it is likely that the government effectively will be required either to join its forfeiture claim in a criminal indictment or elect between remedies of civil forfeiture and criminal conviction").

Considering the present conservative cast of American politics, the chief avenue of reform will continue to be the courts, especially through Eighth Amendment jurisprudence. To that end, it will be important for claimants to introduce into district courts, through defenses of nonperpetrating parties, the concepts that the *Milbrand* court has adopted for the Second Circuit.

[34] 58 F.3d 841 (2d Cir. 1995).

[35] *Id.* at 842-43. The farm was located in Pembroke, New York. *Id.*

[36] *Id.* at 843.

Law enforcement agents also discovered small plots of marijuana plants of various sizes located throughout the farm,[37] and found a barn with 183 harvested marijuana plants hanging to dry.[38] Inside Mark Milbrand's farmhouse, police found more marijuana, paraphernalia and seeds separated and labeled by year, size, quality and height, as well as a loaded gun.[39]

This was the second time that Marcia Milbrand's son had been arrested for growing marijuana.[40] In 1980, while Mark was living with her at her home, police executed a search warrant and discovered 1000 containers of seeds in her garage, marijuana plants and plant lights in her basement, and in Mark's bedroom, "in plain view, marijuana, marijuana packaging material, scales, photographs of Mark standing next to tall marijuana plants, and books on growing marijuana."[41]

Ten years later, the district court in the 1990 civil forfeiture action heard testimony that after the farm was raided, Marcia Milbrand told an agent that she was aware that Mark had a "problem with marijuana" and that they had "built the farm so that Mark would have a place to do his farming."[42] The district court ruled for the government in forfeiting the eighty-five-acre tract and farmhouse, determined that Marcia Milbrand's innocent owner defense was unbelievable,[43] and rejected her excessive fines defense[44] because Mark had "used the *entirety* of the property to further his *advanced drug enterprise*."[45]

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[37] *Id.*

[38] *Id.*

[39] *Id.* at 843, 848.

[40] *Id.* at 843.

[41] *Id.*

[42] *Id.*

[43] Marcia Milbrand admitted in testimony that when she went to the house once a week to clean, she went into drawers and cabinets where the police later discovered contraband and drug paraphernalia. *Id.* at 843, 848. The district court also found her "demeanor indicated that she was shading the truth on certain matters." *Id.* at 843.

[44] *Id.* The court did not articulate Marcia Milbrand's rationale behind her excessive fines defense.

[45] *Id.* at 844 (emphasis added).

### B. *The Second Circuit's Analysis*

The Second Circuit affirmed the district court's decision in July 1995, and adopted two separate tests for determining excessiveness under the Eighth Amendment. For perpetrators, the *Milbrand* court created a nexus text which considers forfeitures in light of:

> the nexus between the offense and property and the extent of the property's role in the offense [including] whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; whether the property was important to the success of the illegal activity; the time during which the property was illegally used and the spatial extent of its use; whether its illegal use was an isolated event or had been repeated; and whether the purpose of acquiring, maintaining or using the property was to carry out the offense.[46]

In addition to the nexus requirement, the *Milbrand* court included two other elements in its perpetrator test: "the role and culpability of the owner,"[47] and "the possibility of separating offending property that can readily be separated from the remainder."[48]

Recognizing that Marcia Milbrand was a nonperpetrating owner, however, the Second Circuit developed a separate test for her class of claimants.[49] Lower courts would now consider nonperpetrator defenses in light of:

> (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the

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[46] *Id.* at 846.

[47] *Id.*

[48] *Id.*

[49] *See infra* Figure 1 (illustrating the separate tests developed for perpetrator and nonperpetrator owners).

success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.[50]

Figure 1 illustrates the perpetrator/nonperpetrator distinction by the Second Circuit:

Figure 1

**Milbrand's Two Excessive Fines Tests**

| Perpetrator Test | Non-Perpetrator Test |
|---|---|
| 1. Nexus between Property and the Offense | 1. Harshness of Forfeiture vs. Gravity of the Offense and Possible Sentence Imposed on Perpetrator |
| 2. Role and Culpability of the Owner | 2. Relationship between Property and the Offense |
| 3. Possibility of Separating Offending Property from the Remainder | 3. Role and Degree of Culpability of the Owner |

In determining the harshness of forfeiture in this case, the *Milbrand* court judged the property's worth at roughly $66,000.00.[51] However, the court counterbalanced this monetary harshness against the gravity of Mark's offense. This offense was deemed severe, because the possible sentence under a federal criminal prosecution could have included a fine of at least two million dollars.[52]

Under the second part of the nonperpetrator test, the court found that the relationship between the property and the marijuana production was integral considering the extent to which it was spread across the entire farm.[53] Finally, under the culpability factor

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[50] *Milbrand*, 58 F.3d. at 847-48.

[51] *Id.* at 848.

[52] *Id.*

[53] *Id.* For a description of the extent of the drug activity on the farm, see *supra* part IA.

of the *Milbrand* test, the court found that the owner's role indicated "a significant degree of culpability in the criminal use of the property."[54] The court therefore ruled that the forfeiture was not constitutionally excessive, implying that none of the indicia of excessiveness it included in its new nonperpetrator test were present in Marcia Milbrand's case.[55]

## II. THE ORIGINS OF *MILBRAND*

### *A. Pre-*Austin *Crisis*

To understand the legal plight of nonperpetrating owners like Marcia Milbrand, it is necessary to appreciate the mechanics of the Controlled Substances Act,[56] the law applied in the *Milbrand* case.[57] In its goal to win the "war on drugs,"[58] Congress has attached powerful substantive and procedural weapons to this federal forfeiture statute. For example, in a federal civil forfeiture action the government need only show a low threshold of drug activity before it can seize the property,[59] and the property must merely "facilitate" criminal conduct enough to form a "nexus" with the drug activity.[60] In addition, because the Controlled Substances

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[54] *Milbrand*, 58 F.3d. at 848.

[55] *Id.*

[56] 21 U.S.C. §§ 801-950.

[57] *Milbrand*, 58 F.3d at 842.

[58] In addition to developing the procedural and substantive mechanics of anti-drug provisions in the Controlled Substances Act, Congress and state legislatures have instituted mandatory sentences for nonviolent drug offenses that vastly surpass previous sentencing for similar offenses. *See* UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5-15 (1991).

[59] *See supra* note 13 (comparing civil and criminal forfeiture, and noting that in a civil action the government need only show probable cause of criminal conduct before seizing the property).

[60] United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 733 (C.D. Cal. 1994) (noting that "[p]robable cause for a civil forfeiture is comparatively easy for the government to establish").

The federal circuits disagree over whether § 881(a)(7) requires a "substantial connection" between the offense and the property, or whether there should

Act is governed procedurally by admiralty and maritime rules,[61] the government must only demonstrate by probable cause that a "nexus" of drug activity has occurred before seizing the property.[62] The burden of proof then shifts to the property owner, who must demonstrate by a higher standard, preponderance of the evidence, that either the property is free of criminal taint or that the owner was unaware of the alleged criminal activity.[63]

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merely exist a "nexus," where the government need only demonstrate that illegal activity on the property is more than incidental and fortuitous. For a survey of courts following the "substantial connection" approach, see United States v. Rural Route 1, 24 F.3d 845, 848 (6th Cir. 1994); United States v. 2204 Barbara Lane, 960 F.2d 126, 129 (11th Cir. 1992); United States v. 28 Emery Street, 914 F.2d 1, 3-4 (1st Cir. 1990). For the "nexus" approach, see United States v. RR #1, 14 F.3d 864, 868-69 (3d Cir. 1994); United States v. 785 Nicholas Ave., 983 F.2d 396, 403 (2d Cir. 1992). Neither statutory interpretation, however, has curbed the flood of successful forfeiture actions. *See infra* note 64 and accompanying text.

[61] 21 U.S.C. § 881(b) ("Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property . . . .") (exceptions omitted).

[62] *See* Michael F. Alessio, Comment, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429, 437 (1995) ("This burden has been articulated as 'less than prima facie proof but more than mere suspicion,' and has been characterized as the 'lowest [burden] in any American courtroom.'") (citing, *inter alia*, United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 n.7 (2d Cir. 1986)).

[63] For a general discussion of probable cause in civil forfeiture, see United States v. 429 S. Main Street, 843 F. Supp. 337 (S.D. Ohio 1993); *aff'd*, 52 F.3d 1416 (6th Cir. 1995). In *429 S. Main Street*, the court noted that:

> [t]he procedures for forfeiture under the customs laws apply to forfeitures under 21 U.S.C. § 881. The burden of proof in forfeiture cases is found in 19 U.S.C. § 1615. The burden is initially on the government to show probable cause to believe that the criminal activity occurred, as well as probable cause to believe that there is a nexus between the property and the criminal activity. Probable cause is defined as a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion. Probable cause is a question of law for the court.
>
> Once probable cause is shown, the burden then shifts to the claimant to prove by a preponderance of the evidence that the property

Consequently, civil forfeiture has amounted to a lucrative operation for the federal government, with billions of dollars in property seized.[64] Commentators have noted many "horror stories" of grossly disproportionate forfeitures.[65] There also have been

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> is not subject to forfeiture. Where the government has demonstrated probable cause in an action under § 881 (a)(7), the burden shifts to the claimant to prove by a preponderance of the evidence that the property was not used to commit or facilitate the commission of an offense under Title 21. Summary judgment may be appropriate where a claimant fails to show that the facts constituting probable cause did not actually exist.

*Id.* at 340 (citations omitted).

[64] David Heilbroner, *The Law Goes on a Treasure Hunt,* N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine), at 70. From 1984 to 1994, there were over 200,000 federal forfeitures, resulting in $3.6 billion in added revenue. *Id.* The Justice Department estimates that $1.7 billion more is "in the pipeline." *Id.*

The Supreme Court has acknowledged that the federal government has developed a "financial stake" in drug forfeitures, "apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures *in order to meet the Department of Justice's annual budget target.*" United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 n.2 (1993) (emphasis added).

[65] *See, e.g.*, Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution,* 39 N.Y.L. SCH. L. REV. 1 (1994). The following are examples of grossly disproportionate forfeitures:

> In South Dakota, a couple permitted a friend to visit, knowing he possessed thirty-nine marijuana seedlings. After the friend left with the seedlings, the police searched the premises and found a trace of marijuana and a marijuana butt in a car belonging to the couple's daughter. The police seized the house.

*Id.* at 4.

"A detective combing through old arrest reports on Maui, Hawaii, found an overlooked opportunity for a seizure and confiscated a family's house because a son had grown marijuana there four years earlier." Heilbroner, *supra* note 64, at 70.

One civil forfeiture of real property involved only two phone calls from the defendant's premises:

> On February 20, 1986, Paul F. Born III, gave his home telephone number to John Mueller, an undercover law enforcement official, during the discussion of a drug transaction. Mueller called Born twice, and they agreed that Born would sell two ounces of cocaine to Mueller

indications that the relative ease with which forfeiture actions can be brought has led to governmental hubris and a corresponding abuse of discretion.[66] It is not surprising then that the Supreme Court has curbed governmental power in this area, not only by applying the Eighth Amendment, but also by finding abuses of the Fifth Amendment's Due Process[67] and Double Jeopardy Clauses[68] as well.[69]

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> for $3200. Born was not present when the transaction took place at a local bar, but he was convicted of federal criminal narcotics violations. The United States then instituted a civil action under 21 U.S.C. § 881(a)(7) to forfeit Born's one-third interest in his house. The government offered Born's parents, who owned the remaining two-thirds interest in the house, a chance to purchase Born's interest or receive two-thirds of the proceeds from a forfeiture sale. The Seventh Circuit Court of Appeals affirmed the forfeiture action.

Douglas S. Reinhart, Note, *Applying the Eighth Amendment to Civil Forfeiture After* Austin v. the United States: *Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235, 236 (1994) (citing United States v. 916 Douglas Avenue, 903 F.2d 490, 494 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991)).

[66] For example, in United States v. The North 907.5 Feet of the N.E. Quarter, 999 F.2d 1264 (8th Cir. 1993), the government had plea bargained a married couple to not contest their convictions and two pending civil forfeiture claims against their land, home and vehicle, in exchange for a promise that the government would institute no more "proceedings" against them. *Id.* at 1265 (Beam, J., dissenting). After this deal, the government instituted a *third* forfeiture action, against land abutting the couple's old property. *Id.* (Beam, J., dissenting). The district court dismissed the action, claiming the government had violated their "contract" with the couple. *Id.* at 1264-65. The Eight Circuit reversed, holding that *in rem* forfeitures are directed against the property, not against the owners, and therefore the government had not technically broken their pledge. *Id.* at 1265.

[67] The Due Process Clause states that citizens will not "be deprived of life, liberty or property, without due process of law . . . " U.S. CONST. amend. V.

[68] The Double Jeopardy Clause states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S. CONST. amend. V.

[69] *See, e.g.*, Austin v. United States, 113 S. Ct. 2801 (1993) (finding that civil forfeitures under 21 U.S.C. §§ 881(a)(4) and 881(a)(7) are punitive and subject to the Excessive Fines Clause of the Eighth Amendment); United States v. Alexander, 113 S. Ct. 2766 (1993) (holding that criminal RICO forfeitures are subject to Eighth Amendment); United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (holding that lower courts must provide

### B. *The* Whalers Cove *Proportionality Analysis*

The language and concepts that helped create *Milbrand's* nonperpetrating test emanated from dicta in a 1992 Second Circuit opinion which suggested that the Eighth Amendment's Excessive Fines Clause may be applicable to civil forfeitures.[70] In *United States v. 38 Whalers Cove Drive*,[71] the Second Circuit surmised that "[w]here the seized property is not itself an instrumentality of crime . . . [and] its total value is overwhelmingly disproportionate to the value of controlled substances involved in the statutory violation, there is a rebuttable presumption that the forfeiture is

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claimants with notice and hearing before issuing judgment of civil forfeiture); United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (holding that the innocent owner defense is not limited to bona fide purchasers for value, and should include any person with any interest in the property, whether legal or equitable, and can also include innocent owners who acquired the property after the commission of illegal acts). *But see* Bennis v. Michigan, 116 S. Ct. 994, 999 (1996) (holding that the Due Process Clause does not protect against forfeiture of family car when state indecency law does not include innocent owner defense).

[70] "We are guided in part, however, by *United States v. 38 Whalers Cove Drive*. . . . *Whalers Cove* was a pre-*Austin* case in which we considered the Eighth Amendment contentions of an owner convicted in state court of the narcotics offenses on which the forfeiture was based." United States v. Milbrand, 58 F.3d 841, 847 (2d Cir. 1995) (citations omitted).

In a recent decision that remanded a district court's ruling for the federal government because the lower court did not properly consider an Excessive Fines Clause defense, Second Circuit Court of Appeals Judge Guido Calabresi wrote that *Austin* "vindicated our analysis in *Whalers Cove*." United States v. G.P.S. Automotive Corp., 66 F.3d 483, 500 (2d Cir. 1995). *See also* United States v. 143-147 East 23rd Street, 888 F.Supp. 580, 584 (S.D.N.Y. 1995) (employing *Whalers Cove* analysis in forfeiture of hotel owner's equity interest) *aff'd*, 77 F.3d 648 (2d Cir. 1996) (holding forfeiture also excessive under *Milbrand* multifactor test).

[71] 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992). In *Whalers Cove*, the government brought a § 881(a)(7) forfeiture action against the home of a man who had sold two and a half grams of cocaine to an undercover agent inside his home. *Id.* at 32. The district court granted summary judgment for the government. *Id.* The Second Circuit affirmed. *Id.* at 39.

punitive in nature."[72] The court did not explain whether "instrumentality of crime" meant anything other than the easy "nexus" standard prescribed by 21 U.S.C. § 881 (a)(7),[73] nor did the court speculate that the "value" of the property meant anything other than its monetary worth (e.g. whether it was a residence, whether it housed innocent third parties like children, etc.).[74] Although the *Whalers Cove* court did not explicitly argue that an Eighth Amendment analysis was appropriate, it nevertheless performed a proportionality analysis and determined that the forfeiture would be constitutional.[75]

In performing its Eighth Amendment analysis, the *Whalers Cove* court errantly incorporated language of *Solem v. Helm*,[76] a 1983 Supreme Court decision that applied the Eighth Amendment's Cruel and Unusual Punishment Clause to a prison sentence.[77] In determining whether the defendant in *Solem* had received a constitutionally cruel and unusual punishment, the Supreme Court defined proportionality as a balancing test between the harshness of the defendant's penalty, the gravity of his offense, and comparative sentencing in his jurisdiction and in similar jurisdictions.[78] There-

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[72] *Whalers Cove*, 954 F.2d at 36.

[73] *See supra* note 62 and accompanying text.

[74] *Whalers Cove*, 954 F.2d at 39 (stating that "we infer from the statutes that the imposition of the equivalent of a $68,000.00 fine [the monetary value of the residence] . . . while large, is not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence").

[75] *Id.* at 38-39.

[76] 463 U.S. 277 (1983).

[77] In *Solem*, the trial court employed a state recidivist statute to sentence the defendant to life imprisonment without parole for writing a "no account" check, a nonviolent offense that ordinarily would have brought a maximum punishment of five years' imprisonment and a $5,000.00 fine. *Id.* at 281. The federal district court denied a petition for writ of habeas corpus, but the Eighth Circuit reversed and remanded. Helm v. Solem, 684 F.2d 582 (8th Cir. 1982). The Supreme Court affirmed, holding that despite the defendant's previous offenses, the severe sentence was disproportionate to the petty crime. *Solem,* 463 U.S. at 304.

[78] The specific language of the *Solem* test was "the gravity of the offense and the harshness of the penalty . . . the sentences imposed on other criminals in the same jurisdiction . . . [and] the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 290-92.

fore, the *Solem* Court focused heavily on sentencing to determine whether the defendant's length of incarceration was unconstitutional. *Whalers Cove* relied on this sentencing emphasis even though as a *civil* case it did not pertain to sentencing as did the underlying facts in *Solem*.[79]

Figure 2 illustrates the influence of *Solem's* language upon *Whalers Cove:*

Figure 2

| **Cruel & Unusual Punishment: Sentencing** | **Excessive Fines: Civil Forfeiture** |
|---|---|
| **SOLEM** → | **WHALERS COVE** |
| 1. Harshness of the Penalty vs. Gravity of the Offense | 1. Value of the Property vs. Gravity of the Offense |
| 2. Sentences in Same Jurisdiction for Similar Crimes | 2. Sentences in Same Jurisdiction for Similar Crimes |
| 3. Other Jurisdictions' Sentences for the Same Crime | 3. Other Jurisdictions' Sentences for the Same Crime |

In addition, in weighing "sentences imposed," the *Whalers Cove* court failed to consider the actual criminal sentence and fine of the property owner, but instead looked at the *maximum* amount the owner could be fined under federal and state law.[80] Consequently,

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*Solem* was narrowed substantially in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where a plurality of the Court upheld a mandatory life sentence for a first-time offender for possession of 672 grams of cocaine. In addition, Justice Scalia was joined by four other Justices in maintaining that proportionality review was inappropriate for criminal sentences other than death. *Id.* at 994-96.

[79] The *Whalers Cove* test considered three factors: (1) the value of the property versus the inherent gravity of the offense; (2) the sentence imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. *Whalers Cove*, 954 F.2d at 38.

[80] *Id.* at 39 ("Federal law *authorizes* a sentence of twenty years and a fine of $1,000,000.00 for the distribution of cocaine in an amount less than 500 grams. . . . Under New York law, a defendant who had distributed the same

*Whalers Cove* resulted in a harsh decision: the defendant lost the $68,000.00 equity in his condominium because of two sales totaling two and a half grams of cocaine to a confidential informant *who suggested* at the first sale that the transaction occur in the defendant's home.[81]

### C. *The* Austin *Decision*

Despite this rather modest beginning at applying the Eighth Amendment to civil forfeiture, the Supreme Court chose to review the issue less than a year after *Whalers Cove*.[82] Although not articulated as such, the Court's rapid response may have been due to the deluge of governmental forfeiture actions after Congress amended the Controlled Substances Act to include section 881(a)(7),[83] and the subsequent need to curb a decade of "prosecutorial zeal."[84] As a result, in *Austin* all nine Justices agreed that forfeitures under §§ 881(a)(4) and (a)(7) constituted punishment

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quantity of cocaine as [the claimant] *would be exposed to* 8 years and 4 months imprisonment and $50,000.00 in fines.") (citations omitted) (emphasis added).

[81] *Id.* at 32. The court also did not include the claimant's culpability as a factor, even though the undercover agent induced him into using his home to facilitate the crime. *Id.*

Courts are generally silent on use of "entrapment" issue as a factor in owner culpability. However, one Sixth Circuit judge has voiced discontent at such governmental tactics within the civil forfeiture context. United States v. 429 S. Main Street, 52 F.3d 1416, 1423 (6th Cir. 1995) (Guy, J., dissenting). "Entrapment" is defined as an instance when a law enforcement agent or confidential informant "originates the idea of the crime and then induces another person to engage in conduct constituting such a crime when the other person is not otherwise disposed to do so." BLACK'S LAW DICTIONARY 532 (6th ed. 1990).

[82] "We granted certiorari to resolve an apparent conflict with the Court of Appeals for the Second Circuit over the applicability of the Eighth Amendment to *in rem* civil forfeitures." Austin v. United States, 113 S. Ct. 2801, 2803 (1993).

[83] *See supra* note 64 (noting 200,000 forfeiture actions in a recent 10 year period).

[84] *In re* Assets of Martin, 1 F.3d 1351, 1360 (3d Cir. 1993) ("Further, the Supreme Court's application of Eighth Amendment limitations to forfeitures suggests to us that we need to keep prosecutorial zeal for such remedies within particular boundaries.").

and were subject to the restraints of the Excessive Fines Clause.[85] Despite their unanimity in the judgment, the Justices disagreed on how to define excessiveness in the context of civil forfeiture, leading to a diversity of opinion among lower courts about the meaning of *Austin*.

Concurring Justice Scalia[86] espoused an instrumentality analysis that has become somewhat influential among federal circuit and district courts,[87] and helped inspire many of the elements of both tests developed in *Milbrand*. Justice Scalia argued that an Eighth Amendment analysis should not rest upon the gravity of the underlying offense or the value of the property at issue, but instead should turn on the extent that the property was *instrumental* in the execution of the crime:

> [I]n rem forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty or the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant . . . . The question is not how much the confiscated property is worth, but whether the confiscated property has a *close enough relationship to the offense*.[88]

While Justice Scalia emphasized the historical roots of his instrumentality approach,[89] the true attraction of his approach to lower

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[85] *Austin*, 113 S. Ct. at 2812.

Section 881(a)(4) provides that the federal government shall forfeit "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property . . . ." 21 U.S.C. § 881(a)(4). Section 881(a)(4) represents the personal property counterpart to the real property provision in § 881(a)(7). *See supra* note 18.

[86] *Austin*, 113 S. Ct. at 2812 (Scalia, J., concurring).

[87] *See* United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995) (adopting instrumentality approach for claimants who perpetrated underlying offense); United States v. Chandler, 36 F.3d 358 (4th Cir. 1994) (adopting Justice Scalia's instrumentality approach in *Austin*); United States v. 9638 Chicago Heights, 831 F. Supp. 736 (E.D. Mo. 1993) (applying pure instrumentality approach), *rev'd on other grounds*, 27 F.3d 327 (8th Cir. 1994).

[88] *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring) (emphasis added).

[89] "A prominent 19th-century treatise explains statutory *in rem* forfeitures

courts, however, is not its historical pedigree, but the simple and precise manner in which it can be applied.[90] The instrumentality approach more closely resembles the statutory "nexus" requirement in the forfeiture provision of the Controlled Substances Act,[91] and ostensibly prevents judges from applying "their personal notions of propriety to civil forfeiture proceedings."[92]

While Justice Scalia's instrumentality approach may have some applicability in determining the excessiveness of forfeiture, the *Austin* majority's analysis better explains the reality of the impact that federal forfeiture laws have made on society. The majority circumvented the "historical fiction" of *in rem* forfeiture by arguing that the underlying pretext of forfeiture rested "at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."[93] The majority bolstered its argument by pointing out that Congress had included an innocent owner defense in both §§ 881(a)(4) and 881(a)(7), and thereby implied as a corollary that

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solely by reference to the fiction that the property is guilty." *Id.* at 2814 (Scalia, J., concurring).

[90] In *Chandler,* the Fourth Circuit illustrated the instrumentality approach's efficacy through the use of two hypotheticals:

> Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness, even though the property has such a high value. On the other hand, forfeiture of a row house, which is owned by an elderly woman and which shelters her children and grandchildren, upon discovery of a trace amount of cocaine in a grandson's room, might arguably be found to be excessive, even though the house has a relatively low value of $30,000.00. In both cases, the intuitive excessiveness analysis centers on the *relationship* between the property and the offense—the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive.

*Chandler*, 36 F.3d at 364.

[91] The *Chandler* court noted that "Congress . . . did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was *tainted* by the offense." *Id.*

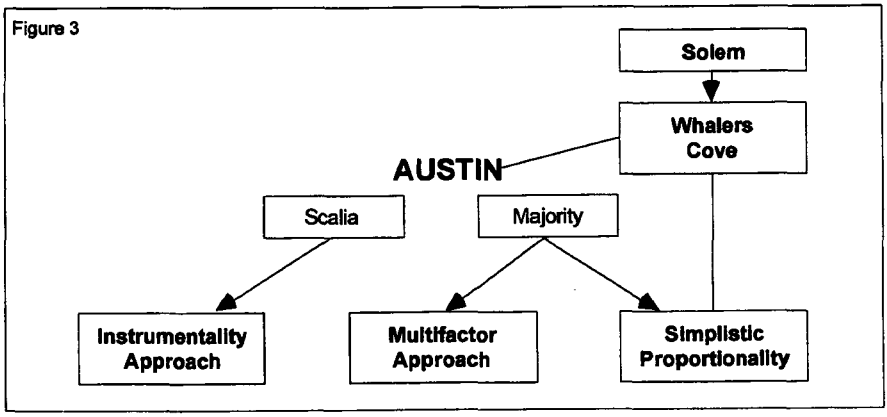
[92] *Id.* at 368 (Wilkinson, J., concurring).

[93] *Austin,* 113 S. Ct. at 2808.

the statute punishes owner culpability.[94] Many courts have since logically extended this argument to conclude that an important part of the excessive fines inquiry is whether the government's punishment (forfeiture) is *proportional* to the owner's culpability.[95] However, the Court declined to fashion a multifactor test that would include both elements of instrumentality and proportionality, and elected instead to allow lower courts the opportunity to review these cases in the first instance, and bring in "other factors."[96]

The contributions of federal jurisprudence to *Milbrand* therefore include: 1) the *Solem* test as seen through the simplistic lens of *Whalers Cove*;[97] 2) Justice Scalia's concurrence in *Austin* which was openly hostile to proportionality concepts;[98] and 3) a tentative *Austin* majority that implicitly suggested partial application of proportionality, but did not demand it.[99]

Figure 3 illustrates the three approaches to excessiveness since *Austin:*




[94] *Id.* at 2810.

[95] United States v. 6380 Little Canyon Road, 59 F.3d 974, 983 (9th Cir. 1995); United States v. Milbrand, 58 F.3d 841, 847 (2d Cir. 1995); United States v. 9638 Chicago Heights, 27 F.3d 327, 330-31 (8th Cir. 1994).

[96] *Austin*, 113 S. Ct. at 2812 n.15. The Court did not enumerate what these "other factors" were.

[97] *See supra* note 78 and accompanying text.

[98] *See supra* notes 86-92 and accompanying text (evaluating the instrumentality approach).

[99] *See supra* text accompanying note 96.

While the majority refused to articulate a test in the case of a convicted drug dealer, *Austin*'s mandate regarding nonperpetrating claimants was even less clear. The role of lower courts, therefore, has proven integral in developing *Milbrand's* nonperpetrator test.[100]

## III. THE FEDERAL LANDSCAPE SINCE *AUSTIN*

Federal courts have taken three basic approaches to civil forfeiture since the *Austin* majority granted them the power to fashion their own inquiries on excessiveness. A few courts have chosen a *Whalers Cove*-style proportionality approach, where they have simply determined the monetary value of the property and compared that to the possible criminal penalties a defendant could incur for an underlying offense.[101] Other courts have embraced

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[100] As an interesting epilogue to a discussion of the Supreme Court's position on civil forfeiture, consider Justice Kennedy's comment on nonperpetrators in his *Austin* concurrence:

> At some point, we may have to confront the constitutional question whether forfeiture is permitted *when the owner has committed no wrong of any sort, intentional or negligent.* That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome.

*Austin*, 113 S. Ct. at 2815 (Kennedy, J., concurring) (emphasis added). Assuming that Justice Kennedy did not overlook the fact that the underlying civil forfeiture statute in *Austin* included an innocent owner defense, the "constitutional question" to which he is referring is not apparent. One strong possibility, however, is that Justice Kennedy considers an owner's "mere awareness" of criminal activity not to be a "wrong" of any sort. An example of this possibility would be an owner who is dominated by the perpetrator of the underlying offense, as a battered wife would be by a dominating husband. Since Justice Kennedy along with joining Justices Rehnquist and Thomas agree with part I of Justice Scalia's concurrence, they support a general instrumentalist analysis of forfeiture excessiveness. This isolated comment, however, in the final paragraph of the concurrence, may lend support to the notion that forfeitures against nonperpetrators are somehow "different" and should be subject to a multifactor approach.

[101] *See, e.g.*, United States v. 143-147 East 23rd Street, 888 F.Supp. 580, 584 (S.D.N.Y. 1995) (holding that forfeiture of hotel owner's equity of

Justice Scalia's instrumentality approach, although they invariably include concepts of proportionality in their enunciated tests.[102] Most circuits, however, have adopted a multifactor approach that combines instrumentality concepts with a broader view of proportionality, and incorporates such extraneous factors as whether the property is a residence or whether innocent parties might be affected by forfeiture.[103] The following sections will examine these three approaches.

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$500,000.00 was not excessive when maximum fine against perpetrator was roughly equivalent to owner's equity interest), *aff'd,* 77 F.3d 648 (2d Cir. 1996) (holding forfeiture also excessive under *Milbrand* multifactor test); United States v. 2408 Parliament, 859 F. Supp. 1075, 1078 (E.D. Mich. 1994) (holding that forfeiture of an $87,000.00 residence was not excessive when claimant could have received two million dollars in federal fines); United States v. 11869 Westshore Drive, 848 F. Supp. 107, 111 (E.D. Mich. 1994) (holding that forfeiture of a $105,000.00 home was not excessive when claimant could have received $250,000.00 in fines) *aff'd,* 70 F.3d 923, 930 (6th Cir. 1995); United States v. 429 S. Main Street, 843 F. Supp. 337, 342 (S.D. Ohio 1993) (holding that forfeiture of $83,700.00 residence is not excessive when claimant could have received $500,000.00 in federal fines), *aff'd,* 52 F.3d 1416 (6th Cir. 1995).

[102] For example, in *Chandler,* the Fourth Circuit indicated that proportionality considerations might be appropriate for nonperpetrating owners, noting that "where the owner's involvement in the offense is only incidental, as opposed to extensive—*e.g.,* where he is simply aware of the offense but not a perpetrator or conspirator—this fact will weigh on the excessiveness side of the scales." United States v. Chandler, 36 F.3d 358, 364 (4th Cir. 1994); *see also* United States v. Milbrand, 58 F.3d 841, 847 (2d Cir. 1995).

[103] *See, e.g.,* United States v. G.P.S. Automotive Corp., 66 F.3d 483, 501 (2d Cir. 1995) (claiming that "most courts" have embraced "what has come to be called a "proportionality test," and then referring to three federal cases that employed proportionality factors other than monetary value of the property: United States v. 9638 Chicago Heights, 27 F.3d 327, 330 (8th Cir. 1994); United States v. RR # 1, 14 F.3d 864, 872-76 (3d Cir. 1994); United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 731-38 (C.D. Cal. 1994)); *see also Chandler,* 36 F.3d at 363 (noting that "[t]he tendency of the courts, including [*RR # 1* and *Zumirez*] . . . has been to combine the two principles of instrumentality and proportionality to come up with various multifactor tests").

### *A. The Simplistic Proportionality Approach*

The proportionality approach, as originally applied to civil forfeiture by the Second Circuit in *Whalers Cove*, involved a balancing of the harshness of the penalty against the gravity of the underlying offense with which the property was associated.[104] A serious weakness of this approach, however, is that harsh and unjust penalties result from strictly comparing real property value to the severe sentencing standards of federal anti-drug laws. For example, in *United States v. 429 South Main Street*,[105] the Sixth Circuit upheld the forfeiture of a home worth less than $84,000.00.[106] The claimant had previously been convicted of making two sales of marijuana, totaling less than four ounces, on his premises.[107] Similar to the facts in *Whalers Cove*, undercover agents in *429 South Main Street* had initiated the transactions with the claimant and had suggested that the purchases take place in his home.[108]

Under certain circumstances, the *Whalers Cove* proportionality approach might actually benefit owners with expensive property and might harm those who own less expensive real estate. As the concurrence in *United States v. Chandler*[109] noted, "property could still be deemed non-forfeitable under a proportionality inquiry if it were, for instance, an extremely expensive home or automobile. Too frequently, proportionality analysis serves only to insulate those who have 'hit it big' in the drug trade from the forfeiture prescribed by statute."[110] Fortunately, in the last year,

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[104] *See supra* text accompanying note 78 (describing the *Whalers Cove* analysis).

[105] 52 F.3d 1416 (6th Cir. 1995).

[106] *Id.* at 1424 (Guy, C.J., dissenting). The Sixth Circuit based its decision on the fact that the claimant could have received up to $500,000.00 in federal fines. *Id.* at 1422.

[107] *Id.* at 1423 (Guy, J., dissenting).

[108] *Id.* (Guy, J., dissenting) (discussing the entrapment issue); *see also supra* note 81.

[109] 36 F.3d 358 (4th Cir. 1994).

[110] *Id.* at 369 (Wilkinson, J., concurring).

the *Whalers Cove* approach has fallen out of favor with most circuits.[111]

### B. The Instrumentality Approach

In contrast to the *Whalers Cove* approach, the Second and Fourth Circuits have gravitated towards an instrumentality approach to determine whether forfeiture is excessive.[112] In *Chandler*,[113] the Fourth Circuit formally rejected proportionality and embraced Justice Scalia's instrumentality approach.[114] *Chandler* is worth considering in detail because it was favorably cited in *Milbrand* where the Second Circuit adopted *Chandler's* instrumentality language almost word-for-word in fashioning its perpetrator test.[115]

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[111] *See supra* note 95 (noting the federal circuits that have formally adopted multifactor approaches). *But see Chandler*, 36 F.3d at 358 (rejecting the use of proportionality in excessive fines analysis); United States v. 429 S. Main Street, 52 F.3d 1416, 1422 (6th Cir. 1995) (affirming lower court's use of strictly monetary proportionality approach).

[112] United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995); United States v. Chandler, 36 F.3d 358 (4th Cir. 1994).

[113] *Chandler* involved a forfeiture action against a secluded 33-acre parcel and farmhouse for alleged drug activity, even though the claimant had never been convicted of any drug offense. *Chandler*, 36 F.3d at 362. Testimony at trial indicated that the owner had paid his hired help with marijuana and cocaine, and that one of these workers had observed bales of marijuana stored throughout the house. *Id.* at 361. A surveillance camera system helped warn of unwanted intruders, and one witness testified that he served as a lookout on the long driveway leading to the house. *Id.* at 366.

[114] *Id.* at 364 ("Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint [of criminal activity on the property] and not to the value of the property or the gravity of the offense.").

[115] *Chandler* defines its instrumentality inquiry as "the nexus between the offense and the property and the extent of the property's role in the offense." *Id.* at 365. In defining "nexus", the *Chandler* court lists five factors:

> [1] whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous;
>
> [2] whether the property was important to the success of the illegal activity;

The *Chandler* court criticized *Whalers Cove's* version of proportionality and cited Justice Scalia's *Austin* concurrence in arguing that instrumentality represented a more accurate view of civil forfeiture within the context of the Controlled Substances Act.[116] The court therefore held that the primary inquiry of an excessive fines defense was the relationship between the property and the underlying offense.[117]

Despite this instrumentality approach, the *Chandler* court did acknowledge that forfeiture partly served to punish the culpability of property owners.[118] Therefore, without admitting it was developing a multifactor test, the court included in its instrumentality test two factors more appropriately identified with a proportionality analysis, namely "the role and culpability of the owner" and "the possibility of separating offending property that can readily be separated from the remainder."[119]

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> [3] the time during which the property was illegally used and the spacial extent of its use;
> [4] whether its illegal use was an isolated event or had been repeated; and
> [5] whether the purpose of acquiring, maintaining or using the property was to carry out the offense.

*Id.* These factors are virtually the same as those the *Milbrand* court adopted for the instrumentality part of the Second Circuit's perpetrator test. *See supra* text accompanying note 50 (quoting the nexus test adopted by the Second Circuit).

[116] The *Chandler* court quoted Justice Scalia's argument that because "the *property* itself is the object of the action, and not its value . . . the value of the property is irrelevant to whether it is forfeitable." *Chandler,* 36 F.3d. at 364 (citations omitted). The court then extended Justice Scalia's rationale:

> It is apparent that Congress, in providing for civil forfeiture of property involved in drug offenses for which punishment exceeds one year, did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was *tainted* by the offense.

*Id.* at 363-64.

[117] *Id.* at 363-65.

[118] "Nonetheless, a forfeiture of property effects punishment on its owner. This appears more clearly so when, as provided in the Controlled Substances Act, the forfeiture law provides an innocent owner defense, implying that some owner culpability is being punished by the Act's forfeiture provisions." *Id.* at 363.

[119] *Id.* at 365.

*Chandler*'s test makes a positive contribution towards checking governmental abuse of forfeiture actions. It is both detailed and methodical by allowing a court to automatically run through the many factors that would determine whether a property is truly an "instrument" of a criminal activity—that is, whether the property is essential to the production, possession, or distribution of drugs. Conversely, by being so specific, the test also helps determine if a piece of property is *not* integral to a drug activity, and therefore not subject to forfeiture. Finally, by tacitly acknowledging that a purely instrumentality approach is constitutionally insufficient to protect property owners' rights,[120] *Chandler* implies that a multifactor test is not entirely inappropriate. *Chandler's* use of proportionality factors in its test should encourage other instrumentality courts to also consider "other factors," as the *Austin* majority has authorized.[121]

The danger of the *Chandler* approach, however, is that the lower courts might not rigorously apply each element of the test. Instead, they might equate an Eighth Amendment "instrumentality" analysis with the "nexus" requirement of 21 U.S.C. § 881(a)(7), which is a very easy standard for the government to attain.[122] Indeed, the concurrence in *Chandler* argued that the two inquiries were very similar, stating:

> [T]he standard established by § 881 *goes far toward answering the instrumentality inquiry* . . . . [I]f the statutory prerequisites for forfeiture are carefully observed, a judgment of forfeiture generally will satisfy the instrumentality test adopted by the court today. *Eighth Amendment*

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[120] *See supra* text accompanying notes 118-19 (noting that the *Chandler* instrumentality test includes two elements associated with owner culpability and proportionality).

[121] Austin v. United States, 113 S. Ct. 2801, 2812 n.15 (1993).

[122] *See supra* text accompanying notes 60-63; *see also* United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 733 (C.D. Cal. 1994) (noting that "[p]robable cause for a civil forfeiture is comparatively easy for the government to establish and it may seek to forfeit property linked with criminal activity where . . . the claimant has never been charged with any crime . . . [or] the claimant has been charged and acquitted").

> *concerns will often be subsumed within the finding in favor of forfeiture.*[123]

Application of a primarily instrumentality approach, therefore, might limit constitutional safeguards for property owners and lead to injustice.[124]

### *C. The Multifactor Approach*

Most circuits that have adopted excessive fines tests have openly embraced a multifactor approach, which can include a variety of factors drawn from instrumentality, proportionality and social policy concerns.[125] The multifactor approach allows for the freedom to consider these other factors by discouraging courts, as the Third Circuit suggested in *United States v. RR #1*,[126] from

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[123] *Chandler*, 36 F.3d at 368 (emphasis added).

[124] There is also a possibility that *Chandler*'s instrumentality approach will not survive in the Fourth Circuit. In *United States v. Wild*, 47 F.3d 669 (4th Cir. 1995), the Fourth Circuit reviewed *Chandler's* holding in the context of criminal forfeiture, noting that:

> *Chandler's* conclusion that proportionality is not to be considered in determining whether an *in rem* forfeiture amounts to an excessive fine *stands alone* among the circuits and could be viewed as inconsistent with our decision in *United States v. Borromeo* [1 F.3d 219, 221 (4th Cir. 1993)]. . . . Because we are distinguishing *Chandler*, this inconsistency, if any, need not be addressed.

*Wild*, 47 F.3d at 673 n.10 (emphasis added). With the Second Circuit's holding in *Milbrand*, of course, the Fourth Circuit no longer stands alone, at least in terms of owners who have perpetrated the underlying offense. *See supra* text accompanying note 50. However, *Wild's* ominous critique demonstrates that, at the very least, the Fourth Circuit is not unanimous in support of the *Chandler* approach.

[125] *See supra* note 95 (noting courts that have used a multifactor approach in determining excessiveness).

[126] 14 F.3d 864 (3d Cir. 1994). In *RR #1*, the trial court entered summary judgment for the government against a property allegedly used for cocaine distribution. *Id.* at 865. The Third Circuit remanded, holding that the owner's affidavit denying the drug activity on the property raised a genuine issue of material fact, and that in applying the Eighth Amendment to possible forfeiture, the trial court should follow the *Austin* majority's mandate and consider the factors the trial court deemed appropriate. *Id.* at 872-73.

"conflating the Eighth Amendment inquiry with § 881(a)(7)'s nexus requirement."[127] This freedom thus authorizes courts to include social policy considerations that are not part of the simplistic *Whalers Cove* proportionality analysis. In *United States v. Shelly's Riverside Heights Lot X*,[128] for instance, the Middle District of Pennsylvania also took into account the fact the claimant's rural lot and log cabin were his "only significant possessions," making forfeiture unduly harsh.[129]

Multifactor courts have also accentuated the effect of forfeiture on innocent third parties.[130] Before *Austin*, courts were generally constrained from taking such important factors into account, often leading to harsh results.[131] A notable exception was *United States v. 835 Seventh Street*,[132] a pre-*Austin* decision that relied on the Second Circuit's *Whalers Cove* dicta on proportionality as controlling.[133] In *835 Seventh Street*, the government brought an

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[127] *Id.* at 873. While noting that Justice Scalia in his *Austin* concurrence argued that the relevant inquiry was the "relationship of the property to the offense," the Third Circuit maintained that "such an inquiry is by no means the only possible inquiry." *Id.*

Subsequently, the Middle District of Pennsylvania followed the *RR #1*'s broad mandate in *United States v. Shelly's Riverside Heights Lot X*, 851 F. Supp. 633 (M.D. Pa. 1994), and included the claimant's degree of culpability as a factor in its analysis. *Id.* at 638. Since there was no evidence that the claimant in *Shelly's Riverside* was growing marijuana for anything other than his own personal use, the court found that forfeiture would be excessive. *Id.*

[128] 851 F. Supp. 633 (M.D. Pa. 1994).

[129] *Id.* at 638.

[130] *See, e.g.*, United States v. 6380 Little Canyon Road, 59 F.3d 974, 985 (9th Cir. 1995); United States v. Milbrand, 58 F.3d 841, 848 (2d Cir. 1995); United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 732 (C.D. Cal. 1994).

[131] *See supra* note 65 (listing examples of harsh forfeiture actions against real property).

[132] 820 F. Supp. 688 (N.D.N.Y. 1992).

[133] Citing *Whalers Cove*, the court in *Seventh Street* argued that "any civil sanction that in effect is punishment invokes the protection of the Eighth Amendment which is a 'personal' and 'humane' limitation on the government's ability to punish an individual." *Id.* at 690 (citations omitted). The court then followed "the Odyssean journey of *Whalers Cove*—a determination of proportionality." *Id.* at 691.

action against a small-time drug dealer for selling a small amount of marijuana. The court stated in a footnote that:

> it is impossible to decide the instant matter without contemplating the effect which the forfeiture will have on the four children in the Habiniak family . . . because Mr. Habiniak suffers from Multiple Sclerosis and that three of the four children are "severely handicapped." [T]he court has assessed the added burden which society will bear if the four Habiniak children are "turned out into the street" and, if it should go that far, become wards of state.[134]

After *Austin*'s, courts need no longer bury their social policy concerns, as the court in *835 Seventh Street* had done. *Austin's* holding allowed courts to freely incorporate social policy concerns as formal elements into their Eighth Amendment analyses.

Figure 4 illustrates the differences between the multifactor approach and the two other approaches:

| Figure 4<br>**Instrumentality** | **Multifactor** | **Simplistic Proportionality** |
|---|---|---|
| Relationship of the Property to the Offense | Instrumentality + Multifactor Proportionality (including "intangible value" of the property: e.g., effect on innocent third parties, poverty of the owner, and whether property is a residence) | Monetary Value of the Property vs. Gravity of the Offense + Possible Sentence Imposed |

### *D. The* Zumirez *Test*

The greatest challenge for courts using the multifactor test has been to develop a comprehensive, logical test which incorporates

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[134] *Id.* at 696 n.9 (citations omitted).

all of the appropriate factors of proportionality, instrumentality and social policy. Perhaps the most influential test developed thus far is from a California district court decision, *United States v. 6625 Zumirez Drive.*[135]

*Zumirez* dealt with a property owner whose son was selling small amounts of drugs out of their family home. In deciding this case, the Central District of California developed a test which weighed three parts equally: "(i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use."[136]

*Zumirez* marks the first time a court articulated why, according to *Austin*, forfeiture is based on the idea of the owner's culpability.[137] The *Zumirez* court argued that the *Austin* majority justified forfeiture,

> at bottom, on the notion that the *owner had been negligent in allowing his property to be misused and that he is properly punished for that negligence.* That the degree of negligence or culpability of the claimant is relevant to whether the forfeiture is excessive *is implicit in that conclusion.* Because the [*Austin*] Court determined that civil forfeiture, in part, punishes the claimant for his offensive conduct, it is appropriate to analyze whether the

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[135] 845 F. Supp. 725 (C.D. Cal. 1994). As of January 1996, *Zumirez* has been followed by seven different courts: United States v. 6380 Little Canyon Road, 59 F.3d 974 (9th Cir. 1995); United States v. 24124 Lemay Street, 857 F. Supp. 1373, 1382 (C.D. Cal. 1994); United States v. 1215 Kelly Road, 860 F. Supp. 764, 766 (W.D. Wash. 1994); United States v. 461 Shelby Road 361, 857 F. Supp. 935, 939 (M.D. Ala. 1994); Aravanis v. Somerset County, 664 A.2d 888, 895 (Md. Ct. App. 1995); Thorpe v. State, 450 S.E.2d 416, 418 (Ga. 1994); People *ex rel.* Michael J. Waller v. 1989 Ford F350 Truck, 642 N.E.2d 460, 465 (Ill. 1994). Surprisingly, very little has been written about this case. *See* Stephen L. Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights,* 39 N.Y.L. SCH. L. REV. 205 (1994) (providing the only current in-depth analysis of the *Zumirez* decision).

[136] *Zumirez*, 845 F. Supp at 732.

[137] *Id.* at 733-34.

fine is excessive in comparison with the claimant's conduct.[138]

*Zumirez* is also the first case to focus its attention on the property owner's conduct, regardless of whether or not the owner committed the underlying offense.[139] "Clearly," the court determined, "the focus of Eighth Amendment analysis should be on the *claimant's* conduct" when analyzing the inherent gravity of the offense.[140] As such, the *Zumirez* court intimated that nonperpetrator claimants should be judged by their own level of culpability, not by the underlying offense of the perpetrator.

Finally, in defining the term "harshness" in the first prong of its test, the *Zumirez* court was the first court to define property as having an *intangible* as well as a monetary value.[141] While at least one court previously had noted that if a property was a residence that fact would weigh against forfeiture,[142] the *Zumirez* court was the first to intelligently define why a residence was, in a social sense, more valuable than its sale price.[143] For *Zumirez*, a property that serves as a home for three handicapped children as in *835 Seventh Avenue*, can be more "valuable" than another home that has a higher monetary value, but does not serve such a socially useful purpose.[144]

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[138] *Id.* at 733 n.4 (citations omitted) (emphasis added).

[139] *Id.* at 733.

[140] *Id.* (emphasis added).

[141] *Id.* at 734.

[142] *See* United States v. 835 Seventh Street, 820 F. Supp. 688, 691 (N.D.N.Y. 1992) (finding that "the substantial purpose of the defendant *res* was to house the [claimant's] family and that any illicit use was merely incidental to [the claimant's] personal predilections which did not consume or override the primary function of the *res*").

[143] In noting that "society and the courts place a higher value on real property, in particular the home," the *Zumirez* court cited the Supreme Court's decision in *United States v. James Daniel Good Real Property,* where the Court noted that "at stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it." *Zumirez*, 845 F. Supp. at 734 (citing United States v. James Daniel Good Real Property, 114 S. Ct. 492, 505 (1993).

[144] *Zumirez,* 845 F. Supp. at 734.

The *Zumirez* approach to nonperpetrators, however, is not without fault. First, instead of establishing a separate Eighth Amendment test for nonperpetrators, the *Zumirez* court analyzed the owner's role in the third prong of its test, according to a three-tiered approach that included the following different factual situations: "(1) the claimant has been convicted of the criminal act or acts underlying the forfeiture; (2) the claimant has never been charged with any crime; and (3) the claimant has been charged and acquitted of the act or acts underlying the forfeiture."[145]

Strangely, in a passage without citation, the *Zumirez* court claims that a court should scrutinize those never charged with criminal activity *more closely* than those who were charged and acquitted:

> In the first situation [conviction], the court can easily evaluate the gravity of the offensive conduct since the court need not engage in assumptions: the claimant did in fact commit the offense which forms the basis of the government's probable cause to forfeit the property. In the second situation [never charged], the court cannot assume that the claimant committed the offense. *Neither can it assume that he did not.* This claimant's conduct must be viewed as necessarily less grave than that of the claimant convicted in the first situation, *but the conduct is inherently more grave than that of the claimant in the third situation* [charged and acquitted]. The behavior of the claimant in the third situation must be considered the least grave: the claimant has been charged and acquitted of the underlying offense, and cannot be treated "as if" he had committed that offense for purposes of evaluating the gravity of his conduct.[146]

The logical flaw in the court's argument is that those who have been acquitted were found not guilty beyond a reasonable doubt.[147] Those who have not been charged, on the other hand,

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[145] *Id.*

[146] *Id.* (emphasis added).

[147] To establish guilt "beyond a reasonable doubt" is to determine it so as to be "fully satisfied, entirely convinced, [or] satisfied to a moral certainty." BLACK'S LAW DICTIONARY 161 (6th ed. 1990).

have not given law enforcement authorities even probable cause to arrest and charge them. In addition, the court's reasoning here flies in the face of the policy in criminal law that an accused is presumed innocent.[148] Considering the quasi-criminal nature of forfeiture,[149] this presumption should be maintained for nonperpetrators in forfeiture actions as well.

Despite this flaw, *Zumirez's* contribution is enormous. In September 1995, the Second Circuit cited *Zumirez* favorably in a post-*Milbrand* decision concerning an excessive fines defense.[150] In *United States v. G.P.S.,* the trial court had not used a multifactor test to determine the nonperpetrating owner's culpability.[151] The Second Circuit, however, held that an "appropriate excessiveness analysis entails a multifactor test combining the principles of both instrumentality and proportionality."[152] The court subsequently remanded the case for a more complete factual development of the owner's culpability.[153]

As in *Zumirez,* the legacy of federal case law to the *Milbrand* court has been a cross-pollination of proportionality, instrumentality and social policy concepts. In addition, some of the more important

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[148] *In re* Winship, 397 U.S. 358, 363-64 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

[149] Austin v. the United States, 113 S. Ct. 2801, 2806 (1993) (recalling that "[w]e said in *United States v. Halper* that 'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term'") (citing United States v. Halper, 490 U.S. 435 447-48 (1989)).

[150] United States v. G.P.S. Automotive Corp., 66 F.3d 483 (2d Cir. 1995). In *G.P.S.*, the government brought a forfeiture against an auto "chop shop" for facilitating the sale of stolen auto parts. *Id.* at 485-86. The trial court ordered forfeiture, and the owners appealed. *Id.* at 486. The Second Circuit reversed and remanded the case, holding that while owners did not have an innocent owner defense, a full fact-finding was nevertheless necessary to determine proportionality and instrumentality inquiries in their Eighth Amendment defense against the forfeiture. *Id.* at 501.

[151] *Id.* at 485.

[152] *Id.* at 501.

[153] *Id.* at 502.

decisions have acknowledged that nonperpetrators should be treated differently.[154] It has been up to the *Milbrand* court to synthesize these concepts into a working test for nonperpetrators.

## IV. ASSESSING *MILBRAND*

The strengths and weaknesses of *Milbrand's* nonperpetrator test lie in the construction of the elements in its three-prong analysis. The following sections examine each prong and evaluate how they work together as one test.

### *A. Proportionality*

The first prong of the *Milbrand* test is a proportionality factor which balances the "harshness of the forfeiture" against "(a) the gravity of the offense and (b) the sentence that could be imposed on the perpetrator of such an offense."[155] The court's description of harshness in a subsequent parenthetical statement—"e.g., the nature and value of the property and the effect of forfeiture on innocent third parties"[156]—is the most innovative language in the test because the description's inclusion of "nature" as well as "value" indicates that the Second Circuit is considering a property's intrinsic as well as monetary value. The addition of "innocent third parties" reinforces the notion that the intrinsic value of a property should be noted, particularly if it is a residence. Also, the court's use of the term "e.g." in the parenthetical is significant, because it does not limit the possible definitions of "harshness." This term suggests that the *Milbrand* court may allow lower courts to be innovative in determining what other factors are appropriate. Thus, *Milbrand's* definition of harshness is much closer to that of *Zumirez* than to *Whalers Cove*.[157]

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[154] United States v. Chandler, 36 F.3d 358, 365 (3d Cir. 1994); United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 733-35 (C.D. Cal. 1994).

[155] United States v. Milbrand, 58 F.3d 841, 848 (2d Cir. 1995).

[156] *Id.*

[157] *See supra* text accompanying notes 74 and 141-44 (comparing the differing definitions of harshness for *Zumirez* and *Whalers Cove*).

The *Milbrand* court weakens the proportionality factor, however, by not drawing a complete distinction between perpetrator and nonperpetrator culpability. The court balances its harshness element against two countervailing elements, the first of which is the "gravity of the offense."[158] A lower court using this standard must then logically inquire, the gravity of *whose* offense? The offense of the perpetrator of the underlying crime, or the nonperpetrating owner? The answer to this question would bear greatly on the outcome of the proportionality analysis, as the following example demonstrates.

In *Zumirez*, a father permitted his son to continue to live at home, despite the fact that his son was involved with drugs.[159] After the son was arrested and the government commenced a forfeiture action, the court had to determine whether to weigh the gravity of the *son's criminal act*, or the gravity of the *father's negligence* in allowing someone to use the property for criminal activity.[160] The court there determined that

> [i]t is unrealistic to expect that forfeiture laws will induce parents to evict children from their homes. This does not mean that parents should be shielded from the forfeiture laws; rather, it means that the court considers the relationship between the parties in evaluating the gravity of the *landowner's conduct*.[161]

The court's distinction is more than semantic. First, by focusing on the property owner, the *Zumirez* court remained true to the underlying principle of forfeiture law as defined by the *Austin* majority, that forfeiture punishes the owner's negligence.[162]

In addition, focusing on the "negligence" of the nonperpetrator limits the scope of the claimant's punishment. In tort law, for example, the underlying purpose of a tort action is to make the

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[158] *Milbrand,* 58 F.3d at 848.

[159] United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 736 (C.D. Cal. 1994).

[160] *Id.*

[161] *Id.* (emphasis added).

[162] *Id.* at 733; *see also* Austin v. United States, 113 S. Ct. 2801, 2808 (1993).

injured party whole.[163] Analogizing this principle to a forfeiture action, the plaintiff government would then be suing the negligent owner for the cost of investigating and arresting the criminal who had used the owner's property.[164] Also, punitive damages in tort law are limited to those defendants who have committed *gross* negligence.[165] Therefore, an owner would have to be more than "merely aware" of the drug activity to have his or her property forfeited.[166]

Unfortunately, the *Milbrand* court failed to define "gravity of the offense" in terms of the nonperpetrating owner's culpability. However, defining "gravity" in terms of the nonperpetrator would be more compatible with the Second Circuit's own rationale for creating a separate, nonperpetrating test:

> Where the owner of the property is not the perpetrator of the crime, however, a consistent approach requires analysis of the amount of the penalty *in light of the role and culpability of the owner in the illicit use of her property.*[167]

Applying this new interpretation in the future would dramatically improve the *Milbrand* nonperpetrator test.

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[163] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 4, at 20 (5th ed. 1984) (noting that "it is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development").

[164] *See* United States v. 835 Seventh Street, 820 F. Supp. 688, 696 (S.D.N.Y. 1992) (stating that "the practical effect [of forfeiting the claimant's home] would be to greatly overcompensate the government for the enforcement costs related to this drug sale and would do little to remove 'an instrumentality of crime' from the streets").

[165] W. PAGE KEETON ET AL., *supra* note 163, at 20 ("Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action 'punitive' or 'exemplary' damages, or what is sometimes called 'smart money.'").

[166] Defining gravity in terms of owner culpability would also be in line with *Chandler's* dicta that "mere awareness" of an offense by a homeowner would "weigh on the excessive side of the scales." *See* United States v. Chandler, 36 F.3d 358, 364 (4th Cir. 1994).

[167] *Milbrand,* 58 F.3d at 847 (emphasis added).

The other countervailing element in *Milbrand's* proportionality prong is "the sentence that could be imposed on the perpetrator of such an offense."[168] This language is a throwback to *Solem*,[169] and is more appropriate for a perpetrator test than a nonperpetrator test. As with the "gravity of the offense" element, this "sentencing" element makes an owner unduly culpable to the perpetrator on the owner's property, by making the owner responsible for the consequences of others' actions, without directly considering the owner's role in the underlying criminal activity.

The presence of the "sentencing" factor is also aggravated by the presence of the verb "could." Courts split over whether to impose the *maximum* sentence as prescribed by federal and state law, or the *minimum* possible standard.[170] Furthermore, courts have split over whether to use the Federal Sentencing Guidelines[171] as a source in calculating possible fines in forfeiture actions, or whether instead to use the much stiffer penalties as provided in the Controlled Substances Act;[172] the difference in

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[168] *Id.* at 847-48.

[169] The Court in *Solem* mandated that lower courts consider "the sentences imposed on other criminals in the same jurisdiction," as well as "the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277, 292 (1983).

[170] *See* United States v. 429 S. Main Street, 52 F.3d 1416 (6th Cir. 1995) (holding that forfeiture of $83,700.00 residence is not excessive when claimant could have received $500,000.00 in federal fines). *But see* United States v. 835 Seventh Street, 820 F. Supp.688, 694 (N.D.N.Y. 1992) ("Further, the court finds that it would be preposterous to assume for present purposes that the *maximum* penalty allowed by § 841 should be used for the proportionality determination.") (emphasis added).

[171] UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1994).

[172] 21 U.S.C. § 841; *see also 832 Seventh Street,* 820 F. Supp. at 694. The court in *835 Seventh Street* stated that:

> [D]espite the fact that one district court within the Second Circuit has held that "it is the statute, and not the Guidelines, which provides the proper guide to determine seriousness," this court declines to strictly apply such a rule. Rather, the court shall apply the possibility of high monetary sanctions under 21 U.S.C. § 841 as one of the many factors it will consider, along with the penalty under the Guidelines, to determine proportionality.

*Id.*

comparable fines set out in the Guidelines and the Act can sometimes be hundreds of thousands of dollars. Fortunately, in *Milbrand* the Second Circuit indicates that it has abandoned the harsh position it took earlier in *Whalers Cove*, by calculating the *minimum* possible penalty for the criminal defendant.[173]

### *B. Instrumentality*

The second prong of the nonperpetrator test represents the instrumentality factor in the *Milbrand* analysis. The court defined this factor as "the relationship between the property and the offense."[174] The court also included three different elements to determine this relationship, "including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive."[175] This language is drawn directly from *Chandler*, and represents the best of what instrumentality can offer.[176] By incorporating *Chandler's* precise language, the Second Circuit will hopefully restrain the government from continuing to make constitutionally frivolous civil forfeiture actions,[177] and will force the government to carefully consider whether the property in question was a true instrumentality of the underlying crime.

### *C. Culpability of the Owner*

The third prong of the nonperpetrator test considers "the role and degree of culpability of the owner."[178] It is commendable that

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[173] United States v. Milbrand, 58 F.3d 841, 848 (2d Cir. 1995). The *Milbrand* court, however, continued to use 21 U.S.C. § 841 to calculate the fine. *Id.*

[174] *Id.*

[175] *Id.*

[176] United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994).

[177] For examples of frivolous forfeitures, see generally Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1 (1994).

[178] *Milbrand*, 58 F.3d at 848.

the *Milbrand* court included this as a distinct element in its test, which is also the second element of the *Chandler* test.[179] However, as indicated above, it is confusing and distorting to have the "harshness" balancing element physically separated from the "culpability" element. As the *Milbrand* court noted, its test is essentially "an analysis of the amount of the penalty in light of the role and culpability of the owner in the illicit use of her property."[180]

A more appropriate construction for the nonperpetrator test would include an approach that clearly segregates the instrumentality and proportionality elements of the test, and makes clear that it is the *nonperpetrating owner's* culpability that is at issue, not the perpetrator of the underlying offense. Accordingly, a clearer construction would be:

> (1) the harshness of the forfeiture compared to the role and degree of the culpability of the owner, and (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive.

The "gravity of the offense" should be properly understood as simply one of several factors in determining the owner's culpability.

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[179] *See Chandler*, 36 F.3d at 365 (listing the five elements in its nexus test).

[180] *Milbrand*, 58 F.3d at 847.

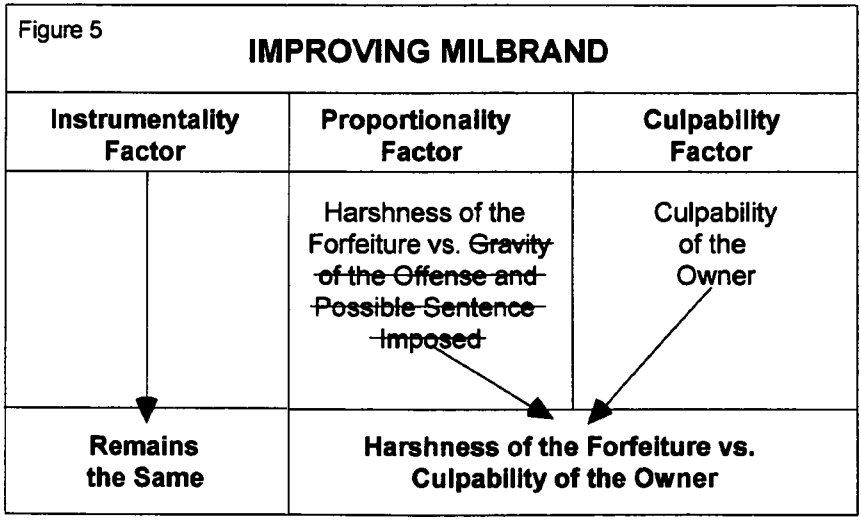
The first application of the Milbrand nonperpetrator test dealt with a strong case of owner culpability. In United States v. 143-147 East 23rd Street, 77 F.3d 648 (2d Cir. 1996), the government sought forfeiture under 21 U.S.C. § 881(a)(7) of the notorious Kenmore Hotel in Manhattan, the largest commercial single occupancy building in the city, after city police and other law enforcement officials repeatedly urged the owning company to take measures to end drug trafficking in the hotel. *Id.* at 649. At one point, an assistant district attorney warned the owner's representative that there had been dozens of arrests associated with the building, as well as three drug-related homicides. *Id.* at 650. The owner, however, took minimal effort in securing the building. *Id.* at 655. The Second Circuit affirmed the government's forfeiture, holding that under the multifactor test created in *Milbrand*, the owner's willful blindness constituted legal culpability. *Id.* at 659.

Finally, the "sentencing" factor should be omitted altogether. It is adopted from part of the *Solem* test that is inappropriate to a civil forfeiture inquiry.[181] As the court in *Chandler* indicated, *Solem's* proportionality analysis has historically been tied to the Eighth Amendment's Cruel and Unusual Punishment Clause, not the Excessive Fines Clause.[182] Lower courts have used this argument to reject a blanket adoption of the *Solem* test to civil forfeiture.[183] Furthermore, the facts of *Solem* suggest that its analysis is distinct from a civil action: it dealt with *incarceration*, where comparison of sentences would be appropriate to determine if there is cruel and unusual punishment.[184] The comparison of criminal fines in a civil action, as the Second Circuit mechanistically made in *Whalers Cove*, is not so appropriate.

Figure 5 illustrates the proposed improvements to *Milbrand:*

Figure 5

**IMPROVING MILBRAND**




Despite these shortcomings, the *Milbrand* test represents a marked improvement for civil forfeiture law, by synthesizing

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[181] *See supra* text accompanying notes 76-79 (discussing inapplicability of *Solem* to civil forfeiture context).

[182] *Chandler*, 36 F.3d at 365.

[183] *Id.*; United States v. Zumirez Drive, 845 F. Supp. 725, 731 (C.D. Cal. 1994).

[184] Solem v. Helm, 463 U.S. 277, 290-92 (1983).

elements from several sources, and drawing attention to the need to distinguish nonperpetrators in an excessive fines analysis.

## V. LESSONS FROM *LITTLE CANYON ROAD*

Thus far, this Note has touched on two major problems in civil forfeiture law. First, as the *Zumirez* court noted, bringing a civil forfeiture action has been procedurally easy for the government, and has led to widespread abuse.[185] The second problem is the difficulty in determining what excessiveness means within the civil forfeiture context. To that end, courts have struggled to create a working definition of the term, employing such factors as harshness of the forfeiture, culpability of the owner and relationship between the property and the criminal offense.[186] This struggle has been essentially a problem of substantive law, with courts offering various tests to balance these different factors.[187]

A recent Ninth Circuit case offers a procedural solution to both of these problems. A month after the Second Circuit decision in *Milbrand*, the Ninth Circuit developed its own multifactor test in *United States v. 6380 Little Canyon Road.*[188] Finding in favor of the property owner, the court in *Little Canyon Road* echoed *Zumirez* by holding that excessiveness should be at least partially connected to the *owner's* culpability.[189] *Little Canyon Road* went a step further than *Zumirez*, however, by procedurally separating the instrumentality and proportionality inquiries.[190]

The court mandated that once a claimant raises an Eighth Amendment defense, the burden of the proof must shift back to the government to show a substantial connection between the property

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[185] *See supra* text accompanying notes 62-66 (documenting general prosecutorial abuse of forfeiture).

[186] *See supra* part (discussing various approaches towards excessive fines defenses in civil forfeiture).

[187] *See supra* text accompanying notes 101-03 (introducing the three basic approaches by federal courts towards excessiveness).

[188] 59 F.3d 974 (9th Cir. 1995).

[189] *Id.* at 985-86.

[190] *Id.*

and the offense.[191] If the government demonstrates this connection, the burden shifts back again to the claimant, this time to show that forfeiture of the property would be grossly disproportionate given the nature and extent of the claimant's criminal culpability.[192]

The beauty of the *Little Canyon Road* two-step approach is that it alters the presently unjust procedure in a 21 U.S.C. § 881(a)(7) action. After *Little Canyon Road*, when a claimant raises an excessive fines defense in the Ninth Circuit, the burden shifts back to the government to prove that the property represents a "true instrumentality" of the underlying crime.[193] Additionally, the government must prove this instrumentality by a *preponderance of the evidence*, not just show probable cause.[194] Furthermore, if courts interpret "instrumentality" for Eighth Amendment purposes

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[191] *Id.* at 985. The court distinguished between the statutory "nexus" standard and the higher "substantial connection" standard it was adopting for Eighth Amendment purposes. *Id.* at 985 n.11.

[192] *Id.* at 985. The court defined its proportionality inquiry as the harshness of the forfeiture, "bearing in mind any *in personam* punishment of the owner." *Id.* (emphasis added). The harshness factors included: "(1) the fair market value of the property; (2) the intangible, subjective value of the property, e.g., whether it is the family home; and (3) the hardship to the defendant including the effect of the forfeiture on defendant's family or financial condition." *Id.*

In addition, the Ninth Circuit instructed lower courts to consider the culpability of the owner, gauged by the following factors:

(1) whether the owner was negligent or reckless in allowing the illegal use of his property; or
(2) whether the owner was directly involved in the illegal activity, and to what extent; and
(3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community.

*Id.* at 986. If forfeiture of a property were found to be excessive under this proportionality inquiry, the court instructed lower courts to consider severability as an option, limiting the forfeiture either "to an appropriate portion or the more poisonously tainted portion of the property." *Id.* at 987.

[193] *Id.* at 985.

[194] *Id.* at 985-86.

the same as *Chandler*, it will be a much more rigorous inquiry than the easy "nexus" statutory requirement. If the government can demonstrate that the property was indeed an instrumentality in the underlying offense, the burden shifts back to the claimant to prove that the forfeiture will be disproportionately excessive.[195]
Figure 6 illustrates the *Little Canyon Approach*:

Figure 6

**Burden-shifting under Little Canyon Road**

| Action Commences | Instrumentality Threshhold | Proportionality Inquiry |
|---|---|---|
| Claimant Must Raise Excessive Fines Defense → | Government Must Prove Property is a True Instrumentality of the Crime → | Claimant Must Demonstrate Forfeiture is Unneccessarily Harsh |

By reserving a proportionality inquiry until this procedural phase of the case, the *Little Canyon Road* approach helps simplify the substantive problem of determining what excessiveness means. Now lower courts in the Ninth Circuit can determine proportionality on their own, instead of having to undertake the unenviable task of weighing it against instrumentality factors, as courts must do in other circuits. Thus, *Little Canyon Road* offers a simple and just process to follow.

## CONCLUSION

The two years since *Austin* have demonstrated that there is an opportunity to curb the "prosecutorial zeal" made too easily

[195] *Id.* at 985.

available by federal civil forfeiture law.[196] During this period, many federal courts have shown a willingness to adopt sophisticated Eighth Amendment analyses that, at the very least, have stymied the more egregious forfeiture actions brought by the federal government.[197] Other courts, however, have restricted themselves to simplistic definitions of constitutional excessiveness,[198] or have rigidly adhered to the *in rem* origins of civil forfeiture.[199] These latter approaches have offered little in the way of reforming the present crisis in civil forfeiture.

*Milbrand* represents the best and the worst of these judicial responses to *Austin.* On the one hand, it marks a major step forward in representing the rights of nonperpetrators in civil forfeiture actions. The *Milbrand* court's synthesis of instrumentality and proportionality elements also offers a general improvement over other circuits by producing an articulated test that lower courts can follow. By mechanistically adopting language, however, that is more suited for Cruel and Unusual Punishment Clause analysis than for Excessive Fines Clause defenses, the *Milbrand* court unfairly taints its nonperpetrator test with the culpability of the perpetrator of the underlying offense.

Courts should not end their excessiveness analyses with the limited success of *Milbrand,* but should continue to synthesize and innovate the multifactor approach, as did the *Little Canyon Road* court by procedurally separating instrumentality and proportionality inquiries. By recognizing both the improvements and the limitations of *Milbrand,* courts in the future will be able to offer more just protection to civil forfeiture claimants, particularly to nonperpetrators.

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[196] *In re* Assets of Martin, 1 F.3d 1351, 1360 (3d Cir. 1993) (stating that "the Supreme Court's application of Eighth Amendment limitations to forfeitures suggests to us that we need to keep prosecutorial zeal for such remedies within particular boundaries").

[197] *See supra* text accompanying notes 125-34 (providing a general evaluation of the multifactor approach).

[198] *See supra* text accompanying notes 104-10 (critiquing the simplistic proportionality approach).

[199] *See supra* text accompanying notes 112-24 (evaluating the instrumentality approach adopted in part by the Second and Fourth Circuits).