

ARTICLES

Civil Forfeiture and the Eighth Amendment After *Austin*

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*Individual freedom finds tangible expression
in property rights.¹*

*Men must turn square corners when they
deal with the Government.²*

I. AN INTRODUCTION TO A WORLD WHERE GUILT OR INNOCENCE IS IRRELEVANT; ALL THAT MATTERS IS HOW MUCH YOUR PROPERTY IS WORTH

Imagine owning an expensive piece of property, a piece of real estate perhaps, or maybe a car or boat. Now imagine having your property forcefully taken away from you because someone suspects, or pretends to suspect, that you are using the property in the commission of criminal acts. Then, imagine having to hire a lawyer and start a

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1. Justice Anthony M. Kennedy, writing for the United States Supreme Court in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993).

2. Oliver Wendell Holmes, writing for the United States Supreme Court in *Rock Island, Arkansas & Louisiana R.R. Co. v. United States*, 254 U.S. 141, 143 (1920).

lawsuit to recover your property. After spending a small fortune in legal fees to recover your own property, imagine you lose your lawsuit, not because you could not prove your rightful ownership before its forceful seizure, but because you could not prove that the person who seized the property lacked a reasonable suspicion that you were using the property in the commission of criminal acts or that you were not in fact using the property in the commission of criminal acts. Finally, imagine that your only recourse is buying your property back from the person who took it.

Not likely to happen in America? Think again. It might not be likely to happen in America if a private party forcefully seized your property. But if your own government took it, you are in deep trouble. This is, in fact, what is happening all over America thanks to 21 U.S.C. § 881³ (Section 881), the civil forfeiture statute, and other state and federal forfeiture provisions.⁴

3. 21 U.S.C.A. § 881 (West 1981 & Supp. 1995).

4. Section 881(a) declares simply that the following is subject to forfeiture and that no property rights exist in these items:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

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

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and

Government touches virtually all things in the United States and, eventually, injures almost everything it touches. This Article explores the constitutional infirmities of Section 881 in light of the government deprivations it has prompted. In particular, the Article examines the significance of the Supreme Court's decision in *Austin v. United States*.⁵

In *Austin*, the Supreme Court imposed a substantive restriction on governments' forfeiture powers based on the Eighth Amendment's Excessive Fines Clause.⁶ However, *Austin* did not define the exact parameters of this restriction. Given governments' tendencies to abuse the powers granted to them, courts should follow the interpretation of *Austin* that results in the greatest restriction on their forfeiture powers. This Article suggests an explanation of *Austin* that would severely restrict these powers, at least those of the United States government.

The case of Donald Scott is a good example of the threat to individual freedom posed by the forfeiture laws and the need for a more restrictive interpretation of governments' forfeiture powers. Mr. Scott owned a 200-acre ranch in the Ventura County portion of Malibu, California, adjacent to the Santa Monica Mountains National Recreation Area. The property, worth approximately \$3-5 million,

all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

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

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

Id. § 881(a).

5. 113 S. Ct. 2801 (1993).

6. *Id.* at 2803.

attracted the attention of no less than seven governmental agencies⁷ in the months leading up to Mr. Scott's death at the hands of Los Angeles Sheriff's Department (LASD) deputies attempting to serve a search warrant on Mr. Scott.⁸ No one of these seven agencies had primary jurisdiction over the situs of Mr. Scott's ranch.⁹

After thoroughly investigating the Scott death, Ventura County District Attorney Michael D. Bradbury concluded that the search warrant was defective.¹⁰ The warrant was issued based on a DEA agent's claim that, using binoculars from the air, he spotted marijuana being cultivated on the property.¹¹ In fact, however, the DEA agent did not use binoculars to spot marijuana; he used his bare eyes.¹² The judge who issued the warrant was not told that the DEA agent was initially reluctant to allow his observation to serve as the sole basis of the warrant.¹³ Nor was he told that the DEA agent was flying at 1,000 feet when he spotted the marijuana¹⁴ by looking for distinctive shades of green.¹⁵ Further, the judge was not told that the LASD unsuccessfully attempted to verify the presence of marijuana cultivation on the Scott property from the ground, that the United States Border Patrol had made two incursions onto the property in a similar attempt

7. Michael D. Bradbury, Report on the Death of Donald Scott, Office of the District Attorney, County of Ventura, California 2-15 (Mar. 30, 1993) (unpublished report, on file with the *Seattle University Law Review*).

8. Participating in the service of the search warrant were the LASD, the Los Angeles Police Department, the National Guard, the National Park Service, the U.S. Forest Service, the California Bureau of Narcotic Enforcement, and the Drug Enforcement Agency. *Id.* at 15. Two of the representatives from the LASD were from the asset forfeiture unit. *Id.* All of this despite the opinion of one Los Angeles Sheriff's Deputy who had visited the Scott ranch that the Scotts posed a minimal threat. *Id.* at 12.

9. *See id.* at 15-16.

10. *Id.* at 48.

11. *Id.* at 12-13.

12. *Id.* at 44.

13. *Id.* at 9. It was not until the DEA agent received information that a confidential informant had seen marijuana plants growing on the property and that the expected yield of the plants was approximately forty pounds that he consented to allow his observations to provide the basis for the warrant. *Id.* at 2, 9. That informant later denied having stated that a yield of forty pounds was expected. *Id.* at 47.

14. *Id.* at 45, 47.

15. *Id.* at 38, 45. As outlined in author Michael Bradbury's report, the likelihood of spotting marijuana from 1,000 feet with the bare eye is small. *See id.* at 28, 37-39. The California courts have previously addressed claims like the one advanced by the DEA agent that marijuana has a color that is unique to nature. *Id.* at 38. The law on this point in California is decidedly against the validity of a probable cause determination based on such a claim alone. *See id.* The Ventura County District Attorney interviewed a Forest Service ranger who had spent hundreds of hours doing aerial surveillance, and his conclusion was that the likelihood that the DEA agent's claim was valid is similar to the claim of "seeing a corn dog sticking out of the ground" at 1,000 feet. *Id.* at 28.

but was unable to verify marijuana cultivation on the property, and that National Park Service and LASD personnel visited the property under false pretenses and were also unable to verify marijuana cultivation on the Scott ranch.¹⁶

In his report, the Ventura County District Attorney concluded that a motivating factor behind the service of the search warrant was the possible forfeiture of the Scott ranch to government authorities.¹⁷ Mr. Bradbury speculated that when the LASD learned of Scott's wife's marijuana possession conviction, sheriff's deputies arranged to search the property, aware that if marijuana was found growing on the property, or if other drugs were found in sufficient quantity, a valuable piece of property could be forfeited to the government.¹⁸ Mr. Bradbury further speculated that the Ventura County Sheriff's Department, which had primary jurisdiction over the geographic area, was not notified of the service of the warrant "because Los Angeles County did not want to split the forfeiture proceeds with [Ventura County]."¹⁹

Most importantly, the Ventura County District Attorney's report concluded that "[t]here would have been no legal impropriety [in forfeiture being one of the motivating factors for obtaining and serving the search warrant] under existing law if the search warrant had been supported by probable cause."²⁰ In other words, the only error of the LASD and its deputies was their failure to secure a valid warrant for their search.

The Scott case amply demonstrates the perverse incentives put in place by the forfeiture laws. When authorities happen upon valuable property in the hands of potential criminals, their incentive is to discover sufficient evidence of criminal wrongdoing to undergird a valid search warrant so the property can be forfeited to the government. This perverse incentive exists because the focus of a forfeiture investigation is entirely on the determination of probable cause, not on the actual commission of wrongdoing. If the government meets a relatively easy burden of probable cause, the property will be forfeited unless the property owner, the claimant, can prove his or her innocence.

16. *Id.* at 3-9.

17. *Id.* at 62. At the briefing before service of the warrant, forfeiture of the Scott ranch was discussed. *Id.* at 16. An LASD deputy stated that the ranch would be seized if more than fourteen marijuana plants were found on the property. *Id.*

18. *Id.* at 61.

19. *Id.* at 51.

20. *Id.* at 34.

In another demonstration of the gross excesses in which government may indulge in this modern age, the Office of Thrift Supervision of Resolution Trust Corporation (OTS) proceeded against the prominent and famous law firm of Kaye, Scholer, Fierman, Hays, & Handler (Kaye Scholer) in March 1992.²¹ Kaye Scholer was charged with withholding information secured from its client, Lincoln Savings & Loan Association, a failed thrift. The charges against Kaye Scholer were accompanied by an unprecedented, draconian asset freeze—a unilateral, no court-consideration freeze²²—based upon a single government agency finding that the law firm had failed to comply with a subpoena about its finances and had threatened to amend its liability insurance policy so as to prejudice OTS's ability to recover restitution.²³

The idea that Kaye Scholer would engage in such behavior was, and is, ridiculous. It was an obvious pretext to impose the freeze against the entire firm.²⁴ The *Wall Street Journal* justly called this freeze a "terrifying trump card."²⁵ "[C]lients got fidgety and banks questioned the firm's ability to repay loans."²⁶ Obviously, the freeze was deliberately intended by the OTS to coerce Kaye Scholer to settle the charges without defending the basic claim.²⁷ The intention succeeded because the firm, unable to function under the freeze order, could not continue in existence long enough for the charges to be adjudicated.²⁸

The New York City Bar Association concluded: "[The] OTS confronted the firm with the choice of settling promptly or going out of business. The effect of this order apparently has been to deprive Kaye Scholer of its right to defend itself in court on the merits."²⁹

21. Amy Stevens & Paulette Thomas, *How a Big Law Firm Was Brought to Knees by Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1.

22. Andrew J. Maloney, *Kaye Scholer Bullied by a Powerful OTS*, WALL ST. J., Dec. 29, 1993, at A9 (Letter to the Editor).

23. See The Committee on Professional Responsibility, Attachment of Law Firm Assets by Federal Regulatory Agencies, The Record of the Association of the Bar of the City of New York 118 (Mar. 1992) [hereinafter Attachment of Law Firm Assets].

24. See *id.* at 118-19 (recognizing that government regulators may use the power to freeze assets not to prevent their dissipation, but rather to force a law firm to settle regardless of the merits).

25. Stevens & Thomas, *supra* note 21, at A1.

26. *Id.*

27. Maloney, *supra* note 22, at A9; see *Arkansas Forbearance*, WALL ST. J., Feb. 22, 1994, at A20.

28. See Stevens & Thomas, *supra* note 21, at A5.

29. Conrad K. Harper, *Preface* to Attachment of Law Firm Assets, *supra* note 23, at 116.

The firm had little choice but to fork over a \$41 million settlement. The alternative was bankruptcy.³⁰

The OTS apparently assumed that Kaye Scholer's duty was to ignore attorney-client privilege and volunteer information it had secured from its client that was "of interest" to the OTS or to Federal Home Loan Bank Board (FHLBB) examiners.³¹ The OTS's position required Kaye Scholer to divulge even negative information about its client whether responsive to any particular inquiry or not.³²

Kaye Scholer asserted that its statements to the FHLBB examiners were truthful, and that to simply volunteer information just because it might be of "interest" to the bank examiners was directly in violation of its responsibilities to a client under the canons of ethics.³³ The duty of inquiry on which the OTS charges were based would not only require lawyers to overstep the scope of their representation but would also make any relationship of trust between lawyers and their clients an impossibility.³⁴ Even heinous serial murderers are entitled to counsel. Even Charles Keating, owner of Lincoln Savings & Loan Association, who apparently purchased 5% of the Senate of the United States,³⁵ is entitled to counsel of undivided loyalty.³⁶

Professor Geoffrey Hazard³⁷ concurred that the OTS misunderstood a lawyer's ethical responsibilities in representing a client who is under investigation by a banking agency.³⁸ He concluded that "Kaye Scholer did not violate existing standards of ethical conduct and professional responsibility, and . . . acted in accordance with its duties under the law."³⁹ He also announced that "[t]he disclosures . . . that . . . [the] OTS alleges should have been made . . . by Kaye Scholer in fact would have violated the standards of ethical conduct and profes-

30. See Attachment of Law Firm Assets, *supra* note 23, at 119-20.

31. See Maloney, *supra* note 22, at A9.

32. Stevens & Thomas, *supra* note 21, at A1.

33. *Id.* at A5.

34. See Harper, *supra* note 29, at 116.

35. Senators McCain (R. Ariz.), De Concini (D. Ariz.), Riegle (D. Mich.), Glenn (D. Ohio), and Cranston (D. Cal.) each secured large campaign contributions from Keating or his thrift while the senators pressured regulators to keep the thrift open. See *Charles Keating's Lasting Taint*, N.Y. TIMES, Oct. 7, 1993, at A28; Martin Tolchin, *Michigan Senator in Savings Scandal Will Retire*, N.Y. TIMES, Sept. 29, 1993, at A16; Richard L. Berke, *Aftermath of the Keating Verdicts*, N.Y. TIMES, Mar. 1, 1991, at A22.

36. See *Letter Clearing Lincoln S & L Lawyer*, NAT'L L. J., Dec. 27, 1993-Jan. 3, 1994, at 10 (reprinting letter written by Hal R. Lieberman).

37. Summary of the Expert Opinion of Geoffrey C. Hazard, Jr. (Feb. 25, 1992) [hereinafter Hazard] (on file with the *Seattle University Law Review*).

38. See *id.* at 17-19.

39. *Id.* at 18-19.

sional responsibility generally recognized as applicable to Kaye Scholer in its role as litigation counsel."⁴⁰

The American Bar Association (ABA) appointed a select Working Group on Lawyers' Representation of Regulated Clients (Working Group) to study the Kaye Scholer matter.⁴¹ The Working Group's report vigorously criticized the OTS and recommended action to stop government agencies from abusing this kind of power in the future.⁴² The Working Group concluded that the OTS's standards of lawyer conduct go beyond, and conflict with, traditional and current standards of professional responsibility.⁴³

The OTS justified these novel standards by asserting that Kaye Scholer had disclosure obligations previously unheard of for lawyers because the firm interpositioned itself between the OTS and Lincoln, thus "making itself the 'sole agent' for the thrift."⁴⁴ This "interposition" theory was most likely an after-the-fact justification for the OTS's charges. After being apprised of OTS's interposition theory, Kaye Scholer submitted a memorandum to the Working Group that documented numerous direct contacts between the regulators and the client, establishing that the regulators had full access to the client directly.⁴⁵

New York's Departmental Disciplinary Committee instituted its own investigation of the OTS's charges.⁴⁶ After a lengthy proceeding, the Disciplinary Committee found "no basis" for taking any disciplinary action against the Kaye Scholer partners for violation of professional ethics.⁴⁷ Because no violation of professional ethics was found, and the FHLBB regulations governing the conduct of lawyers incorporate these professional ethics standards,⁴⁸ Kaye Scholer was vindicated.⁴⁹

40. *Id.* at 19.

41. Maloney, *supra* note 22, at A9. ABA working groups typically consist of distinguished lawyers from private practice and from government and non-profit agencies.

42. *See id.*

43. *Id.*

44. Stevens & Thomas, *supra* note 21, at A5.

45. Maloney, *supra* note 22, at A9. For a detailed accounting of the contacts between Lincoln and the regulators, see Hazard, *supra* note 37.

46. *Letter Clearing Lincoln S & L Lawyer*, *supra* note 36, at 10.

47. *Id.*

48. Hazard, *supra* note 37, at 17.

49. The Disciplinary Committee itself emphasized how squarely its conclusion contradicted the OTS: "Finally, it is significant that the OTS gave us access to its complete document files, and thus we reviewed every document which OTS presumably would have used (at least in connection with the issues we investigated) had its action against Kaye, Scholer resulted in actual litigation before a tribunal." *Letter Clearing Lincoln S & L Lawyer*, *supra* note 36, at 10.

Clearly a serious violation of the canons of ethics occurred in the Kaye Scholer matter, but the violation was by the OTS's lawyers, not Kaye Scholer. The Code of Professional Responsibility provides that "a government lawyer . . . should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results."⁵⁰ The OTS unilaterally imposed the freeze order based on false allegations of the dissipation of assets. This imposition injured hundreds of partners and associates of active defense firms. OTS's intent to coerce Kaye Scholer to settle insupportable charges patently violates the canons of ethics.

The apparently impartial and thorough work of the ABA and the New York State Disciplinary Committee corrected an injustice and helped to restore the reputations of Kaye Scholer and its partners. The bar, the bench, and society should take steps to ensure that the government lawyers who abused their positions are proceeded against; outrages like this cannot be suffered to occur. Finally, this incident affords an example of the perfidy and the depths to which it is possible for government to sink.

II. CIVIL FORFEITURE LAW AND PROCEDURE

Currently, forfeiture statutes in the United States are myriad at the federal level.⁵¹ State forfeiture laws vary even more than federal

50. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1990).

51. See, e.g., 16 U.S.C.A. §§ 3373-3374 (West Supp. 1985) (any fish, wildlife, or plants imported, exported, transported, sold, received, acquired, or purchased in violation of United States Treaty or any Indian tribal law subject to forfeiture); 18 U.S.C.A. §§ 471-474, 492 (West 1976 & Supp. 1995) (counterfeit or fraudulent obligations, securities, counterfeit plates, or stones of the United States are forfeit); 18 U.S.C.A. §§ 476-477, 492 (West 1976 & Supp. 1995) (impressions or tools used to make counterfeit objects are forfeit); 18 U.S.C.A. §§ 478-481, 492 (West 1976 & Supp. 1995) (counterfeit or fraudulent foreign securities or obligations and the tools to make them are forfeit); 18 U.S.C.A. §§ 485-488, 492 (West 1976 & Supp. 1995) (counterfeit coins or bars, foreign or domestic, are subject to forfeiture); 18 U.S.C.A. §§ 492, 501-502 (West 1976 & Supp. 1995) (all counterfeit postage subject to forfeiture); 18 U.S.C.A. § 542 (West Supp. 1995) (entry of goods by means of false statements are subject to forfeiture); 18 U.S.C.A. § 545 (West Supp. 1995) (smuggled goods are subject to forfeiture); 18 U.S.C.A. §§ 656-657, 982(2)(A) (West Supp. 1995) (embezzled funds from a federally insured bank are subject to forfeiture); 18 U.S.C.A. §§ 842, 844 (West 1976 & Supp. 1995) (unlawful explosives are subject to forfeiture); 18 U.S.C.A. § 981(a)(1)(B) (West Supp. 1995) (any property traceable to offense against a foreign nation involving manufacture, importation, sale, or distribution of controlled substances is subject to forfeiture); 18 U.S.C.A. §§ 982(2)(A), 1014 (West Supp. 1995) (proceeds from fraudulently overvaluing loan and credit applications are subject to forfeiture); 18 U.S.C.A. §§ 982(2)(B), 1028 (West Supp. 1995) (fraudulent identification documents are subject to forfeiture); 18 U.S.C.A. §§ 982(2)(B), 1029-1030 (West Supp. 1995) (funds defrauded from access devices or computers are subject to forfeiture); 18 U.S.C.A. §§ 982(2)(A), 1344 (West Supp. 1995) (funds obtained as a result of bank fraud are subject to forfeiture); 19 U.S.C.A. § 2093 (West 1980) (any pre-Columbian monumental sculpture or mural unlawfully imported into the United States is subject

forfeiture laws.⁵² However, states generally have either code provi-

to forfeiture); 21 U.S.C.A. § 853(a) (West Supp. 1995) (all property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of a violation of federal drug laws is subject to forfeiture); 22 U.S.C.A. § 401 (West 1990) (war materials exported in violation of law subject to forfeiture); 22 U.S.C.A. § 1978(e) (West 1990) (fish products from countries violating international programs against overfishing subject to forfeiture); 50 U.S.C.A. § 212 (West 1991) (property used in aid of insurrection subject to confiscation); *see also* 40 C.F.R. § 85.1513(c) (1994) (vehicles or engines imported into the United States without a certificate from the U.S. Customs Service certifying catalyst and O₂ sensor equipment may be subject to seizure).

52. *See, e.g.*, ALA. CODE § 32-8-86 (1989) (vehicles in which identification numbers appear to be altered and ownership cannot be determined are subject to forfeiture); ALASKA STAT. § 11.46.487 (1989) (personal property, other than a motor vehicle, used to aid in the disregarding of a highway obstruction is forfeit upon conviction of the disregarding); ARIZ. REV. STAT. ANN. § 12-817 (1992) (obscene motion picture films and publications are contraband and forfeit); ARK. CODE ANN. § 5-73-110 (Michie 1993) (deadly weapons seized from mentally defective minor are subject to forfeiture at the discretion of the court); CAL. FISH & GAME CODE § 12157 (West Supp. 1995) (devices and apparatus designed to be, capable of being used, or used to take birds, mammals, fish, amphibia, or reptiles in violation of code subject to forfeiture upon conviction); COLO. REV. STAT. ANN. § 16-13-303(1), (3) (West 1990) (vehicles constituting a public nuisance are forfeit); CONN. GEN. STAT. ANN. § 53-397(a)(1) (West 1994) (cash proceeds and property derived from illegal racketeering activity are forfeit); DEL. CODE ANN. tit. 3, § 1308 (1993) (value of imported or infested agricultural nursery stock is forfeit); FLA. STAT. ANN. § 403.413(6)(e) (West 1993) (cranes and winches found unlawfully dumping more than 500 pounds or 100 cubic feet of litter are forfeit); GA. CODE ANN. § 68A-902.4 (Harrison Supp. 1993) (motor vehicle used by person who has been declared an habitual violator, whose license has been revoked, and who has been arrested for driving while under the influence is forfeit); HAW. REV. STAT. ANN. § 708-8204 (Michie 1994) (cable television devices used in cable television services fraud subject to forfeiture); IDAHO CODE § 52-415 (1994) (all personal property declared to be a moral nuisance as per code is subject to forfeiture); ILL. ANN. STAT. ch. 230, para. 25/4.1 (Smith-Hurd 1993) (proceeds from illegal bingo are forfeit); IND. CODE ANN. § 13-7-13-4(d) (Burns 1990) (vehicles used to transport hazardous waste in the commission of a crime are subject to forfeiture); KAN. STAT. ANN. § 22-2512(b) (1988) (devices used for gambling purposes are forfeit); KY. REV. STAT. ANN. § 40.991 (Michie/Bobbs-Merrill 1992) (filing of fraudulent claims or assisting in the filing of fraudulent claims for Vietnam veteran's bonus subjects bonus to forfeiture); LA. REV. STAT. ANN. 14:102.2(B) (West 1986) (animals subjected to cruel treatment are subject to forfeiture); ME. REV. STAT. ANN. tit. 36, § 4373 (West 1990) (unstamped cigarettes are subject to forfeiture); MD. CODE ANN., AGRIC. § 5-905 (1995) (antifouling paint subject to forfeiture); MASS. GEN. LAWS ANN. ch. 143, § 710 (West 1991) (recreational tramway ticket subject to forfeiture upon skier's failure to heed warnings of ski area operator); MICH. COMP. LAWS ANN. § 289.37 (West Supp. 1995) (condemned food products are subject to forfeiture); MISS. CODE ANN. § 97-3-111 (Supp. 1995) (vehicle used in drive-by shooting or bombing is subject to forfeiture); MO. ANN. STAT. §§ 578.030-050 (Vernon 1995) (bears, bulls, cocks, and other creatures used in fighting or baiting activities are subject to forfeiture); MONT. CODE ANN. § 44-12-102 (1995) (funds, raw materials, products, and equipment used in violation of controlled substance act are subject to forfeiture); NEB. REV. STAT. § 28-431 (1989) (controlled substances are forfeit); N.H. REV. STAT. ANN. § 207:18 (1989) (equipment used in the unlawful taking of fish is subject to forfeiture); N.J. STAT. ANN. § 2C:64-1.a.(1) (West 1995) (prima facie contraband subject to forfeiture); N.M. STAT. ANN. § 30-45-7 (Michie 1978) (all equipment, including computers, used in violation of the Computer Crimes Act is subject to forfeiture); N.C. GEN. STAT. § 106-202.20 (Supp. 1994) (illegally possessed plants are subject to forfeiture); N.D. CENT. CODE § 62.1-05-01 (1985) (machines guns, automatic rifles, silencers and bombs are subject to forfeiture); OHIO REV. CODE ANN. § 4969.22 (Anderson 1991) (railroads' right of way

sions or judicial decisions that require forfeiture laws to be read narrowly. A few states, like Wyoming, have very few forfeiture laws; in such states, the few laws that exist are not always readily discoverable.

A. A History of Forfeiture

Historically, the State or Nation or whatever entity inherited the authority of the King in the area of forfeiture had the authority to proceed directly against certain things. This is the action *stricti juris in rem*, to be distinguished from actions *quasi in rem*⁵³ and *in personam*.⁵⁴ In actions *stricti juris in rem*, the State has authority, within certain strictures,⁵⁵ and in certain instances, to “condemn” property. For instance, rotten beef can be seized, impounded, and destroyed in exercise of the public authority and the police power—to protect populations from pestilence or olfactory offense.⁵⁶ Heroin and other

forfeit after 10 years of nonuse); OKLA. STAT. ANN. tit. 29, § 4-129.L.1 (West Supp. 1996) (mussels harvested in violation of code are subject to forfeiture); OR. REV. STAT. § 323.245 (1993) (vending machines that sell cigarettes upon which tax was not paid are subject to forfeiture); S.C. CODE ANN. § 50-11-740 (Law. Co-op. Supp. 1994) (vehicles, animals, and firearms used in hunting bear or deer at night subject to forfeiture); S.D. CODIFIED LAWS ANN. § 1-20-35 (1992) (findings resulting from unauthorized archaeological dig are subject to forfeiture); TENN. CODE ANN. § 70-4-415 (1995) (exotic animals taken in contravention of code are subject to forfeiture); TEX. PARKS & WILD. CODE ANN. § 77.027 (West Supp. 1995) (proceeds from sale of illegally harvested shrimp subject to forfeiture); UTAH CODE ANN. § 76-9-301.6 (1995) (dogs engaged in dog fighting exhibition are subject to forfeiture); VT. STAT. ANN. tit. 6, § 3315 (1988) (livestock products and poultry products used or found in violation of safety laws subject to seizure and condemnation); VA. CODE ANN. § 29.1-407 (Michie 1992) (furs obtained in violation of code are forfeit); WASH. REV. CODE § 9.81.050 (1994) (all funds, books, records, and files of every kind and all other property belonging to a subversive organization are forfeited to the state); W. VA. CODE § 61-3-50(d)(5) (Supp. 1995) (target medium of unauthorized transfer of sound recordings subject to forfeiture); WIS. STAT. ANN. § 941.24 (West 1982) (switchblades must be surrendered to any peace officer); V.I. CODE ANN. tit. 33, § 1581 (1994) (any property, including draft animals, used to transport articles in violation of the tax code is forfeit).

53. See RESTATEMENT (SECOND) OF JUDGMENTS § 6 cmt. a (1982) (explaining distinction between *in rem* and *quasi in rem* proceedings).

54. *Id.* § 5 (explaining scope of *in personam* jurisdiction).

55. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); see also *Doersam v. Brescher*, 468 So. 2d 427, 428 (Fla. Dist. Ct. App. 1985) (holding that hearsay may not form the basis for trier-of-fact's determination that forfeited property was utilized in commission of crime); *State v. Matheason*, 84 Wash. 2d 130, 134, 524 P.2d 388, 390 (1974) (finding statute that provided for seizure of vehicle used to transport proscribed marijuana invalid because it did not provide for notice and hearing to property owner even after seizure).

56. See *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908); see also *United States v. 2,116 Boxes of Boned Beef Weighing Approx. 154,121 Pounds*, 516 F. Supp. 321 (D. Kan. 1981), *aff'd*, 726 F.2d 1481 (10th Cir.), *cert. denied*, 469 U.S. 825 (1984); *United States v. 500 Pounds, More or Less, of Veal and Beef*, 319 F. Supp. 966 (N.D. Cal. 1970).

prohibited substances can also be seized⁵⁷ and destroyed.⁵⁸ In these instances, the thing proceeded against is offensive in and of itself.⁵⁹

In other cases, the thing is not itself a danger, an offense, or a threat, but is used in connection with the violation of a law. For example, a ship that indulges in acts of piratical depredations may be forfeited.⁶⁰ Or a ship engaged to scoop oysters from oyster beds, however efficient, may be condemned because the public authority has acted to protect the resource.⁶¹ Similarly, a ship apprehended in the transport of marijuana may be seized,⁶² and an automobile carrying prohibited alcohol may be apprehended and condemned.⁶³

In the Mosaic law, it was laid down: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten. . . ."⁶⁴ Similarly, the English law of deodand

57. See, e.g., 21 U.S.C.A. § 881(a) (West 1981 & Supp. 1995); accord *United States v. Martino*, 664 F.2d 860 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982); *United States v. Allard*, 600 F.2d 1301 (9th Cir. 1979); *United States v. Glasby*, 576 F.2d 734 (7th Cir.), cert. denied, 439 U.S. 854 (1978); *United States v. Davis*, 461 F.2d 1026 (3d Cir. 1972).

58. See 28 C.F.R. § 50.21 (1995). In *Glennon v. Britton*, the court noted:

The object of the proceedings to be instituted under the statute is that the unlawful and immoral practice be stopped, by destroying implements, apparatus, materials, etc., with which it is carried on. The theory is, in respect of such property, that no one is longer the owner of it. The moment it is used and applied in the unlawful business, it becomes liable to forfeiture; and, though the claimant may appear and claim, he has no greater rights in property so used than has any other person. . . . And, for the promotion of the general welfare, the state, under its police powers, has the undoubted right to adopt the most expeditious, inexpensive, and effective mode of abolishing and abating the same. That, under the various acts of congress, goods and things are seized, condemned, and destroyed . . . and such statutes, and proceedings under them, [have been] regarded constitutional and valid.

40 N.E. 594, 598 (Ill. 1895); see also *Lawton v. Steele*, 152 U.S. 133 (1894) (upholding seizure and destruction of fish nets used in violation of state statute); *People v. One Pinball Machine*, 44 N.E.2d 950, 957 (Ill. App. Ct. 1942) (upholding right to destroy pinball machine used as gambling device).

59. See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); see also *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 454 (7th Cir. 1980) ("The vehicle or other inanimate object is treated as being itself guilty of wrongdoing, regardless of its owner's conduct.").

60. See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 7 (1827); *United States v. The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 209 (1844).

61. See, e.g., *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855).

62. E.g., *United States v. One (1) 1983, Fifty-seven Foot (57') Gulfstream Vessel*, 640 F. Supp. 667 (S.D. Fla. 1986); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. One 55 Foot Fishing Vessel*, 656 F. Supp. 967, 968 (D. Mass. 1987) ("Where a conveyance such as a vessel is used or intended to be used to transport a controlled substance such as marijuana, it is subject to forfeiture.").

63. See, e.g., *United States v. One 1950 Ford Half-Ton Pickup Automobile Truck*, 195 F.2d 857, 859-60 (6th Cir. 1952) (holding that automobile used to transport owner to and from site of illegally operated still was subject to forfeiture proceedings under the Internal Revenue Code).

64. Exodus 21:28.

presupposed that if any property should cause the death of a human being, that property was forfeited to the Crown. The negligence or fault of the owner was irrelevant. The property was forfeited, and the King would use the proceeds from the property sale or give the property to the survivors of the deceased.⁶⁵ Perhaps owing to the large number of deaths caused by the industrial revolution, the concept of deodands was abolished in England in 1846,⁶⁶ and Parliament adopted the Act for Compensating the Families of Persons Killed by Accidents.⁶⁷ However, a case decided the same year continued the rationale that property could be forfeited in the absence of the owner's negligence.⁶⁸

England did retain forfeiture law as applied to persons who violated the customs and revenue laws. These actions were brought *in rem* in the Court of Exchequer and reflected the belief that if a property owner engaged in illegal conduct, the owner's property rights should be taken away.⁶⁹

English law undoubtedly had a strong influence on the development of forfeiture doctrine in the United States. Although the Supreme Court decided *in rem* proceedings with regard to State mechanics' and provisioners' liens,⁷⁰ *The Palmyra*⁷¹ was the first case decided in which a ship was seized by the United States government for violations of a piracy statute.⁷² The United States seized the ship at sea, and the lower court ruled that the ship should be returned to its owners.⁷³ The lower court based its decision on the argument that to forfeit the ship through a proceeding *in rem*, a conviction *in personam* should have been entered concerning a person.⁷⁴ The Supreme Court

65. OLIVER W. HOLMES, *THE COMMON LAW* 24-25 (3d ed. 1923); see also 1 WILLIAM BLACKSTONE, *COMMENTARIES* *299-300.

66. An Act to Abolish Deodands, 1846, 9 & 10 Vict., ch. 62 (Eng.).

67. Lord Campbell's Act, 1846, 9 & 10 Vict., ch. 93 (Eng.).

68. *Regina v. Woodrow*, 153 Eng. Rep. 907 (Ex. 1846).

69. For a complete history of early English forfeiture law, see generally HOLMES, *supra* note 65, at 1-38; Jacob J. Finklestein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973); Leslie C. Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661, 661-69 (1978); Stephen A. Youngman, Comment, *Forfeiture of Aircraft Used in Crimes—The Consequences to the Innocent Owner or Security Interest Holder*, 49 J. AIR L. & COM. 989, 989-93 (1984).

70. *Blaine v. The Ship Charles Carter*, 8 U.S. (4 Cranch) 327 (1808); *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819).

71. 25 U.S. (12 Wheat.) 1 (1827).

72. 3 Stat. 77 (1819); 3 Stat. 113 (1820).

73. *The Palmyra*, 25 U.S. (12 Wheat.) at 2.

74. *Id.* at 5.

disagreed and held that the ship should be forfeited. Justice Story wrote for the Court:

[A]t the common law, in many cases of felony, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was part, or, at least, a consequence, of the judgment of conviction. It is plain, from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right, by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem*, cognisable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*.⁷⁵

Thus, the Court defined the proceedings *in rem* against the ship as separate and independent of any action against an owner, agent, or employee.⁷⁶

Property seizure and subsequent forfeiture, absent any wrongdoing by the owner, has occurred frequently since *The Palmyra*. In *Dobbins's Distillery v. United States*,⁷⁷ the lessee of a distillery failed to keep certain records and falsified others in violation of a statute.⁷⁸ The owner/lessor had no knowledge of the lessee's violations, yet the circuit court ordered forfeiture of the property.⁷⁹ The judgment was later affirmed by the United States Supreme Court.⁸⁰

Again, in *J.W. Goldsmith, Jr.-Grant Co. v. United States*,⁸¹ the Supreme Court held that when a secured party sold an automobile to an individual who was later apprehended for transporting untaxed liquor in that automobile, the secured party forfeited his interest in the

75. *Id.* at 14.

76. *See id.*

77. 96 U.S. 395 (1877).

78. *Id.* at 396.

79. *See id.* at 397.

80. *Id.* at 404.

81. 254 U.S. 505 (1921).

automobile.⁸² Although the secured party argued that the forfeiture “deprived the . . . [c]ompany of its property without due process of law” because the lessor was unaware of any wrongdoing,⁸³ the Court reasoned that the government’s interest in enforcing the laws of the United States outweighed the innocent owner’s property interest.⁸⁴

The Supreme Court further developed its rationale for allowing the forfeiture of an innocent party’s property in *Van Oster v. Kansas*.⁸⁵ In *Van Oster*, the Court held that the State of Kansas constitutionally seized property that was used for the transportation of illegal liquor.⁸⁶

[C]ertain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.⁸⁷

Since *Van Oster*, the objective of discouraging illegal uses of property has led the Supreme Court to sustain other forfeiture statutes against constitutional attack by distinguishing actions *in rem* from actions *in personam*.⁸⁸

B. Section 881

The federal government is authorized to initiate forfeiture proceedings through numerous specific statutes. Many statutes provide for civil actions *in rem*,⁸⁹ although some statutes, such as the criminal forfeiture statutes, require a person’s conviction before that person’s property can be forfeited.⁹⁰ The statutory scheme under Section 881, relating to forfeitures associated with violations of current drug laws, is a representative example of a civil forfeiture statute.⁹¹

Section 881 provides an extensive list of the various types of property subject to forfeiture⁹² and incorporates the Supplemental Rules for Certain Admiralty and Maritime Claims procedures

82. *Id.* at 511-13.

83. *Id.* at 509.

84. *See id.* at 510.

85. 272 U.S. 465 (1926).

86. *Id.* at 466, 469.

87. *Id.* at 467-68.

88. *See* *Various Items of Personal Property v. United States*, 282 U.S. 577, 580 (1931).

89. *See, e.g.*, 21 U.S.C.A. § 881 (West 1981 & Supp. 1995).

90. *See, e.g., id.* §§ 848, 853.

91. *See id.* § 881.

92. *See id.*; *supra* note 4.

governing the seizure of property. Property subject to forfeiture under Section 881 may be seized upon service of process issued pursuant to the Supplemental Rules.⁹³ Section 881 also incorporates the enforcement provisions of the customs laws⁹⁴ relating to the following: the seizure, summary, and judicial forfeiture of property; the disposition of the property or proceeds of the property; the remission or mitigation of forfeitures; and the compromise of claims, except to the extent those provisions are inconsistent with the provisions of Section 881. Additionally, the duties imposed on customs officers, or other persons under the enforcement provisions of the customs laws, shall be performed by officers, agents, or other persons authorized or designated by the Attorney General, unless the actions arise from seizures and forfeitures effected by customs officers.⁹⁵

Under Section 881, property can be seized without process if the Attorney General has probable cause to believe that the property is subject to civil forfeiture.⁹⁶ Once a piece of property is seized, the property is not repleviable but is deemed to be in the custody of the Attorney General, subject only to orders of a court having jurisdiction over the property.⁹⁷

When the property is seized, a report is submitted to the United States Attorney for the district where the alleged violation occurred.⁹⁸

93. 21 U.S.C.A. § 881(b) (West Supp. 1995).

94. The enforcement provisions of the customs laws can be found at 19 U.S.C.A. §§ 1602-1619 (West Supp. 1995). The authorization for the application of the customs laws can be found at 19 U.S.C.A. § 1600 (West Supp. 1995).

95. 21 U.S.C.A. § 881(d) (West Supp. 1995) provides as follows:

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

96. *Id.* § 881(b)(4).

97. *Id.* § 881(c).

98. 19 U.S.C.A. § 1602 (West Supp. 1995), which pertains to the seizing officer's duty to report the seizure to the appropriate customs officer, provides as follows:

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs

The property is then appraised at its domestic or market value.⁹⁹ If the seized property was used to import, export, transport, or store any controlled substance,¹⁰⁰ forfeiture proceedings are commenced.¹⁰¹ Notice of the seizure and the intent to forfeit the property is published for at least three consecutive weeks. Written notice of the seizure, with information about applicable procedures, is sent to each party who

officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

19 U.S.C.A. § 1603(b) (West Supp. 1995), which pertains to the customs officer's duty to report seizures to the United States attorney, provides as follows:

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

Other relevant provisions include 19 U.S.C.A. § 1604 (West Supp. 1995) (pertaining to the United States Attorney General's duty to prosecute violations of the customs laws for recovery of any fines, penalties, or forfeitures that were incurred by reason of such violations) and 19 U.S.C.A. § 1605 (West Supp. 1995) (pertaining to the storage of seized property pending disposition according to law).

99. 19 U.S.C.A. § 1606 (West Supp. 1995) provides as follows: "The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws."

100. Controlled substance is defined in 21 U.S.C.A. § 802(6) (West 1981). Forfeiture of real and personal property under Section 881 is "not dependent on the quantity of the controlled narcotic substance found." *United States v. One 1977 Chevrolet Pickup*, 503 F. Supp. 1027, 1030 (D. Colo. 1980). *But see United States v. Land*, Property Currently Recorded in the Name of Neff, 960 F.2d 561, 563-64 (5th Cir. 1992) (holding that possession of half gram of cocaine in house did not support forfeiture action); *United States v. One Gates Learjet*, 861 F.2d 868 (5th Cir. 1988) (holding that trace amount of cocaine, invisible to the naked eye, was insufficient to support forfeiture under Section 881).

101. 19 U.S.C.A. § 1607(a) (West Supp. 1995) provides as follows:

If—

- (1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed \$500,000;
- (2) such seized merchandise is merchandise the importation of which is prohibited;
- (3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance; or
- (4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

appears to have an interest in the seized property.¹⁰² If no claim is filed or bond given within twenty days from the date of first publication of the seizure, the property is forfeited.¹⁰³ If any person claiming an interest in the property files a claim and bond within the requisite time period, the United States Attorney for the district in which seizure was made shall proceed to condemn the property.¹⁰⁴ The bond filed must be in the amount of \$5,000 or 10% of the value of the property, whichever is lower, but in no event less than \$250. The claimant must also agree to pay the costs and expenses of the condemnation proceeding in the event the property is finally forfeited.¹⁰⁵

As an alternative to proceedings in federal court, the claimant (owner) may file a petition for remission or mitigation with the Secretary of the Treasury.¹⁰⁶ This procedure is frequently chosen by

102. *Id.*

103. 19 U.S.C.A. § 1609(a) (West Supp. 1995) provides as follows:

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel [sic] vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 1613 of this title, into the Customs Forfeiture Fund.

104. 19 U.S.C.A. § 1608 (West Supp. 1995) provides as follows:

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of \$5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than \$250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

105. *Id.*

106. 19 U.S.C.A. § 1618 (West Supp. 1995) provides as follows:

Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Commandant of the Coast Guard or the Commissioner of Customs, as the case may be, if under the navigation laws, before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, the Commandant of the Coast Guard, or the Commissioner of Customs, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or

the clearly innocent owner. This petition does not contest the probable cause for the forfeiture, but asserts the innocence of the lien creditor. Decisions by the Secretary with regard to these petitions are final and are not judicially reviewable.¹⁰⁷

In a forfeiture proceeding, the property, not the owner, is considered the offender,¹⁰⁸ just as in the case of a pirate ship.¹⁰⁹ The government's right to the property relates back to the time of the offense.¹¹⁰ Thus, the plain language of Section 881 severs the rights of secured parties or purchasers who have advanced credit or purchased "guilty" property.¹¹¹

1. Probable Cause

Property owners are placed in grave difficulty by substantive and procedural aspects of forfeiture doctrine. In order to forfeit property, the government is only required to show probable cause to seize the property.¹¹² In most courts, this means that the government must only demonstrate reasonable grounds for the belief that the property is subject to forfeiture, supported by less than prima facie proof, but more than mere suspicion.¹¹³

Applying this standard in *United States v. One 56-Foot Motor Yacht Named The Tahuna*,¹¹⁴ the Ninth Circuit Court of Appeals defined the required level of probable cause as "whether the information relied on by the government is adequate and sufficiently reliable

mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

For criteria and procedure under 19 U.S.C.A. § 1618, see 28 C.F.R. § 9 (1994).

107. See *United States v. One 1961 Cadillac*, 337 F.2d 730, 732-33 (6th Cir. 1964).

108. See *United States v. One 1975 Pontiac Lemans*, 621 F.2d 444, 447 (1st Cir. 1980).

109. See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 7 (1827); *United States v. The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 209 (1844).

110. See 21 U.S.C.A. § 881(h) (West Supp. 1995). Section 881(h) declares that all right, title, and interest in such property vests in the United States upon commission of an act giving rise to forfeiture under Section 881.

111. See *id.*

112. *United States v. 6250 Ledge Road*, 943 F.2d 721, 725 (7th Cir. 1991).

113. *United States v. \$38,600.00 in U.S. Currency*, 784 F.2d 694, 697 (5th Cir. 1986); see, e.g., *United States v. Daccarett*, 6 F.3d 37, 55 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994); *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir.), *cert. denied*, 113 S. Ct. 2349 (1993); *United States v. Walker*, 900 F.2d 1201, 1204 (8th Cir. 1990); *United States v. Padilla*, 888 F.2d 642, 643-44 (9th Cir. 1989); *United States v. Dickerson*, 873 F.2d 1181, 1184 (9th Cir. 1988).

114. 702 F.2d 1276 (9th Cir. 1983).

to warrant the belief by a reasonable person" that the property was utilized for an illegal purpose.¹¹⁵ Similarly, the United States District Court for the District of Massachusetts upheld vessel forfeiture when probable cause was based on the government's (subjective) *belief* that the vessel was intended for an illegal purpose.¹¹⁶ In a money forfeiture case, the First Circuit held that "[t]he government need only show that it has probable cause to believe that the money is drug-related. This showing can be made wholly with otherwise inadmissible evidence."¹¹⁷

The United States District Court for the Southern District of Florida characterized the government's burden as "comparatively easy, even for a civil case."¹¹⁸ According to this court, evidence that a boat was found in the vicinity where a drug transaction recently occurred and was modified for increased speed and carrying capacity provided sufficient probable cause to initiate forfeiture proceedings.¹¹⁹

Once the government meets its burden, the burden of proof shifts to the person claiming the property. The property owner must show that the government did not have probable cause¹²⁰ or must demonstrate, by a preponderance of the evidence, that the owner was an innocent.¹²¹ The burden of proof shifts to the property owner because of the legal fiction that civil forfeitures are forfeitures *in rem*, or against the thing, and not against the person who owns the thing.¹²² Because the action is against the thing,¹²³ the usual gamut of constitutional protections for persons accused of a crime does not apply. In fact, the guilt or innocence of the property owner is generally irrelevant.¹²⁴ However, the Supreme Court has acknowledged that rejecting the constitutional claim of a property owner who proved that he or she was not only uninvolved in the unlawful activity

115. *Id.* at 1282.

116. *United States v. One 55 Foot Fishing Vessel*, 656 F. Supp. 967, 968-69 (D. Mass. 1987).

117. *United States v. \$250,000.00 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987); *see also United States v. \$5,644,540.00 in United States Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986); *United States v. One 1974 Porsche 911S*, 682 F.2d 283, 286 (1st Cir. 1982).

118. *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F. Supp. 290, 295 (S.D. Fla. 1985).

119. *Id.* at 292, 296.

120. 19 U.S.C.A. § 1615 (West Supp. 1995).

121. *See* 21 U.S.C.A. §§ 881(a)(4)(C), (a)(7) (West Supp. 1995).

122. *See* discussion *supra* part II.A.

123. *See* discussion *supra* part II.B.

124. "Despite [the] proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

but also took all reasonable steps to prevent the illegal use of the property would be difficult.¹²⁵

2. Innocent Owner Defense

In addition to providing the government a relatively easy burden of probable cause, current forfeiture doctrine may allow innocent owners to lose their property notwithstanding their innocence. Sections 881(a)(4)(C) and (a)(7) provide that no conveyance or interest in real property shall be forfeited by reason of any act or omission established by the owner to have been committed or omitted without his or her knowledge or consent.¹²⁶ Although this provision appears to completely protect innocent owners, the government need only show probable cause to forfeit the property and the burden is on the owner to prove, by a preponderance of the evidence, lack of knowledge or consent.¹²⁷

The Supreme Court has also provided a constitutionally grounded innocent owner defense, though only in dictum. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹²⁸ the Court stated that if a property owner proved that he or she (1) was uninvolved and unaware of the wrongful activity and (2) took all reasonable precautions to prevent the proscribed use of the property, then it would be difficult for a court to reject the owner's argument that the forfeiture of the property was unconstitutional.¹²⁹

The lower courts have given meaning to the Supreme Court's dictum in *Calero-Toledo*. For example, a forfeiture action was unsuccessful when a daughter used a family car without authorization in an illegal manner when, at the time that she did so, her father was trying to find her to repossess the car.¹³⁰ Similarly, a forfeiture action failed when a father gave his son permission to use a vehicle on one occasion, and the son used the car illegally on a different, unauthorized occasion.¹³¹ However, if general consent to use the vehicle is given and if a borrowed vehicle is used illegally by a person with a past criminal record, forfeiture will be allowed.¹³²

125. *Id.* at 689-90. The innocent owner defense is not a defense that is asserted successfully with any great frequency.

126. See 21 U.S.C.A. §§ 881(a)(4)(c), (a)(7) (West Supp. 1995).

127. *United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995).

128. 416 U.S. 663 (1974).

129. *Id.* at 689.

130. *United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280, 1286-88 (E.D. Pa. 1986).

131. *United States v. One 1971 Ford Truck*, 346 F. Supp. 613, 620-21 (C.D. Cal. 1972).

132. *United States v. One 1980 BMW 3201*, 559 F. Supp. 382, 386 (E.D.N.Y. 1983).

3. Facilitation

Another statutory interpretation that allows for broad application of forfeiture laws is facilitation. Forfeiture actions may succeed even when the property bears only slight connection to the alleged illegal conduct. With three limited exceptions,¹³³ Section 881(a)(4) subjects to forfeiture all conveyances that are used, or intended to be used, "in any manner to facilitate the transportation, sale, receipt, possession, or concealment" of controlled substances.¹³⁴ Section 881(a)(7) subjects to forfeiture all real property that is "in any manner or part" used or intended to be used "to facilitate . . . a violation of this subchapter punishable by more than one year's imprisonment."¹³⁵ The similar language of the conveyance and real property forfeiture provisions has resulted in courts interpreting the provisions similarly.¹³⁶

Under both provisions, courts have differed in construing what constitutes facilitation. Some courts allow property forfeiture no matter how tenuous the property's connection to the activity justifying the forfeiture.¹³⁷ For example, in *United States v. 38 Whalers Cove Drive*,¹³⁸ a confidential drug informant requested that a drug sale occur inside a condominium. Because the condominium permitted the drug seller to conduct the drug sale "in an atmosphere of relative privacy," the court found that a sufficient connection existed between the property and the drug activity to bring the property into the purview of the [forfeiture] statute.¹³⁹

133. 21 U.S.C.A. § 881(a)(4)(A)-(C) (West Supp. 1995).

134. *Id.* § 881(a)(4).

135. *Id.* § 881(a)(7). For a discussion of the scope of the word "facilitate," see Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303, 325-29 (1988).

136. James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 167 n.16 (1990).

137. See, e.g., *United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 653-54 (7th Cir. 1993); *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir. 1993); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 33 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); *United States v. 228 Acres of Land and Dwelling Located on Whites Hill Rd.*, 916 F.2d 808, 811-12 (2d Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991); *United States v. 916 Douglas Ave.*, 903 F.2d 490, 492-94 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991); *United States v. 4492 South Livonia Rd.*, 889 F.2d 1258, 1269 (2d Cir. 1989); *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160-61 (2d Cir. 1986), *superseded by statute* as stated in *United States v. All Funds Presently on Deposit or Attempted to be Deposited in any Accounts Maintained at American Express Bank*, 832 F. Supp. 542 (E.D.N.Y. 1993); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982) (holding that property used in any manner to facilitate unlawful narcotics activity can be forfeited), *cert. denied*, 461 U.S. 914 (1983).

138. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

139. *Id.* at 33.

Similarly, in *United States v. One 1979 Mercury Cougar XR-7*,¹⁴⁰ a car was used to locate a suitable landing spot for an airplane full of marijuana, to arrange for the rental of a U-Haul truck to transport the marijuana, and to lease a motor home and a metal building in which to stash the contraband after its arrival.¹⁴¹ The car was forfeited because, although the car was never used to transport marijuana, “its use in laying the groundwork for the marijuana operation establishe[d] beyond peradventure the nexus required by the statute” between the property and the commission of crimes involving illegal drugs.¹⁴²

Furthermore, when a drug transaction was arranged over the phone,¹⁴³ a house was forfeited on the ground that it facilitated the sale of the narcotics.¹⁴⁴ The court noted that the government need show only a nexus between the property and the crime that is more than “incidental or fortuitous.”¹⁴⁵

In contrast to this tenuous connection, other courts require a “substantial connection” between the property forfeited and the criminal conduct.¹⁴⁶ For example, in *United States v. 1966 Beechcraft Aircraft Model King Air A-90*,¹⁴⁷ the court relied on legislative history to conclude that a substantial nexus between the property and the underlying criminal activity must be shown before property may be forfeited.¹⁴⁸ However, the court held that the use of an airplane to transport conspirators to an exchange site established a substantial connection sufficient to justify forfeiting the property.¹⁴⁹

140. 666 F.2d 228 (5th Cir. 1982).

141. *Id.* at 229.

142. *Id.* at 230.

143. 916 *Douglas Ave.*, 903 F.2d at 491.

144. *Id.* at 494.

145. *See id.*

146. *See, e.g., United States v. Two Tracts of Real Property*, 998 F.2d 204, 210-11 (4th Cir. 1993); *United States v. Schifferli*, 895 F.2d 987, 989 (4th Cir. 1990); *United States v. One Parcel of Real Property*, 900 F.2d 470, 474 (1st Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *United States v. 1966 Beechcraft Aircraft Model King Air A90*, 777 F.2d 947, 953 (4th Cir. 1985) (requiring substantial connection between property and conduct justifying forfeiture); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985).

147. 777 F.2d 947 (4th Cir. 1985).

148. *Id.* at 953.

149. *Id.* In an anomalous case, a court held that no sufficient nexus existed between a car and an illegal drug transaction when the car was used to transport the drug seller to a prearranged meeting spot where the transaction money changed hands. *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026, 1029-30 (1st Cir. 1980). The court reasoned that although the statute set out a *per se* rule that conveyances used to transport contraband were subject to forfeiture, conveyances used to transport proceeds of contraband were not, *per se*, subject to forfeiture. *Id.* at 1028. In cases dealing with proceeds, the court required that an antecedent relationship exist between the car and the illegal activity; when no antecedent relationship exists, forfeiture is not

The plain language of the statute suggests that courts err when they insist on a substantial connection between property and illegal behavior. However, some courts have created the substantial connection requirement in an attempt to distinguish among parties based on culpability, a result encouraged by some commentators.¹⁵⁰ In any case, even the substantial connection test does not impose much of a burden on the government.

4. Delay

The allowable time period for bringing a forfeiture action also does not impose much of a burden on the government. No requirement of promptitude limits the government's power.

Prior to the Supreme Court's 1993 term, whether government delay in initiating a forfeiture proceeding could preclude forfeiture remained questionable.¹⁵¹ Under the customs laws relating to the seizure and forfeiture of property, which are incorporated in Section 881,¹⁵² forfeiture actions must be commenced within five years.¹⁵³ However, under the customs laws, various internal timing requirements mandate that proceedings be initiated promptly.¹⁵⁴ In *United States v. James Daniel Good Real Property*,¹⁵⁵ the Supreme Court directly addressed whether failure to comply with the internal timing requirements of the customs laws could justify dismissal of a forfeiture action.¹⁵⁶ The answer was negative. As long as the forfeiture proceeding was initiated within the five year statute of limitations, the government's action was timely.¹⁵⁷

allowed. See *id.* at 1029-30. The court's holding is curious because the statute does not, in fact, lay down a rule that *only* conveyances used to transport contraband are *per se* subject to forfeiture. The statute very plainly states that "[a]ll conveyances . . . which are used . . . in any manner to facilitate the . . . sale" of illegal drugs are subject to forfeiture. 21 U.S.C.A. § 881(a)(4) (West Supp. 1995) (emphasis added). Clearly, the statute does not restrict forfeiture to property that has an "antecedent relationship" with the criminal activity. The words "antecedent relationship" (or any others having the same or similar meaning) are not found in the statute.

150. See, e.g., Speta, *supra* note 136, at 181.

151. See, Youngman, *supra* note 69, at 1014; see generally Kenneth Kandarar, *Federal Property Forfeiture Statutes: The Need to Guarantee a Prompt Trial*, 33 U. FLA. L. REV. 195 (1981); Kenneth Kandarar, *Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 SW. L.J. 925 (1980).

152. 21 U.S.C.A. § 881(d) (West Supp. 1995).

153. 19 U.S.C.A. § 1621 (West Supp. 1995).

154. See, e.g., *id.* §§ 1602-1604.

155. 114 S. Ct. 492 (1993).

156. *Id.* at 505-07.

157. *Id.* at 507.

5. Disposition of Forfeited Property

As a result of these broad interpretations of the statute and the government's incentives to forfeit property, forfeiture laws foster abuse and corruption. When property is forfeited to the federal government under Section 881, the property may be (1) retained "for official use"; (2) transferred to any federal, state, or local law enforcement agency that participated directly in the seizure; (3) sold at public sale or by any other commercially feasible means; (4) forwarded to the General Services Administration for lawful disposal; (5) forwarded to the Drug Enforcement Administration for disposition; or (6) transferred to any foreign country that participated directly or indirectly in the seizure of the property.¹⁵⁸

Section 881 also includes a provision for expense and cost recovery: When property is sold or money is forfeited, the proceeds may be used to reimburse the federal government for all of its seizure and forfeiture expenses.¹⁵⁹ Also covered are expenses associated with the maintenance of custody and advertising, as well as court costs.¹⁶⁰ After covering these expenses and costs, the remaining proceeds are forwarded to the Treasurer of the United States.¹⁶¹

This expense and cost recovery provision, Section 881(e), is one of the most important provisions of Section 881 because without it, it is safe to assume that the statute would be used less frequently and would be less amenable to abuse.

Section 881(e) explains the Donald Scott incident.¹⁶² The value of Donald Scott's property probably attracted the attention of the many law enforcement agencies, all seeking reimbursement for their expenses. Section 881 gives the Attorney General great latitude to determine reimbursement amounts for state and local law enforcement agencies.¹⁶³ In his analysis of the Donald Scott death, the Ventura County District Attorney speculated that the LASD did not inform the Ventura County Sheriff's Department, which had primary jurisdiction over the Scott ranch, of the service of the warrant "because Los Angeles County did not want to split the forfeiture proceeds with [Ventura County]."¹⁶⁴

158. 21 U.S.C.A. § 881(e)(1) (West Supp. 1995).

159. *See id.* § 881(e)(2)(A)(i).

160. *Id.*

161. *Id.* § 881(e)(2)(B).

162. *See supra* pp. 3-5.

163. *See* 21 U.S.C.A. § 881(e)(3)(A) (West Supp. 1995).

164. Bradbury, *supra* note 7, at 51.

Another concern raised by the disposition of forfeited property provisions of Section 881 is that property forfeited may be retained "for official use."¹⁶⁵ What constitutes "official use" is not explained in the statute and remains open to question. For example, instances have been reported of federal law enforcement agencies retaining expensive sports cars. In Drug Awareness Resistance Education (DARE) programs around the country, one particularly favored method of impressing upon today's youth that crime does not pay is to drive up in an expensive sports car proudly displayed as formerly the property of a drug dealer.

The statutory provisions governing the sale of forfeited property also cause concern. The statute simply states that property forfeited may be sold "by public sale or any other commercially feasible means."¹⁶⁶ The statute does not impose any requirement that property be sold to bring the highest price in a given market. Consequently, property may be sold for far less than fair market value, a possibility that raises the prospect of corruption. Certainly such impulses should be held at bay as much as possible through strict procedural requirements governing the sale of forfeited property.

6. Constitutional Rights in Civil Forfeiture Proceedings

Only a few of the constitutional guarantees attendant to criminal prosecutions are available in a civil forfeiture proceeding. For example, the Fourth Amendment's protection against unreasonable searches and seizures applies in forfeiture proceedings,¹⁶⁷ as do certain exclusionary rules.¹⁶⁸ Additionally, the Fifth Amendment's privilege against self-incrimination applies in forfeiture cases in which the culpability of the owner is relevant or in which the owner faces the prospect of subsequent criminal prosecution.¹⁶⁹

However, significant constitutional protections attendant to criminal prosecutions do not apply in civil forfeiture proceedings; thus, the label "civil" still accurately describes the process. For example, the Due Process Clause's requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt does not apply in civil forfeiture

165. 21 U.S.C.A. § 881(e)(1)(A) (West Supp. 1995).

166. *Id.* § 881(e)(1)(B).

167. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696-700 (1965); *Boyd v. United States*, 116 U.S. 616, 634-35 (1886).

168. *One 1958 Plymouth Sedan*, 380 U.S. at 696.

169. See *United States v. United States Coin & Currency*, 401 U.S. 715, 717-18 (1971); *Boyd*, 116 U.S. at 634-35.

proceedings,¹⁷⁰ nor does the Sixth Amendment's Confrontation Clause,¹⁷¹ nor the Ex Post Facto Clause.¹⁷²

The Double Jeopardy Clause applies in the civil forfeiture context, but how the clause applies is open to question. In *United States v. Halper*,¹⁷³ the Supreme Court held that the Double Jeopardy Clause applies if the forfeiture is considered punishment.¹⁷⁴ Since *Halper*, the Court has considered whether forfeiture constitutes punishment and has concluded that it does.¹⁷⁵ In *Department of Revenue of Montana v. Kurth Ranch*,¹⁷⁶ the Supreme Court wrote that "[a] defendant convicted and punished for an offense may not have a non-remedial civil penalty imposed against him for the same offense in a separate proceeding."¹⁷⁷ Because civil forfeiture proceedings result in nonremedial civil penalties imposed in a separate proceeding,¹⁷⁸ usually following a criminal conviction, the language of *Kurth Ranch* might bar most civil forfeiture actions. Thus, the government would be forced to bring criminal forfeiture proceedings in the same proceeding as the criminal action.¹⁷⁹

While this may, at first blush, seem to be a significant impediment to law enforcement agencies that initiate civil forfeiture proceedings, in fact it is not. Instead of prosecuting criminally, the governmental agency may seek to punish in a civil forfeiture proceeding. Similarly, the state can institute the criminal prosecution, and the federal government can institute the civil forfeiture proceedings, utilizing the double sovereignty avoidance of the Double Jeopardy Clause.

Additionally, Mr. Justice Scalia's dissent in *Kurth Ranch* hints that the case's holding might not be as all-encompassing as it first appears. Justice Scalia asks whether the order of punishment is significant in determining whether the Double Jeopardy Clause bars the second

170. See *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 271-72 (1877); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 897 (1st Cir. 1987).

171. See *United States v. Zucker*, 161 U.S. 475, 481 (1896).

172. See *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544-45 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988).

173. 490 U.S. 435 (1989).

174. See *id.* at 448-49.

175. See *infra* part III.A.

176. 114 S. Ct. 1937 (1994).

177. *Id.* at 1945.

178. See *infra* part III.A.

179. Even in criminal forfeiture proceedings, the government does not have to prove that forfeiture is warranted under the law beyond a reasonable doubt; rather, the preponderance of the evidence burden prevails. *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994).

punishment, hinting that if civil forfeiture occurs first, the Double Jeopardy Clause will not bar the subsequent criminal prosecution.¹⁸⁰ Thus, the holding of *Kurth Ranch* might not be symmetrical; the holding might bar double punishments when civil proceedings are instituted after a criminal prosecution, but not when civil proceedings precede the criminal prosecution.¹⁸¹

Though *Kurth Ranch* will probably result in a significant curtailment of government abuse under the civil forfeiture statute, *Kurth Ranch* will not prevent all abuse. A substantive limitation on the government's forfeiture powers is needed. The Excessive Fines Clause might provide that protection. The Supreme Court revived the Excessive Fines Clause in its 1993 term, and this clause holds the promise of containing government abuses more completely than does the Double Jeopardy Clause.

III. THE EIGHTH AMENDMENT AND THE 1992-93 SUPREME COURT TERM

The Supreme Court decided *Austin v. United States*¹⁸² during its 1992-93 term. Because *Austin* imposes a substantive limitation on the government's power to forfeit property, this decision may come to be considered the most important of the four civil forfeiture opinions the Court issued during its 1992-93 term.¹⁸³

A. *Austin v. United States*

1. Facts

In *Austin*, the Supreme Court addressed whether the Eighth Amendment's Excessive Fines Clause¹⁸⁴ applies in civil forfeiture cases.¹⁸⁵ The petitioner, Richard Austin, was convicted of possessing cocaine with intent to distribute.¹⁸⁶ Shortly after Austin pleaded

180. *Kurth Ranch*, 114 S. Ct. at 1959-60.

181. Mr. Justice Scalia's dissent argues that the Double Jeopardy Clause does not bar successive punishments, only successive prosecutions. *Id.* at 1959. The Court could later accept Justice Scalia's decision, thus rendering the Double Jeopardy Clause useless as a bar to a civil forfeiture proceeding.

182. 113 S. Ct. 2801 (1993).

183. *United States v. James Daniel Good Real Property* 114 S. Ct. 492 (1993); *Austin v. United States*, 113 S. Ct. 2801 (1993); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993); *Republic Nat'l Bank of Miami v. United States*, 113 S. Ct. 554 (1992).

184. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

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

186. *Id.*

guilty to the charge, the United States filed an *in rem* action in the United States District Court for the District of South Dakota, seeking to forfeit Austin's home and auto body shop under Sections 881(a)(4) and (a)(7).¹⁸⁷

According to a local police officer's affidavit, Austin agreed to sell cocaine while at his body shop.¹⁸⁸ Austin then left his shop and went to his home, and he returned with the cocaine he had agreed to sell.¹⁸⁹ State authorities subsequently searched Austin's shop and home and discovered small amounts of marijuana and cocaine, drug paraphernalia, and \$4,700 in cash.¹⁹⁰ In opposition to the government's motion for summary judgment, Austin argued that the forfeiture of his home and shop would violate the Excessive Fines Clause.¹⁹¹

Both the district court and the Eighth Circuit Court of Appeals rejected Austin's argument.¹⁹² The Supreme Court accepted certiorari to resolve a conflict among the circuits over the applicability of the Eighth Amendment in civil *in rem* actions.¹⁹³

2. The Conflict Among the Circuits

Prior to *Austin*, the First,¹⁹⁴ Third,¹⁹⁵ Fourth,¹⁹⁶ Seventh,¹⁹⁷ Eighth,¹⁹⁸ Ninth,¹⁹⁹ and Eleventh²⁰⁰ Circuits each de-

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 2802-03.

191. *Id.* at 2803.

192. *Id.*

193. *Id.* at 2804.

194. *See, e.g.,* *United States v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements*, 960 F.2d 200, 206 (1st Cir. 1992); *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 44-45 (1st Cir. 1989) (finding the Eighth Amendment's disproportionality protections inapplicable in the civil context).

195. *See, e.g.,* *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990) (holding that civil forfeiture does not violate the Eighth Amendment).

196. *See, e.g.,* *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989) (holding that the Eighth Amendment's disproportionality protections apply only in the criminal context).

197. *See, e.g.,* *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 726-27 (7th Cir. 1991); *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1296 (7th Cir. 1990) (holding that the Eighth Amendment does not apply in civil actions), *cert. denied*, 502 U.S. 809 (1991).

198. *See, e.g.,* *United States v. 508 Depot Street*, 964 F.2d 814, 818 (8th Cir. 1992) (holding that the Eighth Amendment's proportionality analysis does not apply in civil actions), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

199. *See, e.g.,* *United States v. 300 Cove Rd.*, 861 F.2d 232, 233-34 (9th Cir. 1988) (holding that the Eighth Amendment's disproportionality restrictions do not apply in the civil context), *cert. denied*, 493 U.S. 954 (1989). Although the Ninth Circuit was steadfast in its conclusion that

cided that the Eighth Amendment did not apply in civil forfeiture proceedings. The Sixth Circuit hinted that the Eighth Amendment did not apply in such proceedings but never directly addressed the issue because no cases were presented in which a forfeiture constituted excessive punishment, even if the Eighth Amendment applied.²⁰¹ When the Second Circuit was confronted with the issue in *United States v. 38 Whalers Cove Drive*,²⁰² the court held that the Eighth Amendment did apply when an individual was subjected to a civil penalty properly classifiable as punitive under the test set forth in *United States v. Halper*.²⁰³ Thus, a split in the circuits was created.

The split between the circuits was precipitated by two 1989 Supreme Court decisions, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal*²⁰⁴ and *United States v. Halper*.²⁰⁵ In *Kelco Disposal*, the Court opened the door for the Excessive Fines Clause to be applied in the civil forfeiture context. The Court found that the Excessive Fines Clause was designed to limit "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."²⁰⁶ In *Halper*, the Court opened the door even further to the possibility that the Excessive Fines Clause might apply in the civil forfeiture context. The Court found that a civil penalty might constitute punishment for purposes of the Eighth Amendment.²⁰⁷ The Court rejected a formalistic solution to the

the Eighth Amendment did not apply in civil forfeiture proceedings, the Ninth Circuit concluded without trouble that the Eighth Amendment did apply in criminal forfeiture cases. See *United States v. Littlefield*, 821 F.2d 1365, 1368 (9th Cir. 1987); *United States v. Busher*, 817 F.2d 1409, 1415-16 (9th Cir. 1987). To the Ninth Circuit, criminal forfeiture was clearly punishment, and the courts had "the constitutional responsibility" to assure that the forfeiture did not inflict excessive punishment. *Littlefield*, 821 F.2d at 1368. In civil forfeiture cases, however, the court had no such responsibility; in fact, it had "no discretion" at all. See *id.*

200. See, e.g., *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991) (stating that the Eighth Amendment proportionality analysis does not apply in civil forfeiture proceedings).

201. See *United States v. 566 Hendrickson Boulevard*, 986 F.2d 990, 999 (6th Cir. 1993); *United States v. 141st Street Corp.*, 911 F.2d 870, 881 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

202. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

203. *Id.* at 35; *United States v. Halper*, 490 U.S. 435 (1989).

204. 492 U.S. 257 (1989).

205. 490 U.S. 435 (1989).

206. *Kelco Disposal*, 492 U.S. at 267.

207. *Halper*, 490 U.S. at 447. In *Halper*, the defendant was convicted of defrauding the government of \$585 and sentenced to two years imprisonment and fined \$5,000. *Id.* at 437. The government then sought to impose on him a penalty of \$130,000 under the False Claims Act. *Id.* at 438. The defendant argued that the penalty was punishment, and thus, that he was being subjected to double jeopardy. See *id.* The Court held that a defendant is entitled to have the government account for its losses when a civil penalty is sought to be imposed after the imposition

problem of what might constitute punishment. The labels "civil" and "criminal" were rejected as being "not of paramount importance."²⁰⁸ Instead, the Court wrote the following:

[T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.²⁰⁹

The twin aims of punishment the Court identified were retribution and deterrence.²¹⁰ Quoting an earlier Supreme Court case, the Court wrote that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."²¹¹ Having cast the definition of punishment in rather broad terms, the Court concluded that any civil sanction that serves not only remedial purposes, but also serves the goals of retribution or deterrence, is punishment.²¹²

Thus, *Kelco* and *Halper* precipitated the split in the circuits. The First Circuit, in *United States v. One Parcel of Real Property with Buildings, Appurtenances and Improvements*,²¹³ decided that the Eighth Amendment's proportionality analysis did not apply in the civil forfeiture context without fully addressing the arguments based on *Kelco* and *Halper*.²¹⁴ The court cited *Kelco* and *Halper* and discussed the Second Circuit's opinion in *38 Whalers Cove Drive*.²¹⁵ However, the court, having ruled the other way in a previous case, felt bound by its precedent.²¹⁶ The prior decision relied on was *United States v. 40 Moon Hill Road*.²¹⁷ However, in *40 Moon Hill Road*, the court did not address whether the Eighth Amendment applied in civil forfeiture proceedings because the appellants in that case failed to make the argument in their brief; thus, appellants had waived the point.²¹⁸

of criminal penalties, the penalty bears no relationship to the compensation of the government for its loss, and the penalty appears to qualify as punishment in the ordinary sense of the term. *Id.* at 449-50.

208. *Id.* at 447.

209. *Id.* at 448.

210. *Id.*

211. *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

212. *Id.*

213. 960 F.2d 200 (1st Cir. 1992).

214. *See id.* at 206-07.

215. *Id.*

216. *Id.* at 207.

217. 884 F.2d 41 (1st Cir. 1989).

218. *Id.* at 44.

Despite this, the court relied on this decision as precedential authority for the proposition that the Eighth Amendment did not apply in civil forfeiture proceedings.

In contrast, the Third Circuit held that the Eighth Amendment did not apply in civil forfeiture proceedings because the "effect of the statute does not belie a civil sanction. Rather, it is a permissible civil response by Congress to complement criminal law enforcement directed at a most corrosive force in our society."²¹⁹ The Third Circuit cited the opinion of the Fourth Circuit in *United States v. Santoro*²²⁰ to bolster its analysis.²²¹ The decision in *Santoro* cited neither *Kelco* nor *Halper*.²²²

The Seventh Circuit addressed, though only summarily, the issues raised by *Kelco* and *Halper*.²²³ In *United States v. 6250 Ledge Road*,²²⁴ the Seventh Circuit recognized that at least one commentator suggested that *Kelco* and *Halper* could be read as suggesting that the Eighth Amendment applies in the civil forfeiture context.²²⁵ However, the court did not address the merits of the defendant's argument because the argument did "not extend beyond the contention that the government failed to show that his entire property was connected to drug activity."²²⁶ The court held that the defendant must explain why forfeiture of all his property ran afoul of the Eighth Amendment, not just claim that it did.²²⁷ When the court addressed the issue in *United States v. On Leong Chinese Merchants Ass'n Building*,²²⁸ it relied on Ninth Circuit authority summarily to reject the argument that the Eighth Amendment applied to civil forfeiture proceedings.²²⁹

In *United States v. 508 Depot Street*,²³⁰ the Eighth Circuit relied on the *in rem* nature of a civil forfeiture proceeding to hold that the

219. *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 401 (3d Cir. 1990).

220. 866 F.2d 1538 (4th Cir. 1989).

221. *One 107.9 Acre Parcel of Land*, 898 F.2d at 401.

222. *See Santoro*, 866 F.2d at 1544.

223. *See, e.g., United States v. 6250 Ledge Rd.*, 943 F.2d 721, 727-28 (7th Cir. 1991) (dismissing argument based on litigant's failure to explain why forfeiture was disproportionate); *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289, 1296 (7th Cir. 1990) (relying on Ninth Circuit authority to summarily dismiss argument that Eighth Amendment applies in civil forfeiture proceeding), *cert. denied*, 502 U.S. 809 (1991).

224. 943 F.2d 721 (7th Cir. 1991).

225. *Id.* at 727-28 (citing D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE ACTIONS § 13.05 (1991)).

226. *Id.* at 728.

227. *Id.*

228. 918 F.2d 1289 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991).

229. *Id.* at 1296.

230. 964 F.2d 814 (8th Cir. 1992), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

Eighth Amendment did not apply.²³¹ Like the Seventh Circuit, this court also relied upon the Ninth Circuit's reasoning in *United States v. 300 Cove Road* to find that the Eighth Amendment did not apply.²³² In *300 Cove Road*, the Ninth Circuit held that "[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures. . . ." ²³³ This reasoning is flawed because the Constitution probably does not allow forfeiture to be visited upon truly innocent owners, as the Supreme Court has hinted but has not yet directly asserted.²³⁴ Nevertheless, the Eleventh Circuit also cited *300 Cove Road* as authority for the proposition that the Eighth Amendment did not apply in civil forfeiture proceedings; the Eleventh Circuit cited neither *Kelco* nor *Halper*.²³⁵

The Second Circuit is the only circuit that relied on *Kelco* and *Halper* to hold that the Eighth Amendment applied in civil forfeiture proceedings.²³⁶ In *38 Whalers Cove Drive*, the government seized a condominium belonging to Edwin Levin, who pled guilty to selling about \$250 worth of cocaine from his condominium.²³⁷ Levin's condominium was valued at \$145,000, of which about \$68,000 was Levin's equity.²³⁸ The court analogized Levin's situation to that of the defendant in *Halper*.²³⁹ It had little trouble deciding that the Eighth Amendment applied in civil forfeiture proceedings. The court stated:

Although the Supreme Court did not explicitly so rule in *Halper*, in [*Kelco*], decided shortly after *Halper*, the Court stated that *Halper* "implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns. . . ."

We read *Halper* to apply to civil forfeitures. Forfeitures that are overwhelmingly disproportionate to the value of the offense must

231. *Id.* at 817-18.

232. *Id.* at 817 (citing *United States v. 300 Cove Rd.*, 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)).

233. 861 F.2d at 234.

234. As the Court stated in *Calero-Toledo v. Pearson Yacht Leasing Co.*, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive" if an owner proved that he or she was uninvolved and knew nothing of the wrongful activity and could not reasonably have prevented the wrongful use of his or her property. 416 U.S. 663, 689-90 (1974).

235. *See United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991).

236. *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

237. *Id.* at 32.

238. *Id.*

239. *Id.* at 34.

be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes.²⁴⁰

Thus, the court found that removing instrumentalities of crime is a legitimate civil purpose of an *in rem* forfeiture.²⁴¹ Other legitimate purposes of civil forfeiture include compensating the government for its investigation and enforcement expenditures.²⁴²

The court went on to demonstrate how the *Halper* rule applied in the civil forfeiture context. In applying the *Halper* test, the court stated that the particular forfeiture at hand must be examined to determine whether the forfeiture is punitive in nature or whether the forfeiture is fully justified by legitimate civil and remedial purposes.²⁴³ In making this determination, the focus of the inquiry is on the individual who has violated the law.²⁴⁴ Thus, the court stated:

[A] forfeiture . . . will not be presumed punitive where the seized property has been used substantially to accomplish illegal purposes, so that the property itself can be said to be "culpable" or an instrumentality of crime. Where the seized property is not itself an instrumentality of crime, however, 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 punitive in nature.²⁴⁵

Once the presumption that a forfeiture is punitive arises, the burden shifts to the government to account for its losses.²⁴⁶ The government may show the costs of investigation and detection, as well as damages attributable to the defendant.²⁴⁷ A reasonable allocation for generalized enforcement costs can also be made.²⁴⁸ However, the determination of costs and damages must be individualized.²⁴⁹ "[F]ull responsibility for the 'war on drugs' [cannot be placed] on the shoulders of every individual [wrongdoer]."²⁵⁰

240. *Id.* at 35 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal*, 492 U.S. 257, 275 n.21 (1989)).

241. *Id.* However, items that themselves cannot be considered contraband cannot be considered instrumentalities of crime. *See id.* at 37.

242. *Id.* at 36.

243. *See id.* at 36-37.

244. *Id.*

245. *Id.* (citation omitted).

246. *Id.* at 37.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

In the case of Edward Levin, the appellant in *38 Whalers Cover Drive*, the court first considered whether the forfeited condominium constituted an instrumentality of crime.²⁵¹ Because the government did not argue that the condominium was an instrumentality of crime, the court addressed the next issue: whether the forfeiture served the civil goal of compensation.²⁵² To determine whether the forfeiture fulfilled that purpose, the court had to determine whether the forfeiture was disproportionately large relative to the value of the drugs involved in the crime.²⁵³ Because the value of Levin's interest in the condominium was almost three hundred times the value of the cocaine involved in the crime, the court held, as a matter of law, that the forfeiture was overwhelmingly disproportionate and thus presumptively punitive.²⁵⁴

Ordinarily, at this point in the proceedings, the government would have the opportunity to show its costs in an attempt to defeat the presumption that the forfeiture was punitive.²⁵⁵ However, instead of remanding the case for findings of fact on this issue, the court held as a matter of law that the forfeiture of Levin's interest in the condominium did not violate the Eighth Amendment.²⁵⁶

The Second Circuit considered that the Eighth Amendment does not proscribe mere punishment; it proscribes only severe punishment.²⁵⁷ The court said that three factors are relevant in determining whether a punishment is grossly disproportionate to the crime committed: "(1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions."²⁵⁸ The court held that drug trafficking is an inherently grave offense.²⁵⁹ Because fines in the same range as the value of Levin's equity in his condominium were countenanced under both federal and state law for

251. *Id.* Whether a piece of property is considered an instrument of crime usually depends on whether possession of the property alone constitutes an offense. *See, e.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) (rebuffing a state's attempt to characterize a vehicle used to transport liquor as contraband, stating "[t]here is nothing even remotely criminal in possessing an automobile").

252. *38 Whalers Cove Drive*, 954 F.2d at 37.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 37-39.

257. *Id.* at 38.

258. *Id.*

259. *Id.* at 38-39.

similar offenses,²⁶⁰ the forfeiture did not violate the Eighth Amendment.²⁶¹

3. The Majority Opinion of the Supreme Court

In *Austin*, the Court directly addressed the issue of whether the Eighth Amendment's Excessive Fines Clause applies in civil forfeiture proceedings under Section 881 and held that it does.²⁶² In the Court's view, the Excessive Fines Clause applies in all civil proceedings in which the government stands to gain financially,²⁶³ whether those proceedings are criminal in nature is not outcome determinative.²⁶⁴ The Court rejected the government's argument that the Eighth Amendment does not apply in civil proceedings unless the forfeitures are so punitive as to be considered criminal punishment.²⁶⁵ Civil proceedings can effect punishment, just as criminal proceedings can.²⁶⁶ Thus, the question is not "whether forfeiture under [Section 881] is civil or criminal, but rather whether it is punishment."²⁶⁷

The Court relied on the *Halper* test to determine whether the forfeiture sought in *Austin* constituted punishment.²⁶⁸ First, the Court recognized that civil sanctions that do not serve purely remedial purposes, but can also serve the purposes of retribution or deterrence, constitute punishment under *Halper*.²⁶⁹ The Court then analyzed whether forfeiture could be understood to constitute punishment when the Eighth Amendment was enacted, and whether forfeiture can be understood to constitute punishment today, under the *Halper* test.²⁷⁰

The Court relied on two factors in concluding that, at the time the Eighth Amendment was adopted, forfeiture was understood, at least in part, to constitute punishment.²⁷¹ First, the Court recognized that the forfeiture of property involved in wrongdoing has been traditionally understood as a method of punishing the owner of the property, either

260. *Id.* at 39.

261. *Id.*

262. 113 S. Ct. 2801, 2803 (1993).

263. *Id.* at 2804. The Court noted "that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Id.* (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257, 268 (1989)).

264. *Id.* at 2804-05.

265. *Id.* at 2805.

266. *Id.* at 2806.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *See id.* at 2806-10.

for negligently using the property or for negligently suffering the property to be misused.²⁷² Second, the Court relied on its reservation over the forfeiture of property of a truly innocent owner:²⁷³ “If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court’s past reservation of that question makes sense.”²⁷⁴

In addition to being an acceptable interpretation of the Framers’ intent, the Court also held that forfeiture is properly considered punishment today.²⁷⁵ Important to the Court in this determination were the exemptions in the statute for innocent owners and 19 U.S.C. § 1618, which empowers the Secretary of the Treasury to return property to people who did not intend to break the law.²⁷⁶ These provisions demonstrated to the Court that Congress intended to impose a penalty only on willful lawbreakers.²⁷⁷ Also important in this regard was the tying of forfeiture to the commission of criminal acts.²⁷⁸ Additionally, the Court relied on the legislative history of the real property forfeiture provision of Section 881, which indicates that Congress viewed forfeiture as punishment.²⁷⁹ Finally, the Court relied on the *Halper* test, and concluded that forfeiture can be understood as punishment today because forfeiture does not serve solely remedial purposes, but also serves the policies of retribution and deterrence.²⁸⁰

Having determined that forfeiture constitutes punishment for Eighth Amendment purposes, the Court remanded the case to the circuit court to determine whether the punishment was excessive for purposes of the Excessive Fines Clause.²⁸¹

272. *Id.* at 2808. In a footnote, the Court wrote that excessive reliance on the “technical distinction between proceedings *in rem* and proceedings *in personam* . . . would be misplaced” and that the *in rem* fiction was created primarily to broaden the jurisdiction of the courts. *Id.* at 2808-09 n.9.

273. *Id.* at 2808 (citing, among other cases, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)).

274. *Id.* at 2809.

275. *Id.* at 2810.

276. *Id.* at 2810-11 (citing 21 U.S.C. § 881(a)(4), (a)(7) (year of code not provided); 19 U.S.C. § 1618 (year of code not provided)).

277. *Id.* at 2811.

278. *Id.*

279. *Id.*

280. *Id.* at 2812.

281. *Id.*

4. Mr. Justice Scalia's Concurrence

Mr. Justice Scalia wrote separately to express his opinion that the majority went too far and needlessly attempted "to derive from our sparse case law on the subject of *in rem* forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy."²⁸² The concurring Justice also wrote that "the excessiveness inquiry for statutory *in rem* forfeitures is different from the usual excessiveness inquiry."²⁸³

First, Mr. Justice Scalia noted that the issue of whether forfeitures constitute punishment for Eighth Amendment purposes does not depend on the owner's culpability.²⁸⁴ Perhaps Justice Scalia's best argument on this point was the following: "If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture."²⁸⁵

Mr. Justice Scalia also wrote to emphasize how the excessiveness analysis for *in rem* forfeitures is unique: *In rem* forfeitures are distinguishable from *in personam* forfeitures because the former are not based on the value of the penalty relative to the offense, but are based on the relationship of the property to the offense.²⁸⁶ Justice Scalia provided an example of scales used to weigh illegal drugs in preparation for sale; such scales would be subject to forfeiture regardless of their composition, be it gold or plastic.²⁸⁷

But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.²⁸⁸

282. *Id.* at 2813.

283. *Id.*

284. *Id.* at 2814.

285. *Id.*

286. *Id.* at 2815.

287. *Id.*

288. *Id.*

Justice Scalia found justification for this distinction in the common law—in the case of deodands, for example, in which only the instrumentality of the wrong was forfeited, not the entire piece of property.²⁸⁹

B. Post-Austin Litigation

The Supreme Court was given an early opportunity to comment on the holding of *Austin* in *Alexander v. United States*.²⁹⁰ In *Alexander*, the petitioner was convicted of three offenses that were predicated on obscenity offenses under the Racketeer Influenced and Corrupt Organizations (RICO) Act.²⁹¹ The petitioner was sentenced to six years of imprisonment, fined \$100,000, and ordered to pay the cost of prosecution, incarceration, and supervised release.²⁹² The government then sought forfeiture of the petitioner's assets related to his racketeering enterprise. The government was successful in having the court order the forfeiture of the petitioner's businesses and almost \$9 million acquired through racketeering activity.²⁹³

The Supreme Court did not consider whether the forfeiture violated the Excessive Fines Clause.²⁹⁴ However, in remanding to the court of appeals for determination whether the forfeiture was excessive the Court stated,

It is somewhat misleading, we think, to characterize the racketeering crimes for which petitioner was convicted as involving just a few materials ultimately found to be obscene. Petitioner was convicted of creating and managing what the District Court described as "an enormous racketeering enterprise." It is in light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture was "excessive" must be considered.²⁹⁵

289. *Id.* The law of deodands did not become part of the law of this county; in this country, it was abolished by the Constitution. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). However, the law of statutory forfeiture is "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Id.*

290. 113 S. Ct. 2766 (1993).

291. 113 S. Ct. at 2769-70. The RICO Act is codified at 18 U.S.C.A. § 1962 (West 1984 & Supp. 1995).

292. *Alexander*, 113 S. Ct. at 2770.

293. *Id.*

294. *Id.* at 2775.

295. *Id.* at 2776 (citations omitted).

This language is opaque; however, the language might indicate that a guiding factor in the excessiveness inquiry should be the connection or nexus between the property sought to be forfeited and the criminal activity. Such an interpretation would be consistent with Mr. Justice Scalia's concurrence in *Austin*. Justice Scalia wrote that the determinative factor in the excessiveness inquiry is "whether the confiscated property has a close enough relationship to the offense."²⁹⁶ His nexus test would thus constitutionalize the "substantial connection" test.

The federal courts are thus left with two tests: (1) a value test that compares the value of the property forfeited against the nature of the offense or the amount needed to effectuate the legitimate remedial purposes of the forfeiture; and (2) a nexus test that asks whether the property has a close enough relationship to the offense.²⁹⁷ The federal courts are split as to the applicable test, with some courts applying both tests to uphold forfeitures,²⁹⁸ and other courts applying only Mr. Justice Scalia's test.²⁹⁹

In applying the value test, a court compares the value of the property forfeited to the criminal punishment that the property owner might have received. If the value of the property forfeited is not grossly disproportionate to the criminal punishment the owner might have received, the court will uphold the forfeiture.³⁰⁰

In applying the nexus test, a court simply asks whether the property has a sufficiently close relationship to the conduct justifying forfeiture. The sole inquiry appears to be Mr. Justice Scalia's isolated incident test: A piece of property does not have a sufficiently close relationship with conduct justifying forfeiture if the property was not used for illegal activity on a regular or frequent basis; an isolated incident is insufficient.³⁰¹

296. *Austin*, 113 S. Ct. at 2815.

297. *United States v. 429 South Main Street*, 843 F. Supp. 337, 341 (S.D. Ohio 1993), *aff'd in part*, 52 F.3d 1416 (6th Cir. 1995).

298. *United States v. 11869 Westshore Drive*, 848 F. Supp. 107, 111 (E.D. Mich. 1994), *aff'd*, 70 F.3d 923 (6th Cir. 1995); *429 South Main Street*, 843 F. Supp. at 341-42 (applying both the value test and the nexus test).

299. *United States v. Myers*, 21 F.3d 826, 831 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1995); *United States v. 427 & 429 Hall Street*, 842 F. Supp. 1421, 1429-30 (M.D. Ala. 1994); *United States v. 2828 North 54th Street*, 829 F. Supp. 1071, 1073 (E.D. Wis. 1993) (only applying Justice Scalia's nexus test).

300. *See, e.g., 11869 Westshore Drive*, 848 F. Supp. at 111; *429 South Main Street*, 843 F. Supp. at 341-42 (applying value test).

301. *See, e.g., Myers*, 21 F.3d at 831 (holding that forfeiture of property was not disproportionate when property provided location and ideal concealment of marijuana growing

The value test does not make sense in the civil forfeiture context when the property owner has not already been convicted of the underlying offense. A court cannot meaningfully compare the value of the property forfeited with whatever punishment the property owner might have received had he been convicted, when that property owner has not been accorded the due process guarantees inherent in a criminal prosecution, or when he has been accorded these guarantees but has been acquitted.

The value test also does not make sense in the civil forfeiture context for the reasons summarized by the United States District Court for the Central District of California in *United States v. 6625 Zumirez Drive*.³⁰² In *6625 Zumirez Drive*, the United States argued that the proper test was set out in *Solem v. Helm*.³⁰³ In *Solem*, the Supreme Court set out a three-prong analysis for determining whether a particular punishment violates the Cruel and Unusual Punishment Clause.³⁰⁴ Under *Solem*, the factors were (1) the gravity of the offense compared with the harshness of the penalty; (2) the sentences imposed in the same jurisdiction for similar crimes; and (3) the sentences imposed in other jurisdictions for the commission of the same crime.³⁰⁵

The *6625 Zumirez Drive* court rejected the *Solem* analysis. The court recognized that the *Solem* factors are guidelines for evaluating whether a punishment violates the Cruel and Unusual Punishment Clause, not the Excessive Fines Clause,³⁰⁶ and stated that when the *Austin* Court explicitly declined to establish a test for analyzing the Excessive Fines Clause, it implied that the lower courts are not bound by the Cruel and Unusual Punishment Clause guidelines.³⁰⁷ Further, the *6625 Zumirez Drive* court recognized that another recent Supreme Court decision casts doubt on *Solem's* continuing viability.³⁰⁸

Westshore Drive, 848 F. Supp. at 111 (holding two sales within short period of time sufficient; use of house as "sales office" and barn as "warehouse" sufficient); 429 *South Main Street*, 843 F. Supp. at 342 (finding isolated incident insufficient; repeated use of property for illegal activity sufficient); 427 & 429 *Hall Street*, 842 F. Supp. at 1430 (finding sale of drugs out of grocery store sufficient to make store guilty); 2828 *North 54th Street*, 829 F. Supp. at 1073 (finding substantial drug manufacturing operation at property sufficient).

302. 845 F. Supp. 725 (C.D. Cal. 1994).

303. 463 U.S. 277 (1983), overruled by *Harmelin v. Michigan*, 501 U.S. 957 (1991).

304. *Id.* at 290-92.

305. *Id.*

306. *6625 Zumirez Drive*, 845 F. Supp. at 731.

307. *Id.*

308. *Id.* The Supreme Court decision referred to is *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (Scalia, J., joined by Rehnquist, C.J.) ("*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."); *id.* at 1005 (Kennedy, J., joined by

Finally, and most significantly, the 6625 *Zumirez Drive* court found that only the first of the three *Solem* factors can be applied in the Excessive Fines context because a meaningful comparison of the value of property with the criminal penalty that could be imposed for that act in the same and other jurisdictions is nearly impossible.³⁰⁹ This analysis requires the court to calculate a sentence for the owner as if the owner was convicted of a crime for which the owner has not been convicted.³¹⁰ Even if the court could calculate a sentence, no reason exists to use this as a guide under a civil forfeiture scheme because Congress has seen fit to punish drug-related activities through two different devices: (1) a criminal statute imposing imprisonment and fines, and (2) a civil statute imposing forfeiture. One is not intended to mitigate the effects of the other.³¹¹

The 6625 *Zumirez Drive* court fashioned a new three pronged test attempting to "give renewed significance to the Eighth Amendment's Excessive Fines Clause and . . . have the added benefit of checking the government's potential for abusive use of the civil forfeiture statutes."³¹² The three prongs are: (1) the inherent gravity of the offense compared with the harshness of the penalty; (2) whether the property was an integral part of the commission of the crime; and (3) whether the criminal activity involving the defendant's property was extensive in terms of time or spatial use or both.³¹³

The 6625 *Zumirez Drive* court's test is highly appealing, especially the second and third prongs of the analysis, which evolve "from the traditional notion that *in rem* forfeitures are based on the legal fiction that 'the thing is primarily considered the offender.'"³¹⁴ However, the first prong needlessly confuses the analysis and contradicts what the court earlier identified as problematic in the *Solem* analysis. How can a court weigh the harshness of the penalty against the gravity of the offense, when the property owner might not have been found guilty of the offense under the criminal law, with its procedural protections? To its credit, the 6625 *Zumirez Drive* court acknowledged that a

O'Connor and Souter, JJ., concurring in part and concurring in judgment) (limiting *Solem's* applicability, explaining that "intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality").

309. 6625 *Zumirez Drive*, 845 F. Supp. at 731-32.

310. *Id.* at 732.

311. *Id.*

312. *Id.* at 735.

313. *Id.* at 732.

314. *Id.* at 734 (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)).

claimant, charged and acquitted of the underlying offense, "cannot be treated 'as if he had committed [the] offense for purposes of evaluating the gravity of his conduct.'"³¹⁵ However, simply focusing on the property's guilt in the fashion suggested by Justice Scalia would constitutionalize a proportionality test that would be relatively easy to administer and that would prevent abuses by local, state, and federal governments.

IV. THE IMPORTANCE OF AUSTIN

Austin is the most important civil forfeiture case of the 1992-93 Supreme Court term because it imposes a substantive restriction on the government's power to forfeit property. If Mr. Justice Scalia is correct, the government will no longer be able to forfeit huge tracts of land when only a portion of the land was used to traffic drugs. Case names such as *United States v. 107.9 Acres* will practically disappear from case name indices. To paraphrase Justice Scalia, the building in which an isolated drug sale happens to occur will no longer be susceptible to forfeiture because such a confiscation would be an excessive fine.

The other civil forfeiture cases decided by the Supreme Court in the 1992-93 term have less potential to significantly limit the government's power to seize and forfeit property. In *United States v. James Daniel Good Real Property*,³¹⁶ the Court held that before the government can seize real property, it must give the property owner notice and an opportunity to be heard.³¹⁷ However, the Court's holding was limited to real estate,³¹⁸ and, as Mr. Justice Thomas pointed out in his dissent, notice and opportunity to be heard will avail the property owner little in most circumstances.³¹⁹ The holding of *James Daniel Good Real Property* does not change the allocation of burdens in civil forfeiture proceedings; the government still need only show probable cause to seize the property.³²⁰ Even the majority in *James Daniel Good Real Property* minimized the significance of its holding, writing that "[r]equiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden."³²¹ The Court also explained that the government can prevent the sale of property prior to seizure simply by filing a notice

315. *Id.* at 733.

316. 114 S. Ct. 492 (1993).

317. *Id.* at 505.

318. *Id.*

319. *See id.* at 516.

320. 21 U.S.C.A. § 881(b)(4) (West Supp. 1995).

321. 114 S. Ct. at 504.

of *lis pendens*.³²² Thus, *James Daniel Good Real Property* is a less significant decision than *Austin*.

In the 1992-93 term, the Supreme Court also decided *United States v. 92 Buena Vista Avenue*³²³ and *Republic National Bank of Miami v. United States*.³²⁴ In *92 Buena Vista Avenue*, the Court held that the innocent owner defense is available to people who acquire interests in property after the acts giving rise to the property forfeiture under Section 881 were committed.³²⁵ The United States argued that Section 881(h) prevented a person who acquired the later interest from being considered an owner for purposes of the innocent owner defense.³²⁶ The Court disagreed, writing that the government's argument "would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited. It seems unlikely that Congress would create a meaningless defense."³²⁷

In *Republic National Bank of Miami*, the Court considered whether a federal court could continue to exercise jurisdiction in an *in rem* civil forfeiture proceeding after the *res*, the thing that was proceeded against, was reduced to cash and deposited in the United States Treasury.³²⁸ The government argued that because the *res* was deposited into the United States Treasury, it could no longer be reached, and funds in the treasury can only be released by Congressional appropriation.³²⁹ The Court declined to adopt the government's position, holding that a federal court retains jurisdiction in such a circumstance.³³⁰ Mr. Justice White, concurring, wrote that he was "surprised that the Government would take such a transparently fallacious position."³³¹

Neither *92 Buena Vista Avenue* nor *Republic National Bank of Miami* poses the sort of threat to the government's current civil forfeiture proceedings that *Austin* poses. *92 Buena Vista Avenue* simply preserves the innocent owner defense; it does not impose any new constraint on the government's forfeiture powers.³³² Nor does *Republic National Bank of Miami* constrain the government; it simply

322. *Id.* at 503.

323. 113 S. Ct. 1126 (1993).

324. 113 S. Ct. 554 (1992).

325. *See* 113 S. Ct. at 1137.

326. *See id.* at 1134.

327. *Id.* at 1135.

328. 113 S. Ct. at 556.

329. *Id.* at 560.

330. *Id.* at 562.

331. *Id.* at 563.

332. *See* 113 S. Ct. at 1137.

preserves the right of appeal when forfeited property has already been converted into cash and deposited in the treasury.³³³

Given the above, the question becomes not so much whether Mr. Justice Scalia is right, but whether the Justice is correct. His argument that the touchstone of the inquiry is the relation of the property to the offense relies on the irrelevance of the owner's culpability.³³⁴ The excessiveness inquiry in cases dealing with *in personam* fines asks whether the fine relates to the offense.³³⁵ The *in rem* excessiveness inquiry must be different, Justice Scalia reasoned, if the offense "is not relevant to the forfeiture."³³⁶ However, the majority in *Austin* reasoned that the culpability of the owner is always relevant, in the sense that forfeiture must be understood as punishment of the owner of the property.³³⁷ Thus, the Scalia analysis stresses the importance of the character of the *in rem* proceeding, a distinction on which the majority refuses to place much reliance.³³⁸

However, Mr. Justice Scalia's instrumentality inquiry resonates with familiar principles and precepts. In *in rem* forfeiture actions, the property is still considered the wrongdoer.³³⁹ The majority opinion was unwilling to go so far as to abolish this ancient distinction.³⁴⁰ Because the majority was unwilling to transform the fundamental nature of *in rem* actions, Justice Scalia's analysis will likely take root in the jurisprudence of *in rem* forfeitures. Ironically, the fiction of *in rem* forfeiture, which was developed primarily to expand the reach of the courts,³⁴¹ will probably end up doing so again—with the concomitant result of limiting Congress' powers.

V. CONCLUSION

In Section 881, Congress created a civil forfeiture statute that grants enormous power to the United States to seize and forfeit the property of citizens, guilty or innocent, whose property has a sufficient connection to illegal drug activity. Section 881 is only one example, among many, of such extensive power. The power has undoubtedly been abused on occasion, and will certainly be abused again in the

333. See 113 S. Ct. at 561-62.

334. See *Austin*, 113 S. Ct. at 2814.

335. *Id.* at 2814-15.

336. *Id.* at 2815.

337. See *id.* at 2808-12.

338. See *id.* at 2808-09 n.9.

339. See *id.* at 2808-09.

340. See *id.* at 2806-12.

341. *Republic Nat'l Bank of Miami*, 113 S. Ct. at 559.

future. Courts and legislatures should not countenance the forfeiture of property that is not instrumental in the commission of a drug or other offense. Mr. Justice Scalia's concurrence in *Austin* would control the scope and extent of civil forfeiture.

In the civil forfeiture context, as in many others, government overreaching is the rule rather than the exception. Congress should have expected as much when it reformed the drug forfeiture laws in 1984, giving law enforcement agencies more incentive to seize and forfeit property. Forfeiture delivers billions of dollars worth of property to prosecutors and police every year. There is very little oversight of the disposition of this property. Surely current excesses cannot be countenanced either by Congress or by the courts. Meaningful proportionality review is one avenue out of this dilemma, and Mr. Justice Scalia's concurrence in *Austin* shows lower courts the way.

The forfeiture of property should be made more difficult. The threats posed to individual liberty are too grave; private property rights must be preserved. When private property rights are no longer respected in our constitutional scheme, the end of freedom as we know it may be near.