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I. INTRODUCTION

For law enforcement, civil forfeiture must seem too good to be true. On the bare-bones showing of probable cause, the government can seize any property thought to be proceeds of a crime or suspected of being used or intended for use in criminal activity.[1] The government has confiscated items such as a car driven to a meeting where criminal activity was discussed,[2] a boat leased to an individual who brought a small amount of marijuana on board,[3] a house in which one family member peddled narcotics,[4] and an entire business where illegal acts occurred in one aspect of its operations.[5]

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1. *See, e.g.*, 18 U.S.C. § 981 (1988 & Supp. V 1993) (the government's civil money laundering forfeiture provision); 21 U.S.C. § 881 (1988 & Supp. V 1993) (authorizing the civil forfeiture of property connected to narcotics activity). Forfeiture is authorized in more than 140 federal statutes and most states have one or more laws permitting forfeiture. STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE § 2.01, at 2-1 (1994).

2. *See* United States v. 1990 Toyota 4Runner, 9 F.3d 651 (7th Cir. 1993). The court affirmed the forfeiture of a car under 21 U.S.C. § 881(a)(4), reasoning:

> In order to import the heroin into the United States and place it in Oloko's [the conspirator's] possession, someone had to go to Manila, get it, and bring it back. In order for someone to go to Manila for this purpose, arrangements for the trip had to be made . . . . In order to make these arrangements, the conspirators had to meet, and Oloko's presence at the meeting was "facilitated" by the Toyota, his mode of conveyance to and from the meeting.

Id. at 652.

3. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-88 (1974) (affirming forfeiture of a yacht under a Puerto Rico statute).

4. *See* United States v. 5000 Palmetto Drive, 928 F.2d 373, 374 (11th Cir. 1991) (holding that a house, seized pursuant to 21 U.S.C. § 881(a)(7), must be returned to the claimant because she was an innocent owner).

5. *See* United States v. 141st St. Corp., 911 F.2d 870, 880 (2d Cir. 1990), (upholding the forfeiture of a building seized pursuant to 21 U.S.C. § 881(a)(7)), *cert. denied*, 498 U.S. 1109 (1991).

Typically the government can effect its seizure without notice to the owner and without giving the owner a prior opportunity to object.[6] The owner need not have been charged or convicted of a crime—either at the time of seizure or ever.[7] Alternatively, the seizure can come long after conviction, even years after the defendant has served his sentence.[8]

Once property is seized, the law effectively presumes that the property is proceeds or an instrument of criminal activity. The owner shoulders the burden of proving the property's "innocence."[9] To make this showing, the owner not only must pay the costs and expenses associated with a legal proceeding, he usually must do without his property in the meantime even as the government dallies.[10]

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6. *See, e.g.*, 19 U.S.C. §§ 1609-1615 (1988 & Supp. V 1993) (U.S. Customs Service procedures for seizure, forfeiture, and recovery of seized property). *But see* United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (requiring prior notice and opportunity to be heard before government can seize real property).

7. Most people who lose property through civil forfeiture are never charged with a crime. And, under the fiction that it is the property that is guilty or tainted, they need not be. *See, e.g.*, The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (explaining that a criminal conviction is irrelevant to civil forfeiture because forfeiture reaches property and does not depend on the owner's guilt or innocence). Modern cases are in accord. *E.g.* United States v. 7715 Betsy Bruce Lane, 906 F.2d 110, 111-12 (4th Cir. 1990) ("In civil forfeiture cases, property is subject to forfeiture 'even if its owner is acquitted of—or never called to defend—criminal charges.'") (quoting United States v. 3120 Banneker Drive, N.E., 691 F. Supp. 497, 499 (D.D.C. 1988)).

8. *See Good*, 114 S. Ct. at 497 (seizure of a residence four-and-one-half years after drugs were found on defendant's property and after defendant was sentenced and released from jail).

9. Once probable cause is established, the burden shifts to the claimant to demonstrate by a preponderance of the evidence that the property was not associated with criminal activity, or that the claimant is an "innocent owner." *See, e.g.*, United States v. 5 Bell Rock Rd., 896 F.2d 605, 606 (1st Cir. 1990); United States v. 1980 Bertram 58' Motor Yacht, 876 F.2d 884, 888 (11th Cir. 1989). The claimant first must prove that he has a sufficient interest in the property to have standing. *See, e.g., 5000 Palmetto Drive*, 928 F.2d at 375. To be an innocent owner, the claimant must prove that the underlying criminal activities were committed without his knowledge or consent. 21 U.S.C. § 881(a)(7) (1988).

10. *See* United States v. $8850, 461 U.S. 555 (1983). The Court held that the government's 18-month delay in filing a civil forfeiture proceeding did not violate the claimant's right to due process. However, it stated that a delay becomes unreasonable when the government fails to satisfy the test applied in speedy trial cases as announced in Barker v. Wingo, 407 U.S. 514 (1972). This flexible test balances (1) whether the delay is reasonable given its length; (2) the government's reasons for the delay; (3) whether and when the claimant asserted his rights; and (4) prejudice to the claimant. *Id.* at 530; *$8850*, 461 U.S. at 564.

The resolute and well-heeled owner can persist but, if he is somehow involved in wrongdoing, he also risks losing his privilege against self-incrimination. Any testimony in defense of the property can be used against him in a later criminal trial.[11] Moreover, he faces pressure—and the greater the value of the property, the greater the pressure—to sacrifice the property in return for a "deal" with prosecutors to avoid criminal charges.[12]

With a device so congenial, it is no surprise that government forfeitures are at an all-time high. Both in the value of property seized and the number of actions filed, the pace is dramatic and accelerating. The federal government effected 35,295 seizures of property in 1991, up eighteen times in six years.[13] According to figures provided by the Justice Department's Executive Office for Asset Forfeiture, net deposits in the Asset Forfeiture Fund grew from $93.7 million in 1986 to $643.6 million, $531 million, and $555.7 million in 1991, 1992 and 1993, respectively.[14] State and local law enforcement agencies have been busy too.

But forfeitures are not popular just because they are quick and easy—they are also highly profitable. In most forfeiture regimes, law enforcement agencies may sell what they seize and keep the proceeds.[15]

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11. *See, e.g.*, United States v. Parcels of Land, 903 F.2d 36, 44 (1st Cir. 1990) (explaining that courts should try to preserve a claimant's privilege but specifying no particular methods of doing so); *see also* United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991) (permitting exception to general rule that adverse inferences can be drawn from failure to testify in civil cases if defendant actually faces choice of waiving privilege or losing the civil case).

12. *See, e.g.*, Martin L. Haines, *Prosecutors & Criminals Sharing Wages of Crime*, N.J. L.J., Oct. 19, 1992, at 17. *See also* United States v. 1985 Mercedes-Benz 300SD, 14 F.3d 465, 468 (9th Cir. 1994) (explaining that after the defendant accepted a plea bargain, the government dropped the criminal charges and pursued a forfeiture claim).

13. *See* David A. Kaplan, *Where the Innocent Lose*, NEWSWEEK, Jan. 4, 1993, at 42.

14. EXECUTIVE OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM: FISCAL YEAR 1993, at 15 (1994) [hereinafter 1993 ANNUAL REPORT].

15. The most significant change in the Comprehensive Forfeiture Act, Pub. L. No. 98-473, §§ 301-02, 98 Stat. 1837, 2040-57 (1984) (codified at 28 U.S.C. § 524 (1988 & Supp. V 1993)), was the change from depositing forfeited amounts into the general treasury to earmarking forfeited amounts exclusively for law enforcement. *See* 28 U.S.C. § 524(c).

Under federal forfeiture laws, the United States government holds property in two stages. The first stage is seizure pending forfeiture. The government holds property pending a final order of forfeiture through administrative or judicial action. Months may elapse between seizure and a final order and, during that time, the United States

The more they confiscate, the more they get. As a result, a significant portion of law enforcement revenue now depends on aggressive and frequent pursuit of forfeitable property.[16] For example, since 1985, the federal government has given $1.2 billion to state and local police and has provided $540 million to build prisons.[17] According to a former head of the Justice Department's Asset Forfeiture Section, the department's "marching orders" were: "Forfeit, forfeit, forfeit. Get money, get money, get money."[18]

Can a device this easy, quick and profitable also be fair? In a word, no. Abuses abound. For example, in South Dakota, a couple permitted a friend to visit, knowing he possessed thirty-nine marijuana seedlings.[19]

Marshals Service is responsible for the property. The government's inventory of property seized pending forfeiture had grown to $1.9 billion at the end of 1993. 1993 ANNUAL REPORT, *supra* note 14, at 20.

The second stage is disposal of forfeited property. The government has several options. It may deposit the net cash and proceeds from the sale of property into the Asset Forfeiture Fund. The Asset Forfeiture Fund is an account in the Treasury Department that holds forfeited cash and property proceeds. *See* 28 U.S.C. § 524(c). In 1993, net deposits totaled $555,707,039. 1993 ANNUAL REPORT, *supra* note 14, at 38. The net amount subtracts about $20 million paid to other federal agencies which do not participate in the Fund.

The government may also retain forfeited property for official use or transfer it to another federal agency or any state or local law enforcement agency that participated in the seizure of the property. 21 U.S.C. § 881(e)(1) (1988 & Supp. V 1993). In 1993, the federal government retained $12.8 million of conveyances and other property for official use and transferred $10.2 million to state and local agencies. 1993 ANNUAL REPORT, *supra* note 14, at 17.

Finally, the government destroys contraband forfeited property such as illegal drugs. *See* 21 U.S.C. § 881(f)(2) (Supp. V 1993).

16. *See, e.g.*, John T. McQuiston, *Official's Use of Seizure Law Is Questioned*, N.Y. TIMES, Oct. 2, 1992, at B1, B2 (reporting that through aggressive pursuit of forfeiture, the District Attorney of Suffolk County, New York, added more than $3 million to his budget between 1990 and 1992). The asset forfeiture unit of the State Attorney's Office in Connecticut reported its recent forfeiture tallies as follows: 1593 forfeiture cases involving $2.2 million in seized cash, more than 160 vehicles, and 17 parcels of real property. *State Roundup*, CIVIL REMEDIES IN DRUG ENFORCEMENT REP. (National Ass'n of Att'ys Gen., Washington, D.C.), Feb.-Mar.1992, at 21. The Los Angeles County Sheriff's Department acknowledged seizing more than $151.4 million in cash between 1988 and 1993. *Ex-Sargeant Sentenced, Alleges Misconduct*, L.A. TIMES, Apr. 13, 1993, at B1.

17. *See* Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES, July 5, 1993, at 1, 20.

18. *Id.* at 21 (quoting Michael F. Zeldin, former director of the U.S. Department of Justice Criminal Division's Asset Forfeiture Office).

19. *See* Kaplan, *supra* note 13, at 42.

After the friend left with the seedlings, the police searched the premises and found a trace of marijuana and a marijuana butt in a car belonging to the couple's daughter.[20] The police seized the house.[21] In California, a couple sold their $289,000 home to a man later convicted of a federal crime.[22] The couple took back a $160,000 note secured by the home.[23] The government later seized the house and the couple waged a ten year court battle to recover the property.[24] Eventually the couple prevailed, but they were near bankruptcy and, after ten years, the house was so badly damaged that the couple ended up taking a loss.[25] In various drug stings, police agents have suggested that the informant/buyers arrange their purchases in homes or condominiums knowing this would permit seizure of the seller's real estate.[26] The police have set up drug sales in which anyone who drove by and purchased immediately lost his car.[27]

Of course government confiscation of property is not always unfair. But fairness and constitutionality depend on the reason for the taking, the nature and amount of property seized, and the procedures used to accomplish the seizure.

Modern forfeiture is justified as a means of taking the profit out of crime and as a device to destroy criminal "enterprises,"[28] that is, any

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20. *Id.*

21. *Id.*

22. *See* John Enders, *Forfeiture Law Casts a Shadow*, L.A. TIMES, Apr. 18, 1993, at B3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See, e.g.*, United States v. 41430 DePortola Rd., No. 91-55099, 1992 U.S. App. LEXIS 6584, at *3 (9th Cir. 1992) (defending party claimed he was entrapped to commit the crime at a particular location).

27. *See, e.g.*, Fred Strasser, *Forfeiture Isn't Only for Drug Kingpins*, NAT'L L.J., July 17, 1989, at 1, 26 (describing car seizing techniques of the Broward County, Florida, Sheriff's Office).

28. The term criminal "enterprise" usually is associated with criminal forfeiture. This article deals with civil, not criminal forfeiture. The Racketeer Influenced and Corrupt Organizations Act of 1970, Pub. L. No. 91-452, §§ 901-02, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)) and the Controlled Substances Act of 1970, Pub. L. No. 91-413, §§ 100-709, 84 Stat. 1242 (codified as amended at 21 U.S.C. § 848 (1988 & Supp. V 1993)) (the "Kingpin Statute") provide for criminal forfeiture of illegal enterprises. Criminal forfeitures are *in personam* proceedings instituted as part of the criminal case against a defendant. The forfeiture affects only the defendant's interest in the property. The defendant enjoys all rights recognized in criminal cases, such as proof beyond a reasonable doubt. And, generally, property may not be adjudged forfeit until the defendant is convicted of the

business, association, cartel, or concerted action that tends to continue operating even if involved individuals are jailed. These are laudable objectives that appeal to good common sense and elementary principles of morality. It is the essence of justice to deprive a criminal of his booty and to destroy what are, in effect, nests of criminal activity.

Laws might have been drafted to achieve just these goals while respecting due process of law and other constitutional rights. Instead, modern forfeiture laws simply borrow from the ancient practices and historical uses of forfeiture. These practices and uses rest on different premises and largely ignore the individual's interests in seized items.

Historically, forfeiture rested on the irrational and superstitious idea that property which caused harm was guilty and should be destroyed.[29] Its scope expanded over time to include seizure of property as summary punishment for possessing or trading in articles without government authority, or for failure to pay government taxes or fees.[30] Forfeiture proceeds also became a significant source of government revenue. As

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underlying crime. Yet, civil forfeiture is also designed to take the profits and assets from criminal businesses. The Department of Justice described the objectives of federal civil forfeiture as follows:

> Property is forfeited to the United States Government if it is determined to be the tool of or the proceeds of illegal activities such as drug trafficking, organized crime, and money laundering. Forfeiture deters crime by taking away the profits of illegal conduct and can immobilize crime syndicates by stripping away the cars, boats, airplanes, houses, currency and other properties which are essential to a large-scale criminal enterprise. The objective of forfeiture is to dismantle drug trafficking rings and other criminal enterprises, not only by prosecuting and imprisoning the drug kingpins, their top echelons, money launderers and drug financiers, but also by stripping away the criminal assets of the illegal organizations. Consequently, the valuable car, boat, or airplane used to transport illegal drugs can be seized, as well as the luxury home or the lucrative business, if financed through an illegal source of income. Seizing criminal assets literally takes the "profit" out of crime.

EXECUTIVE OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM: FISCAL YEAR 1992, at 3 (1993) [hereinafter 1992 ANNUAL REPORT].

29. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974) (discussing the historical background of forfeiture statutes); United States v. United States Coin & Currency, 401 U.S. 715, 719 (1971) ("Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing."); *see also* KESSLER, *supra* note 1, § 1.02, at 1-3 to 1-6 (discussing the historical origins of civil forfeiture); Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 FORDHAM L. REV. 287, 290-91 (1993) (tracing the historical roots of forfeiture).

30. *See* Schwarcz & Rothman, *supra* note 29, at 291.

inherited, the forfeiture remedy treated the property owner as a bystander; action was pursued directly against the offending property.[31]

When laudable and sensible modern goals were simply hitched to these ancient, sometimes irrational, and often high-handed practices, abuse was inevitable. If anything, the amalgam of old theories and new objectives has produced ever expanding grounds for confiscation and a virtual smorgasbord of injustices. For example, not only do current laws permit seizure of the instruments of crime, but they also allow seizure of any property which was *intended* to be used in *facilitating* crime.[32] Not only do current laws permit seizure of the profits of crime, but some also allow seizure of substitute profits and proceeds[33] and the tracing of property into the hands of third parties.[34]

Until recently, the government has been able to turn back constitutional challenges to its forfeiture practices. Its chief defense has rested on longstanding historical practice.[35] After all, governments have been getting away with all sorts of forfeitures—and raising lots of revenue—for a very long time. Recently, however, the Supreme Court has begun to strip away the fictions associated with forfeitures and to apply constitutional limitations.[36]

In the 1993-94 term, in *United States v. James Daniel Good Real Property*,[37] the Supreme Court ruled that, absent exigent circumstances, real property owners are constitutionally entitled to notice and an

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31. *See id.*

32. *See, e.g.*, 21 U.S.C. § 881(a)(4) (1988) (authorizing forfeiture of all property used or intended for use in manufacturing, compounding, processing, delivering, importing, or exporting controlled substances).

33. *See, e.g.*, 21 U.S.C. § 853; N.Y. CIV. PRAC. L. & R. § 1311 (McKinney 1988) (permitting *in personam* forfeiture against tainted or untainted assets, proceeds or substituted proceeds).

34. Under the federal drug forfeiture laws, if a person receives property which is proceeds from a drug transaction, he will lose the property unless he can show that, at the time he received the property, he had no actual knowledge of facts subjecting the property to forfeiture. 21 U.S.C. § 881(a)(6) (1988). Knowledge can be imputed from circumstances such as a wife leaving a large amount of money (damages from a personal injury lawsuit) in the home and her husband later using it for a drug purchase. *See* United States v. $44,000, 596 F. Supp. 1308, 1311 (E.D. Mo. 1984).

35. *See, e.g.*, Austin v. United States, 113 S. Ct. 2801 (1993).

36. *See id.* at 2812 (holding the Excessive Fines Clause of the Eighth Amendment applicable in a forfeiture case involving a residence); United States v. James Daniel Good Real Property, 114 S. Ct. 492, 497 (1993) (ruling that procedural due process protections apply to forfeiture proceedings).

37. 114 S. Ct. 492 (1993).

opportunity to be heard prior to seizure of their lands or leaseholds.[38] In so holding, albeit by a bare 5-4 majority, the Supreme Court brought forfeiture squarely within the reach of procedural due process protections.[39] And in the 1992-93 term, the Supreme Court decided four forfeiture cases with one in particular, *Austin v. United States*,[40] representing a fundamental shift in thinking about forfeiture. In *Austin*, the Court held that even civil forfeitures can impose punishments so disproportionate to the underlying wrong that they will violate the Excessive Fines Clause of the Eighth Amendment.[41] This ruling signalled that the civil nature of a forfeiture proceeding will not insulate forfeiture actions from the protections of the Excessive Fines Clause, and by implication, the Double Jeopardy Clause, warrant requirements, and other constitutional safeguards.

Unfortunately, neither *Good* nor *Austin*, by themselves, or together with the Court's other forfeiture rulings, are enough to corral runaway forfeiture and its abuses. Thus far, the Court has shown no inclination to re-examine forfeiture doctrine from top to bottom. Even with the issues it has confronted, the Court has been too timid to signal precisely how far it is willing to go and too reluctant to spell out exactly how its rulings should be applied.[42] Nevertheless, these two cases set the stage for a fundamental shift in the Court's thinking about how the Constitution applies to civil forfeitures.

Building upon the Supreme Court's first steps, this article attempts to set out what the reality of forfeiture practice is. As more fully developed in Part II, this reality rests on a handful of key understandings. First, forfeiture is a unique and uniquely harsh invasion of an individual's property interests. Second, as the Court has now essentially recognized, the civil or criminal nature of a forfeiture proceeding is irrelevant to application of constitutional protections against excessive fines and other limits on government overreaching. Third, there is no single all-purpose

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38. *See id.* at 500-01.

39. *See id.*

40. 113 S. Ct. 2801 (1993). The other cases were Alexander v. United States, 113 S. Ct. 2766 (1993) (pertaining to criminal forfeiture of defendant's assets used in adult entertainment business); United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (regarding the 21 U.S.C. § 881(a)(6) forfeiture of real estate allegedly purchased with proceeds of drug trafficking); Republic Nat'l Bank of Miami v. United States, 113 S. Ct. 554 (1992) (holding that the Court of Appeals was not divested of jurisdiction by the United States' transfer of forfeited res from the district).

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

42. *See id.* (suggesting but not deciding that double jeopardy applies to some forfeitures; the Court declined to enumerate the factors which must be weighed to determine if a forfeiture is excessive).

rationale for seizure of property. Rather there are multiple and distinct justifications, and the amount and nature of property seized must be limited by the justification on which it is based. Fourth, there are no interests in seized property separate from the individuals who own, use, or possess the property. It follows that asset seizures, no less than other government invasions of individual rights, are limited by the full panoply of due process protections. Finally, permitting police departments and prosecutors' offices to profit directly from the sale and use of forfeitable assets undermines fair and evenhanded law enforcement or, at least, the appearance of such law enforcement.

The balance of the article sketches the kind of substantive and procedural rules that might emerge from our new-found realism about forfeiture. In Part III, the article explains how an invigorated excessive fines and substantive due process analysis can mitigate the harsh and disproportionate applications of forfeiture. Finally, in Part IV, the article argues that, under procedural due process, the government must bear the burden of proof in forfeiture cases and that courts should consider whether the entire forfeiture process—from bond requirements, time limits, and standards of proof—falls below minimal norms of fairness. Part IV also attempts to identify a procedural due process limit on forfeiture schemes that permit police to keep the money and property they seize. It may be, however, that these payback schemes precariously walk the line of constitutionality and that real reform lies in legislative solutions.

II. THE REALITY OF CIVIL ASSET FORFEITURE

A. *The Unique and Severe Nature of Forfeiture*

Forfeiture is not an ordinary civil remedy. Courts routinely characterize it as "harsh,"[43] "oppressive,"[44] and "disfavored."[45] Others have described certain forfeiture practices as official extortion[46] and the entire forfeiture regime as "a draconian punishment that is virtually bereft of constitutional protections."[47]

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43. United States v. $31,990, 982 F.2d 851, 856 (2d Cir. 1993).

44. *Id.*

45. United States v. 384-390 W. Broadway, 964 F.2d 1244, 1248 (1st Cir. 1992).

46. DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.02, at 1-21 to 1-24 (1994) (describing practices in St. Louis, Missouri; Volusia County, Florida; and Los Angeles, California, where police seized cars and cash under flimsy circumstances and owners had option of paying something to get all or a portion of the property back).

47. George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 668 (1991).

There are several characteristics that mark modern civil asset forfeiture as a unique and a uniquely severe remedy. First, its use, although resting on multiple rationales, is typically anchored to the idea that the property owner participated in, obtained profits from, or intentionally or negligently aided others in the commission of crime. The criminal nexus carries a taint or stigma that attaches to the property owner. It explains the courts' frequent characterization of forfeiture as "quasi-criminal."[48] Indeed, it was the Supreme Court's tardy but welcome acknowledgement that forfeiture is in fact punishment for blameworthy conduct, a penalty for one's complicity in the criminal uses of property, that led it to conclude that forfeiture is the constitutional equivalent of a fine.[49]

Second, forfeiture, although linked to criminality, is often disproportionate to the underlying transgression. Whether the nature or the value of any property seized bears any equivalence to harms caused by use of the property or to the culpability of the property owner is pure happenstance. The effects of forfeiture can be unpredictable, accidental, and often perverse. The inattentive parents who lose an automobile because their teenager carries marijuana in the vehicle can readily attest to this.[50]

Finally, forfeiture is a confiscation of property and a complete divestiture of ownership, not a mere restraint on use, temporary loss, or a device used to satisfy pre-existing debts or secure jurisdiction. Ownership of property, although subject to wide-ranging restrictions and even severe regulation, is a basic and fundamental liberty interest. Forfeiture extinguishes ownership even in real property and even in one's home. In this regard, the analogy of forfeiture to fines, while apt, is inadequate to capture the severity of forfeiture. Forfeiture is to fines what capital punishment is to incarceration.

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48. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 632 (1886); United States v. $191,910, 16 F.3d 1051, 1063 (9th Cir. 1994); United States v. Riverbend Farms, Inc., 847 F.2d 553, 558 (9th Cir. 1988).

49. *See* Austin v. United States, 113 S. Ct. 2801, 2812 (1993) (holding that forfeiture under 21 U.S.C. § 881(a)(4) and (7) constitutes punishment for an offense).

50. *See, e.g.*, United States v. 1978 Chrysler Le Baron Station Wagon, 648 F. Supp. 1048, 1051 (E.D.N.Y. 1986) (affirming forfeiture of the claimant's car under 21 U.S.C. § 881(a)(4) when he loaned it to his son who used it to transport drugs; the court rejected the statutory innocent owner defense because the claimant knew his son had a criminal record); *see also* Kaplan, *supra* note 13, at 42 (reporting on the government seizure of a 1987 Oldsmobile because the police said the owner's son drove it to a local Sears store where he allegedly shoplifted a pair of pants).

B. *Forfeiture Can Be a Civil Remedy but the Significance of the Civil/Criminal Label is Limited*

As harsh and oppressive as civil asset forfeiture is, it does not follow that forfeiture must be deemed a criminal proceeding for constitutional purposes. Although statutes could limit forfeiture to criminal proceedings and currently some types of forfeitures can be effected only in criminal cases,[51] the primary determinant of whether a proceeding is criminal or civil is the legislature's classification of the remedy as one or the other.

Some commentators argue that, because forfeitures involve harsh punishments for behavior tied to criminal activity, they are criminal cases. If so viewed, all constitutional protections associated with criminal proceedings would apply. A property owner would be entitled to a presumption of innocence, adjudged guilty under a reasonable doubt standard, protected against double jeopardy, and so on. This line of argument is appealing because it appears to offer a ready-made solution to some of the excess and abuse of current forfeiture practice. Yet it rests on an incomplete view of what makes a proceeding criminal. Moreover, it vests too much significance in the criminal/civil label. As the Supreme Court has made plain, many constitutional provisions including double jeopardy, excessive fines,[52] protections against unreasonable searches and seizures,[53] and the privilege against self incrimination, once thought to apply only in criminal cases also apply in civil cases.[54]

A forfeiture proceeding can appear similar to a criminal proceeding in a number of ways. Like a criminal case, some forfeitures are designed to punish, involve sanctions equivalent to criminal fines, and may stigmatize the individual for involvement with criminal conduct. But criminal cases are more than just proceedings that impose monetary punishments or that somehow link a person to criminal behavior. Criminal cases are particular processes to adjudge someone guilty or not guilty of a crime, an act falling outside the boundaries of civilized behavior. Strict procedures such as proof of guilt beyond a reasonable doubt are used not only to protect the defendant against the magnitude of a finding of guilt, but also to give weight and meaning to the judgment

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51. *E.g.*, 18 U.S.C. § 1963 (1988 & Supp. V 1993) (RICO criminal enterprise forfeiture).

52. *Austin*, 113 S. Ct. at 2812 (1993).

53. Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 534 (1967).

54. United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971); *see* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1384-89 (1991) (discussing how privilege is applied in forfeiture cases).

that particular behavior constitutes a crime. Criminal cases are criminal cases precisely because the society, through the legislature, has labeled them as such and, being so labeled, they must follow particular procedures to protect the defendant and to give life and significance to the ceremonial aspect of guilt adjudication. There is, of course, a circularity here in that criminal cases trigger certain procedures, but the procedures themselves—trial by jury, guilt beyond a reasonable doubt, right to appointed counsel—mark the proceeding as criminal.[55] In the end, if a legislature identifies a proceeding as civil, it will be so regarded unless the proceeding so nearly tracks a criminal case that it is its functional equivalent or unless it leads to punishments, like incarceration or loss of citizenship, that necessarily bespeak societal condemnation.[56]

Happily, the criminal/civil distinction is not as constitutionally significant as some have supposed. Unless a constitutional provision is expressly confined to criminal prosecutions, the Supreme Court looks past the label and asks whether the purposes of the particular constitutional safeguard are served by applying it in a civil case.[57] Following this approach, the Court has held that the Double Jeopardy Clause applies to civil fines and punitive drug taxes imposed after a criminal conviction.[58]

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55. *See* United States v. Assortment of 89 Firearms, 465 U.S. 354, 363 (1984) (discussing whether procedural mechanisms established by Congress for enforcing forfeitures under 18 U.S.C. § 924(d) mark the statute as a civil sanction).

56. *See id.* at 362-63 (questioning whether a forfeiture sanction under § 924(d) was intended as a punishment and concluding that Congress intended it to be a civil sanction); Allen v. Illinois, 478 U.S. 364, 368-69 (1986) (stating that where a statutory scheme is so punitive the proceeding must be considered criminal); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 149 (1963) (discussing the permissibility of involuntary forfeiture of citizenship rights); *see also* Cheh, *supra* note 54, at 1350 (discussing the similarity of certain sanctions in criminal and civil proceedings). Many laws provide for either civil or criminal proceedings against a wrongdoer. Parallel actions can be brought in, for example, tax, securities law, and environmental cases. *See* Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1989); Carol E. Longest, Note, *Parallel Civil and Criminal Proceedings*, 24 AM. CRIM. L. REV. 855 (1987).

57. *See, e.g.*, Austin v. United States, 113 S. Ct. 2801, 2806 (1993) ("[T]he question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.") (footnote omitted).

58. United States v. Halper, 490 U.S. 435, 448-49 (1989) (distinguishing criminal from civil is an "abstract approach" perhaps useful in some contexts but "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments.") (quoting United States v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)); *see also* Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937, 1948 (1994) (stating that the "drug tax is a concoction of anomolies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis.").

It has also held that the Excessive Fines Clause applies to disproportionate and extreme forfeitures designed to punish for an offense.[59]

The Court's sensitivity to the values underlying a particular constitutional provision, rather than a wooden and formal declaration that certain constitutional provisions just do not apply to civil cases, tracks the development of search and seizure doctrine under the Fourth Amendment. Initially the Supreme Court concluded that non-criminal regulatory inspection programs like municipal, fire, and health and safety inspections of homes or businesses "touch at most upon the periphery of the important interests safeguarded by the Fourteenth [and Fourth] Amendment's protection against official intrusion . . . ."[60] Later cases, however, repudiated this notion, and it is now comfortably settled that non-criminal regulatory or administrative searches fall within the Fourth Amendment's protections.[61] This is because the Fourth Amendment's concern with invasions of privacy and arbitrary governmental intrusions can arise in both criminal and non-criminal contexts.

In holding the Excessive Fines Clause applicable to forfeitures that impose punishment, the Court provided a short catalog of constitutional provisions that may apply to forfeitures.[62] Applicable, it noted, are the Fourth Amendment[63] and the Fifth Amendment's protection against self incrimination.[64] Inapplicable are the Sixth Amendment's Confrontation Clause[65] and the due process requirement of proof beyond a reasonable doubt.[66] The Court acknowledged that it had held double jeopardy not applicable to certain forfeiture proceedings,[67] but it distinguished its ruling by observing that the forfeiture at issue served only a remedial, not

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

60. Frank v. Maryland, 359 U.S. 360, 367 (1959).

61. *See* See v. City of Seattle, 387 U.S. 541, 546 (1967); Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 540 (1967).

62. *Austin*, 113 S. Ct. at 2804 n.4.

63. *Id.* (citing 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965); Boyd v. United States, 116 U.S. 616, 622 (1886)).

64. *Id.* (citing United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971)). The privilege against self incrimination applies to civil forfeitures even though the Fifth Amendment is textually limited to "criminal case[s]." *Id.*

65. *Id.* (citing United States v. Zucker, 161 U.S. 475, 481 (1896)).

66. *Id.* at 2804 n.4 (citing Lilienthal's Tobacco v. United States, 97 U.S. 237, 271-72 (1878)).

67. *Id.* (citing United States v. Assortment of 89 Firearms, 465 U.S. 354, 357 (1984)).

a punitive function.[68] The Court clearly signalled that, where forfeitures operate as punishment, the Double Jeopardy Clause will apply.[69]

Thus, although forfeitures are civil proceedings, constitutional provisions not clearly limited to criminal prosecutions can and do apply. Moreover, forfeitures are subject to procedural due process limitations which, while not as stringent as Fifth and Sixth Amendment criminal process requirements, can rein in the unfairness of many current forfeiture regimes.

C. *Justifying Forfeiture: Different Property, Different Rationales*

Modern civil asset forfeiture applies to several different kinds of property and rests on a variety of rationales. The three principal forms of forfeitable property are: contraband, which is property that is a harm in itself or illegal to possess; proceeds, which includes property that represents the profits of crime; and instrumentalities, which are properties that are used, or intended for use, to commit or facilitate a crime. When the government confiscates property, it may simultaneously pursue more than one of these forms of assets. For example, when the government seizes an entire business because of drug dealing on the premises, it may be seizing the business as an instrumentality because it was the situs of illegal activity. It may also be seizing business assets as profits of crime if drug money was funneled back into the purchase of business property.

Ordinarily, little controversy surrounds the seizure of contraband. To protect public health and morals, the legislature can identify certain property which, because of public danger or harm, either cannot be possessed at all or possessed only under strict conditions. Contraband can include items such as stolen property, illicit drugs, outlawed guns, or misbranded products.[70] A constitutional issue may arise over whether a legislature may ban simple possession of property which is completely

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68. *Id.* at 2812.

69. *See id.* at 2805-06. Lower courts have responded to this signal and now apply double jeopardy analysis in appropriate cases; *see infra* note 88.

70. *E.g.*, 21 U.S.C. § 334(a) (1988) (applying to any article of food, drug, or cosmetic that is adulterated or misbranded while in interstate commerce or while held for sale); 49 U.S.C. app. §§ 781-782 (1988) (defining the term "contraband article"). The U.S. Supreme Court has defined contraband as "objects the possession of which, without more, constitutes a crime." 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965). The owner has no right to have contraband returned because it is against public policy to permit possession of the items. *Id.*

harmless; such as a spinning wheel.[71] But, as long as there is a rational basis for the law, and as long as the ban on possession does not offend freedom of expression or freedom of religion (by banning, for example, certain symbols such as flags or crucifixes), such laws will survive constitutional challenge.

Seizure of the profits or proceeds of crime is similarly noncontroversial. The idea of depriving a criminal of the profits of his wrongdoing is rooted in equity and is morally compelling. The idea that one should not profit from his own wrong undergirds the familiar equitable rule that a killer cannot inherit from his victim.[72] Particular applications of proceeds forfeiture have, however, raised thorny questions regarding the calculation of proceeds,[73] the idea of "substituted proceeds,"[74] and separating proceeds from legitimate property.[75] One particularly contentious issue has been seizure of proceeds in the hands of third parties, especially proceeds paid to defense lawyers.[76]

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71. Recall, however, that in *Sleeping Beauty*, the king banned all spindles. A witch had prophesied that Sleeping Beauty would be pricked by a spindle and fall into an eternal sleep.

72. *See, e.g.*, GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 478, at 152-54 (2d ed. 1978) (discussing the principle that a killer cannot profit from his crime).

73. *See* United States v. Milicia, 769 F. Supp. 877, 888-90 (E.D. Pa. 1991), *appeal dismissed*, 961 F.2d 1569 (3d Cir. 1992) (calculating a pharmacy's "proceeds" as the total sales of drugs, 90% of which represented the unlawful distribution of controlled substances).

74. *See* KESSLER, *supra* note 1, § 16.02[2], at 16-9 (discussing the New York forfeiture statute, N.Y. CIV. PRAC. L. & R. § 1310 (McKinney 1988), and the concept of which items may be the subject of a forfeiture action).

75. *See* United States v. Pole No. 3172, 852 F.2d 636, 640 (1st Cir. 1988) (holding that, "the government may have an interest equal only to the portion of the property acquitted by [the property owner] as a result of mortgage payments."); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1158-61 (2d Cir. 1986) (explaining how to separate "clean" and "dirty" money commingled in one account and discussing three possible approaches).

76. Caplin & Drysdale v. United States, 491 U.S. 617, 622-23 (1989). The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 301-22, 98 Stat. 1837, 2040-59, makes forfeitable all proceeds and property derived from proceeds that a defendant obtained from racketeering or continuing criminal enterprise drug activities. *Id.* § 302(a)(3). The statute creates a governmental right in such proceeds from the time of the commission of the offense. *Id.* § 302(c). A third person who claims a right in the property that is subject to forfeiture must establish either that she had a superior right in the property before the defendant committed the crime, or that she was a bona fide purchaser for value or bona fide donee, and was at the time of purchase or gift reasonably without cause to believe that the property was subject to forfeiture. 21

The greatest controversy surrounding forfeiture practice is the confiscation of instrumentalities. The historical justification for the seizure of instrumentalities was the idea that the property was "tainted" or "guilty" by virtue of its use in causing harm. But inanimate property—a car, a condo, a farm—cannot be guilty; only people can be guilty. Although everyone now recognizes the idea of guilty property as a fiction, the law still relies on fictions because they serve a purpose.[77] We may appropriately ask, what purpose does the fiction of guilty property serve?

Instrumentality seizures are justified on several grounds. The chief rationale is that they are a means of stripping criminals of the tools of their trade and the infrastructure that allows them to operate criminal businesses or enterprises. Consider the operation of a "chop shop," a garage outfitted to receive stolen autos and break them down into saleable component parts. The garage is made to look like a legitimate business, but the equipment is assembled and used for the illegal activity. Criminal prosecution of the individuals running the shop might end the operation, but forfeiture prevents confederates from simply picking up where the convicts left off. The property, dedicated to a criminal purpose, is taken out of circulation. In this sense, instrumentality forfeiture can resemble contraband forfeiture in that there is seizure of property which has, in effect, become a harm in itself. Property dedicated to criminal purposes can become analogous to a weapon or a public nuisance. Confiscating such property is similar to disarming a criminal.

Other rationales for instrumentality forfeiture are less defensible. A principal aim of instrumentality forfeiture, whether admitted or not, is punishment and deterrence. The punishment is imposed in addition to any criminal penalties and is wholly unrelated to whether criminal charges could be or were brought. For some, the punishment is for engaging in illegal activity. For others, the punishment is for permitting others, or at

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U.S.C. § 853(u)(6) (1988). For commentary on the issue of forfeiture of attorneys' fees, see Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1; Richard W. Mass, Note, *Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of the Crime"?*, 39 STAN. L. REV. 663 (1987); Lisa F. Rackner, Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124 (1986).

77. *See, e.g.*, New York v. Belton, 453 U.S. 454, 460-61 (1981) (permitting a search incident to an arrest to extend to the passenger compartment of a car on the theory that the arrestee might be able to seize a weapon or destroy evidence—even if that is a factual impossibility in the circumstances; the fiction is meant to give the police a generous bright line for applying the doctrine and it avoids the headache of case-by-case determinations).

least not preventing others, from engaging in illegal activity.[78] Like a fine—but more draconian—the sting of forfeiture can be severe and dramatic. Whole parcels of land can be lost because illicit drugs were present on part of the premises.[79] Owners are at peril for huge losses unless they take steps to ensure that their property is not the situs or vehicle for criminality.[80] Landlords, parents, and businesspeople must monitor the behavior of tenants, guests in cars, family members in the home, and anyone who borrows, leases, or otherwise uses their property.[81] If they do not, they may bear a disproportionate share of the cost of society's war on crime.

The principal flaw in using forfeiture as a form of punishment and deterrence is that it has no correlation with culpability, and it has almost no natural boundaries. Almost any punitive action can serve as punishment or deterrence. For example, forfeiture as punishment need not stop at property used or intended for use in crime. It also can support confiscating *all* property of anyone suspected of engaging in criminal activity or who permits another to engage in criminal activity. A punishment rationale can also justify imposing group penalties. Why not punish whole neighborhoods where crime flourishes? Group punishment can be structured to resemble discipline in a military setting, where if one person in the regiment violates a rule, then all or every tenth soldier in the unit is punished. So, too, if there is a certain level of criminal activity in a neighborhood, then every tenth house could be confiscated. This will encourage wrongdoers to desist and lash the neighbors into a more committed monitoring role.

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78. By authorizing the forfeiture of property acquired knowingly from a drug dealer, Congress intended to render drug dealers 'criminal economic pariahs.' Moshe Heching, Note, *Civil Forfeiture and the Innocent Owner Defense:* United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), 16 HARV. J.L. & PUB. POL'Y 835, 846 (1993).

79. *See* United States v. Two Tracts of Real Property, 665 F. Supp. 422, 425-26 (M.D.N.C. 1987) (holding that an entire tract of land is forfeited even though only the house, pool, and driveway had a connection to the illegal drug activity), *aff'd sub nom.* United States v. Reynolds, 856 F.2d 675 (4th Cir. 1988).

80. *See, e.g.*, United States v. 1990 Toyota 4Runner, 9 F.3d 651, 652 (7th Cir. 1993) (upholding forfeiture of a car driven to a meeting where criminal activity was discussed); United States v. 141st St. Corp., 911 F.2d 870, 872-73 (2d Cir. 1990) (upholding forfeiture of a 41-unit apartment building when only 15 units were used for criminal activity), *cert. denied*, 498 U.S. 1109 (1991).

81. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 665-67 (1974) (allowing the forfeiture of a yacht leased to someone who brought marijuana on board); United States v. 5000 Palmetto Drive, 928 F.2d 373, 375 (11th Cir. 1991) (permitting the seizure of a mother's house because her son was selling cocaine from the house); *141st St. Corp.*, 911 F.2d at 872-73.

Because courts have begun to look closely at forfeitures that punish, government lawyers are vigorously pressing the argument that forfeiture is not punitive but "remedial," or restitutionary.[82] That is, because forfeiture is sparked by some underlying criminal activity, seizure of property which facilitated the crime provides a *res* out of which the government can recover its investigation and prosecution costs and society can recover the costs associated with the crime. The idea borrows from the use of a "liquidated damages" justification which permits seizures of property for the payment of customs and tax obligations. It also borrows from administrative assessments for injuries like fraud, environmental damage, and securities laws violations.

But civil asset forfeitures never were intended to serve as a form of restitution nor are they designed to serve that goal. The property owner owes no money or tax obligation. Nor has he been adjudged guilty of a specific administrative violation or assessed a monetary penalty for the actual damage done. Although it may be possible for the government to obtain a judgment for its expenses (as it may or, for example, when it incurs costs to rescue mountain climbers who voluntary assume inordinate risk), and then attach the wrongdoers property, forfeiture does not establish such a framework. In rejecting the remedial justification in a recent drug forfeiture case, the Supreme Court stated:

> The Government's second argument about the remedial nature of this forfeiture is no more persuasive. We previously have upheld the forfeiture of goods involved in customs violations as "a reasonable form of liquidated damages." But the dramatic variations in the value of conveyances and real property under [the drug forfeiture statute] undercut any similar argument with respect to those provisions. The Court made this very point [previously]: the "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the costs of enforcing the law."[83]

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82. *See, e.g.*, Austin v. United States, 113 S. Ct. 2801, 2811 (1993) (explaining that 21 U.S.C. § 881(a)(4) and (a)(7) are not remedial in purpose); *see also Proportionality/Eighth Amendment/Facilitation*, QUICK RELEASE (Asset Forfeiture Office, U.S. Dep't of Justice, Washington, D.C.), June 1993, at 5 ("We believe that in addition to focusing on the question of whether or not there is a 'substantial connection' between the violation and the property, government attorneys should consider whether a particular forfeiture will serve a recognized remedial purpose.").

83. *Austin*, 113 S. Ct. at 2811 (citations omitted). Some courts have endorsed this argument. *E.g.*, *In re* 1632 N. Santa Rita, 801 P.2d 432, 436 (Ariz. Ct. App. 1990) (rejecting claimant's double jeopardy defense).

Perhaps the most troubling justification for instrumentality forfeiture, and perhaps for all forfeitures, is the by-product benefits that law enforcement agencies reap when they keep the property they confiscate. Of course, law enforcement officials never argue that forfeiture should be permitted solely because it provides revenue. The government readily acknowledges, however, that forfeiture revenues are a significant by-product of their seizure programs, and law enforcement trumpets the financial success it has had through forfeiture. The direct monetary benefits have obviously added zeal to efforts to expand the scope of forfeiture and to apply it aggressively.[84]

III. SUBSTANTIVE LEGAL RULES BASED ON REALITY

Once civil forfeiture is seen for what it is and once the government's reasons for using it are set out, it becomes possible to sketch the constitutional rules which should apply to its use.

A. *The Excessive Fines Clause*

The Supreme Court's recent decision in *Austin v. United States*[85] represents an important shift in the Court's thinking about forfeitures. The Court held that instrumentality forfeiture is subject to the Eighth Amendment's limit on excessive fines.[86] The Court's holding rested on

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84. *See* Bendavid, *supra* note 17, at 21-22 (citing critics who say asset forfeiture is conducted to maximize money rather than follow good law enforcement decisions); Randall Osborne, *Police State*, RIVERFRONT TIMES, Dec. 12-18, 1990, at 1. In St. Louis County, the local law enforcement agency seizes cars and then set an amount which, if paid by the owner, would release the property. *Id.* at 10. The process was called "compromise, settlement and release." *Id.* at 11. In St. Louis County, proceeds from drug related seizures increased from less than $1000 in 1983 to more than $250,000 in the first eight months of 1990. *Id.* at 10; *see also* SMITH, *supra* note 46, at 1-21 to 1-24 (detailing several press accounts of aggressive police pursuit of forfeiture's financial rewards).

An example of the direct linkage between law enforcement decisions, the deployment of personnel, and forfeiture assets is found in a memorandum from Acting Deputy Attorney General Edward S.G. Dennis, Jr., to all United States Attorneys. He exhorted them to make all cases "current," i.e., move them to judgment. Further, he stated, "If inadequate forfeiture resources are available to achieve the above goals, you will be expected to divert personnel from other activities or to seek assistance from other U.S. Attorney's Offices, the Criminal Division, and the Executive Office for United States Attorneys." 37 U.S. ATT'YS' BULL. 214 & exh. A (1989).

85. 113 S. Ct. 2801 (1993).

86. *Id.* at 2812; *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

two fundamental propositions. First, as discussed, the Court rejected the idea that the Excessive Fines Clause applies only to criminal cases, continuing its disregard for the criminal/civil distinction when applying constitutional protections not expressly confined to criminal cases.[87] This conclusion squarely subjects forfeitures to the limits of other constitutional provisions not plainly confined to criminal prosecutions, including the Double Jeopardy Clause and Fourth Amendment protections against unreasonable searches and seizures.[88] Second, the Court pierced a central fiction of forfeiture and acknowledged the reality that many forfeitures are forms of punishment and, as punishments, akin to fines,

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87. *Austin*, 113 S. Ct. at 2804.

88. This is good news not only for policing forfeitures but, in general, for freeing constitutional analysis from the distortions of the criminal/civil dichotomy. The question in constitutional analysis must always be the functional one: what actions of government, what harms to individuals are meant to be prohibited? *See* Cheh, *supra* note 54, at 1389-94 (discussing the constitutional provisions applicable to civil cases).

Lower courts now readily entertain double jeopardy defenses in civil forfeiture cases, but they are divided over how precisely to apply the defense. Although there is agreement that a criminal prosecution and civil forfeiture of assets can constitute successive attempts to punish for the same offense, and thus a violation of double jeopardy, there is disagreement over what constitutes single or successive proceedings and what kinds of forfeitures constitute punishment. The United States Court of Appeals for the Ninth Circuit recently held that a criminal prosecution and a parallel civil forfeiture action are "separate" proceedings for successive prosecution purposes and that double jeopardy will bar whichever judgment issues second. United States v. $405,089.23, 33 F.3d 1210, 1218 (9th Cir. 1994). The Second and Eleventh circuits have held, however, that a criminal prosecution and a contemporaneously conducted civil forfeiture action constitute a "single coordinated prosecution" for double jeopardy purposes. United States v. 18755 North Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994); United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993). The Ninth Circuit has also held, contrary to conclusions by other courts, that civil forfeiture of proceeds of narcotics activities under the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 501(a)(6), 84 Stat. 1236, 1270 (codified as amended at 21 U.S.C. § 881(a)(6)) is punishment for double jeopardy purposes. *Compare* United States v. $405,089.23, 33 F.3d 1210, 1220-21 (9th Cir. 1994) (forfeiture of proceeds constitutes punishment) *with* United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994) (forfeiture of illegal drug proceeds does not constitute punishment). There is a growing need to harmonize the welter of double jeopardy rulings involving forfeiture and administrative/regulatory actions—all spawned by the Supreme Court's conclusion in United States v. Halper, 490 U.S. 435, 448-49 (1989)—that double jeopardy applies to civil and criminal proceedings. For example, there appear to be a large number of cases in Arizona, Florida, and Ohio in which defense attorneys have successfully argued, under double jeopardy principles, that a motorist who administratively lost his license for failing an alcohol breath test could not later be criminally prosecuted for drunk driving. James L. Dam, *New Drunk Driving Defense Works in Hundreds of Cases*, LAWS. WKLY. USA, Feb. 27, 1995, at 1.

they can be constitutionally excessive.[89] The Court recognized that forfeitures can serve multiple purposes, but if they serve to punish, even if only in part, they will be judged as punishments.[90]

Regrettably, the *Austin* majority stopped short of spelling out what would be an excessive forfeiture. Richard Austin was convicted of cocaine possession and, thereafter, the United States seized his mobile home and auto body shop.[91] The government considered these properties "instruments" because Austin stored the cocaine in his home and sold it in his body shop.[92] The majority, stating that "[p]rudence dictates that we allow the lower courts to consider [t]he question" of what factors must be weighed to establish excessiveness, declined to say whether, in these circumstances, loss of a mobile home and an entire business was excessive punishment.[93] The Court simply reversed the judgment of forfeiture and remanded the matter to the lower court.

Only Justice Scalia, although agreeing that a remand was in order, attempted to provide some basis for making an excessiveness calculation. Justice Scalia stated that the test should not be the conventional one of comparing the amount of the fine to the nature of the offense.[94] The offense, he said, was not relevant to the forfeiture.[95] The only relevant consideration was the use to which the property was put. That is, since instrumentality forfeiture is based on property being put to an unlawful use, the question has to be "whether the confiscated property has a close enough relationship with the offense."[96] Thus, it would not be excessive to seize scales used to weigh illegal drugs even if the scales were fabulously valuable and the offense was exceedingly minor. It would be excessive, however, to seize a building where an isolated drug sale happened to occur.[97]

Justice Scalia's insight—judging excessiveness by the purpose of forfeiture—is the right approach, but he failed to take his analysis far enough. He thereby failed to appreciate that his own analysis will mean, in fact, that in some cases excessiveness should be judged by comparing the severity of the forfeiture to the offense.

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89. *See Austin*, 113 S. Ct. at 2812.

90. *Id.*

91. *Id.* at 2803.

92. *Id.* at 2811.

93. *Id.* at 2812.

94. *See id.* at 2813 (Scalia, J., concurring in part and concurring in the judgment).

95. *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment).

96. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

97. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

To say that instrumentality forfeiture is designed to confiscate property put to an unlawful use simply describes the property subject to seizure. It establishes the statutory basis for seizure, a necessary prerequisite, but it does not explain what the purpose of seizing that property is. Recall that the government may have multiple objectives for its seizure.[98] The government might seize the property because, as constituted and available to other criminals, it is a harm in itself. Or it might seize the property because it seeks a res out of which to satisfy direct claims from persons harmed by the owner's unlawful conduct or the actual use of the property. Or, as is most likely the case, the seizure is a means to punish the owner for the underlying criminal conduct. And, if the forfeiture is meant to punish the individual for underlying behavior, the excessiveness calculation must compare the degree of punishment, that is, the complete loss of certain property, to the harm done and the level of culpability. In other words, for some forfeitures, excessiveness will in fact be an assessment of the "fine" in relation to the offense.

To prevail against a claim of excessiveness, the government has, in fact, a two-step burden. First, as Justice Scalia implicitly understood, it must prove a clear and direct statutory basis for its forfeiture.[99] Is the seized property contraband, proceeds, or instrumentalities? In each kind of case, the evidence must show that the property was, in fact, of the character identified. For instrumentalities, this will require a showing—recognized by Justice Scalia—that the property was closely and directly connected to criminal activity.[100] This can be expressed most forcefully by requiring the property to be "integral" to the crime.[101] It should also mean that seized property be limited to that which meets the definition—only that portion of the property in fact found to be integral to the crime. This would invalidate, for example, forfeitures of entire tracts of land where criminal activity was carried out on a discrete and severable part.[102]

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98. *See supra* Part I.

99. *See Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment).

100. *See id.* (Scalia, J., concurring in part and concurring in the judgment). Such a showing is initially statutory but the tightness of the connection is mandated by the requirements of due process of law.

101. Some courts have specifically rejected an "integral" or "necessary" tie. *E.g.*, United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990) (allowing forfeiture of dental office used to write illegal prescriptions on more than 40 occasions in four months even though the offense also was committed elsewhere).

102. *See supra* notes 78-80 and accompanying text. Due process protections should be applied to require that statutory language be strictly construed and that the nature of the property seized be strictly limited to that actually tied to criminality. Such an

If the government can survive the first burden, it then faces a second. The amount of property seized must be consonant with and proportionate to the purpose of the seizure. Initially it must be determined whether the purpose is remedial or punitive. Strictly limited seizures of contraband and proceeds are, by definition, remedial.[103] And remedial seizures are by definition not excessive. For these seizures step one and step two may collapse into each other. Again, this is Justice Scalia's approach, but he failed to account for different rationales of property seizures. Seizures of instrumentalities, however, can be remedial or punitive. To be remedial, the seizure must confiscate property which is a harm in itself. Such property is specially dedicated to criminal uses and, unless seized and destroyed or sold, lies around like a loaded weapon for confederates to pick up and use again for criminal purposes. An example might be a concrete business that rigs bids, buys off officials and corruptly controls its union workers, in other words, an enterprise constructed and operated on principles of criminal behavior.

Getting at such property was the original aim and indeed the genius of modern forfeiture laws. But allegations cannot substitute for proof, and the government must be pressed to show that this is the true nature of the property it has seized.[104] A generalized claim that seizure of facilitation

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approach would have reversed a Fourth Circuit ruling that an entire 26-acre property bisected by a road and taxed as two separate parcels was forfeitable when small drug sales were effected on only the five-acre portion where a house, barn, and other buildings were located. *See* United States v. Santoro, 866 F.2d 1538, 1542-43 (4th Cir. 1989).

103. *Austin*, 113 S. Ct. at 2811; United States v. $21,282, No. 94-1122, 1995 WL 59690, at *1 (8th Cir. Feb. 15, 1995) ("The forfeiture of proceeds of criminal activity which 'simply parts the owner from the fruits of the criminal activity' does not constitute punishment and thus does not implicate the Eighth Amendment.") (quoting United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994)); *see* United States v. Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (discussing how Congress designed forfeiture under 18 U.S.C. § 924(d) as a remedial sanction). Of course, courts should look closely to see that the government is, in fact, limiting its seizure to contraband or proceeds. When a statute defines "proceeds" broadly to include, for example, all money "furnished or intended to be furnished by any person in exchange for a controlled substance" or "any money used or intended to be used to facilitate a violation" or any property "involved in" any illegal money laundering transaction, potential forfeitures might easily encompass more than the profits of crime. *See* 18 U.S.C. § 981(a)(1)(A); 21 U.S.C. § 881(a)(6); United States v. $405,089.23, 33 F.3d 1210, 1221-22 (9th Cir. 1994) (concluding that forfeitures under such broadly written statutes necessarily constituted punishment and not simply the remedial recovery of proceeds).

104. One commentator suggests that the test for what constitutes contraband per se ought to be whether the property is such that it must be destroyed to prevent harm. *See* Tamara R. Piety, Note, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 949 n.186 (1991).

property is akin to remedial seizures of contraband will not be enough. The Supreme Court specifically rejected the government's efforts to seize an individual's home and business as a form of instrumentality contraband because drugs were stored and sold there.[105] The government argued that it had to seize the property to "remove the 'instruments' of the drug trade 'thereby protecting the community from the threat of continued drug dealing.'"[106] The Court dismissed the argument saying,

> Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. In that case it noted: "There is nothing even remotely criminal in possessing an automobile." The same, without question, is true of the properties involved here, and the Government's attempt to characterize these properties as "instruments" of the drug trade must meet the same fate . . . .[107]

Other seizures of instrumentalities are species of punishment. When the drug seller loses his condo, he is being punished for his behavior, or when the landlord loses his building, he is being punished for looking the other way and permitting crime to occur. In such cases, excessiveness must be assessed in relationship to the level and degree of culpability, the duration of the wrongdoing, and the harm that resulted.[108]

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105. *Austin*, 113 S. Ct. at 2801.

106. *Id.* at 2811 (quoting the government's brief).

107. *Id.* (quoting 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)) (citations omitted).

108. Lower courts have identified a variety of excessiveness factors such as monetary value of property, extent of criminal activity, fact that property was a residence, effect of forfeiture on innocent occupants. *E.g.*, United States v. 9638 Chicago Heights, 27 F.3d 327, 331 (8th Cir. 1994). Courts appear divided over the relevance of a proportionality test that would compare the value of the property forfeited to the seriousness of the underlying crime. *See, e.g.*, United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994) (rejecting the test but citing cases approving it). The *Chandler* court summarized its approach as a three-part test:

> [I]n determining excessiveness of an in rem forfeiture under the Eighth Amendment . . . a court must apply a three part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense [a variation of this article's separate step one], (2) the role and culpability of the owner [a variation of this article's separate step two], and (3) the possibility of separating offending property that can readily be separated from the remainder [a variation of this article's

On such an analysis, the forfeiture of the yacht in *Calero-Toledo v. Pearson Yacht Leasing Co.*[109] was excessive. Government authorities seized a vessel which had been leased to users who brought a minute quantity of marijuana on board. The corporate owner knew nothing of the drugs and simply leased the yacht in the same commercially reasonable way it had acted in the past.[110] The yacht was seized as an instrumentality, but it was neither integral to the crime nor was the punishment visited upon the corportate owner proportionate to its culpability, the duration of wrongdoing, or the harm done.

B. *Substantive Due Process*

Substantive due process analysis ordinarily proceeds along two tracks. Almost all laws touching social and economic matters are judged under a lenient rational-basis test, while laws that interfere with certain intimate and personal rights, such as child rearing, marriage and divorce, and use of contraceptives, are judged under a vigorous strict-scrutiny test.[111] The rational basis test is easily satisfied. Ordinary social and economic regulation is presumed constitutional, and so long as the law serves any permissible police power objective, it will be upheld.[112] Legislatures are free to decide, without court interference, how they will tax, regulate, and control behavior.

In contrast, strict scrutiny review requires the government to show a substantial justification for its action and to prove that the law is narrowly tailored to achieve the government's objectives without unnecessary

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separate step one].

Id. at 364.

109. 416 U.S. 663 (1974).

110. *Id.* at 692-93 (Douglas, J., dissenting in part).

111. This strict dichotomy appears to be collapsing in certain areas, such as in cases involving the right of certain individuals to refuse treatment. *See, e.g.*, Washington v. Harper, 110 S. Ct. 1028, 1037 (1990) (applying a standard of reasonableness to a state's requirement that an inmate be treated with antipsychotic drugs against his will).

112. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (concluding that "the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting"); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) (stating that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

interference with personal rights.[113] The rationale for this heightened judicial review flows principally from the idea that there are certain choices which are so personal, so within a constitutionally implied and specially protected sphere of privacy, that interference warrants elevated justification.[114]

Given this dichotomy, and given that civil forfeiture affects not personal privacy but economic and property rights, rare is the litigant who bothers to raise a substantive due process challenge to a civil forfeiture law. But, in certain circumstances, some forfeitures can apply so disproportionately or so unreasonably that they may fail even the frail rational basis test. More fundamentally, because forfeitures affect the interests of property owners in a unique—and uniquely severe—way, courts should stiffen the legislative justification for their use.

As to irrationality, the Court has never held that due process is violated simply because the government confiscates the property of persons innocent of any wrongdoing. Depending on the nature of the property seized and the reason for seizing it, innocent owner forfeitures can be quite rational. For example, if the government is seizing contraband, it should be irrelevant that the owner is "innocent" because contraband, by definition, may not be owned or possessed. Forfeitures applied to innocent owners also are rational if the property is proceeds or profits of a crime. As between the harm to the innocent party and closing off avenues for criminals to launder their profits, a legislature may choose, reasonably, to close off opportunities for the wrongdoers. The legislature may conclude that third parties are frequently in a position to consider whether the property they receive is the product of criminal activity.[115] In this regard the Supreme Court has turned aside arguments that due process prevents forfeiture of attorney's fees as traceable proceeds of crime.[116]

Yet forfeitures divesting innocent owners of property used or intended to be used in the commission of a crime, that is, instrumentality forfeiture, may be irrational. The Supreme Court acknowledged this possibility in

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113. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 371 (4th ed. 1991) ("a law or classification that impairs a fundamental right is subject to 'strict scrutiny' and . . . the law, or classification, must be necessary or narrowly tailored to promote a compelling or overriding interest").

114. *See id.*

115. *E.g.*, United States v. 3100 N.E. 48th St., Unit 618, 871 F. Supp. 437, 443 (S.D. Fla. 1994) (holding that, to prove innocent ownership, the bail bond company must show it conducted a reasonable investigation into the forfeitability of the defendant's property).

116. *See* Caplin & Drysdale v. United States, 491 U.S. 617, 622-23 (1989).

the *Calero-Toledo* yacht seizure case.[117] Again, the yacht owner had no complicity in and no knowledge about the lessee's possession of a small amount of marijuana. Indeed, it did not even know the yacht had been confiscated until it attempted repossession after the lessees failed to pay the agreed upon rent.[118] The *Calero-Toledo* Court stated that forfeitures serve punitive and deterrent purposes and that confiscation of property from "innocent" owners "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[119] Yet the Court also said that confiscation applied to "true innocents" would go too far:

> [I]t would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the prosecuted use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.[120]

The Court voiced this same concern for the "truly innocent owner" in *Austin v. United States*.[121] But the Court's recognition that, theoretically, some forfeitures of innocent owner property can be so arbitrary as to violate due process has had little practical significance. There are two principal explanations for this fact. First, many statutes, including the drug forfeiture statute at issue in *Austin*, exempt innocent owners.[122] Second, courts have interpreted innocent owner defenses very narrowly.[123] The owner must do all he reasonably can to prevent

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117. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685 (1974) (discussing the possible severity of applying instrumentality forfeitures).

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

119. *Id.* at 688.

120. *Id.* at 689-90 (footnote omitted).

121. 113 S. Ct. 2801, 2809 (1993) (explaining how the Court has considered whether the forfeiture of a truly innocent owner's property would comport with due process, but reserved the question because the forfeiture provision exempted innocent owners).

122. *See, e.g.*, 21 U.S.C. § 881(a)(4), (7) (1988) (indicating that exceptions under the statute exist for innocent owners when a criminal act was "committed or ommitted without the knowledge, consent, or willful blindness of the owner").

123. *See, e.g.*, United States v. Mercedes Benz 450 SEL, 657 F. Supp. 316, 319 (E.D. Mo. 1987) (holding that the innocent owner exception fails where the defendant has not done "all that could reasonably be expected to prevent the proscribed use of the . . . vehicle"); *see also* Michael Schecter, *Fear and Loathing and the Forfeiture Laws*,

unlawful use of property and show, in effect, that he was powerless to prevent the misuse of his property. Since it is virtually impossible to prove that you could not have been a bit more cautious and attentive, the defense can be quite hollow.

But forfeitures, because of their very nature, should have to jump a higher hurdle than rationality. Recall that property seizures are not just interferences with mere economic rights, and not mere regulations affecting how we use our property or conduct our business affairs. Forfeiture is the actual physical appropriation of property. The owner is denied all right and title. His interests are expunged. Even in the area of taxation, where extremely burdensome taxation is routinely upheld under a rational basis review, the Court has signalled that taxation intended as total confiscation of property will be looked at more critically.[124]

This total annihilation of interest, this expropriation, is precisely the harm which inspired the Takings/Just Compensation Clause, and it is appropriate to turn to that clause for guidance. Under takings doctrine a physical taking of real property, even if minor, must be compensated.[125] The legislature cannot avoid paying compensation by claiming that the property is essential to obtain a public benefit or that it must be acquired to prevent a public harm.[126] The rule is the same with so-called regulatory takings which deprive an owner of all economically beneficial use of his property. In its recent decision in *Lucas v. South Carolina Coastal Council*,[127] the Supreme Court explained that a legislature

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75 CORNELL L. REV. 1151, 1180 (1990) (noting that, because of the narrowness of the innocent owner defenses, they are rarely applicable and are insufficient to remedy the harshness of forfeiture laws) (citing United States v. Mercedes Benz 380 SEL, 604 F. Supp. 1307 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985).

124. *See, e.g.*, City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974). The Court upheld a 20% gross receipts tax on garages even though the measure was extremely burdensome and operated to give a competitive advantage to public garages which were not subject to the tax. *Id.* at 374-75. The Court said that tax laws do not violate due process of law even if they render a business unprofitable and even if they are "so excessive as to bring about the destruction of a particular business." *Id.* at 374. Yet the Court went on to add that it would react differently if the tax was in reality a confiscation of a business, that is, if the law was "'so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.'" *Id.* at 375 (quoting Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934)) (footnote omitted).

125. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 441 (1982) (stating that, in the case of a taking, "the property owner retains a historically rooted expectation of compensation . . .").

126. *Id.* at 426.

127. 112 S. Ct. 2886 (1992).

cannot sidestep the takings consequences of confiscatory land regulation by simply decreeing that such regulation was necessary to prevent harmful use of the property.[128] When regulation forces a property owner to sacrifice all economically beneficial uses of his property, the only way a state can avoid compensation is by showing, in effect, that the prohibited use could have been enjoined as a nuisance under existing state law.[129]

Such solicitude for real property ownership suggests that it is appropriate for courts to examine critically any government action which expropriates property. Critical examination requires invalidation unless the government's program substantially advances important state interests. Yet solicitude for the protection of real property seems to vanish when the government acts under forfeiture laws. Why? Presumably the result in *Lucas* should be the same even if the government styled its regulation as a forfeiture. Otherwise, South Carolina could pass a statute making it unlawful for any owner of parcels in "critical areas" of designated coastal zones to permit their property to degrade or suffer erosion. The law would provide that violation of the statute would result in forfeiture. If this were permitted, South Carolina could have deprived Mr. Lucas of his land more effectively than just telling him he could not build on it.

The chief obstacle to convincing courts to abandon their usual deference to statutory authorized forfeiture is history. Forfeitures have been permitted for more than 200 years, dating back to the beginning of the republic and existing well before that. The Supreme Court canvassed this history in both *Calero-Toledo*[130] and *Austin*.[131] As the Court explained, three kinds of forfeiture existed in England at the time the Constitution was adopted: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture.[132] Deodand was forfeiture of objects causing death, perhaps for retribution, superstition, religious reasons, or because some fault needed expiation.[133] In biblical times, the offending

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128. *Id.* at 2899.

129. *See id.* ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

130. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974).

131. *See Austin*, 113 S. Ct. 2801, 2806-08 (1993).

132. *Id.* at 2806.

133. *See id.*; *Calero-Toledo*, 416 U.S. at 680-81.

item—the ox that gored a man—was destroyed.[134] Later, in England, the item was forfeit to the Crown, and forfeitures became a source of government revenues.[135] Forfeitures for conviction of a crime were a form of punishment of traitors and felons, and all of the offender's property was confiscated. Neither deodand nor criminal forfeiture of estate took hold in the United States.[136]

The third form of forfeiture, statutory forfeiture, did take root in the United States. "English law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws."[137] Although these early laws were "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,"[138] the rationale of customs and tax laws, particularly in admiralty, frequently was expressed in terms of giving jurisdiction over a res (out of which payment could be extracted) and providing a kind of liquidated damages for evasion of duties or other harms such as piracy.[139]

Is this history conclusive of the validity of forfeiture and does it preclude courts from giving modern forfeiture a close look? The Supreme Court seemed to think so in the *Calero-Toledo* yacht forfeiture case. Recall that the yacht's owner had no prior notice of the seizure and no involvement with the illegal drugs found on board. Writing for the Court, Justice Brennan rejected the owner's constitutional claim that the summary, no-notice seizure violated procedural due process and its claim that seizure of property of an innocent owner was a taking without compensation and a violation of due process of law.[140] Justice Brennan turned aside the taking argument with a historical analysis. He pointed to a "long line of prior decisions of this Court" as permitting the seizure of property of innocent owners, discussed a number of them, and portrayed

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134. *See Exodus* 21:28 (King James) ("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; but the owner of the ox *shall be* quit."); *see also* Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C. L. REV. 57, 63 (1983); Schwarcz & Rothman, *supra* note 29, at 290.

135. Schwarcz & Rothman, *supra* note 29, at 290.

136. *See* U.S. CONST. art. III, § 3, cl. 2 (prohibiting forfeiture of estate as a punishment for treason "except during the Life of the Person attained"); Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 (abolishing forfeiture of estate for felonies).

137. *Calero-Toledo*, 416 U.S. at 682.

138. *Id.*

139. Piety, *supra* note 104, at 954-55.

140. *Calero-Toledo*, 416 U.S. at 679-80.

the historical background as dispositive.[141] But just as *Calero-Toledo* now appears vulnerable to an excessive fines analysis, so, too, its unblinking reliance on history is open to challenge.

First, courts in other contexts have said that an unbroken history of injustice does not necessarily validate behavior. In a variety of circumstances the Court has said that analysis of constitutional rights does not end with the observation that particular government practices have been going on for a long time or that they have become familiar. Rather, the Court should ascertain which values underlie certain constitutional protections and ask whether current practices do and may legitimately intrude upon those values. Again, the reality is that forfeiture applies harshly and oppressively in some circumstances. It sweeps in, without differentiation, property directly causing harm with property tangentially connected to criminality. It sweeps in persons committing criminal acts and the merely negligent or inattentive. Forfeiture, no matter if historically rubberstamped by courts, should be seen for what it is and judged under modern conceptions of due process.

This is, in effect, what the Court concluded in *United States v. James Daniel Good Real Property*,[142] in which a slim majority held that, absent exigent circumstances, seizure of real property requires prior notice and an opportunity to be heard.[143] Even Justice O'Connor, writing separately to say that a seizure under warrant conveyed all of the due process the property owner was entitled to, observed that the modern procedural due process calculus governs forfeiture "notwithstanding its historical pedigree."[144] A fresh look at the reality of forfeiture and

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141. *Id.* at 680. The precedents Justice Brennan discussed were Van Oster v. Kansas, 272 U.S. 465 (1926) (upholding a forfeiture under state law of an innocent owner's interest in an automobile); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921) (holding that a forfeiture statute depriving an innocent owner of his property did not violate the Fifth Amendment); Dobbins's Distillery v. United States, 96 U.S. 395 (1878) (rejecting assertions of innocence as a defense to a forfeiture of property); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) (holding that a conviction was not a prerequisite to a proceeding to forfeit property).

142. 114 S. Ct. 492 (1993).

143. *Id.* at 505.

144. *Id.* at 513 (O'Connor, J., concurring in part and dissenting in part). In a separate opinion, however, Justice Rehnquist held fast to the historical line. *See id.* at 507-11 (Rehnquist, C.J., concurring in part and dissenting in part). He criticized the majority's review of forfeiture under Mathews v. Eldridge, 424 U.S. 319 (1976), saying the decision "departs from long standing historical precedent," and that it "casts doubts upon long settled law relating to seizure of property to enforce income tax liability." *Good*, 114 S. Ct. at 507 (Rehnquist, C.J., concurring in part and dissenting in part). He called the majority's conclusions "ill-considered" and "disruptive." *Id.* at 507 (Rehnquist, C.J., concurring in part and dissenting in part).

judging it by a contemporary understanding of constitutional law also underlies the requiem for the fiction of "guilty property" in *Austin*.

But the notion that history settles the issue of court deference to forfeitures is debatable on other grounds as well. Justice Thomas suggested one such ground in his separate opinion in *Good*.[145] He observed that modern civil forfeiture is a creature different not just in degree but in kind from historical forfeiture. Although he, like Justice O'Connor, believed that procedural due process was accorded in the particular case, he added the following caution:

> And like the majority, I am disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense. . . . [S]ince the Civil War we have upheld statutes allowing for the civil forfeiture of real property. A strong argument can be made, however, that § 881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents.[146]

Justice Thomas continued by saying that because current practice is so far removed from its historical roots, "it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."[147]

Finally, the history of forfeiture might be read to support, or at least not to contradict, an active review by the courts. That is, when closely examined, court deference to early forfeiture might be explained by the obvious substantiality (if not the precise tailoring) of the government's interests. The government plainly has a substantial interest in the seizure of contraband and in preventing the circulation of forbidden items.[148] So, too, it clearly has a substantial interest in the efficient enforcement of its tariff and trade laws and the collection of taxes and duties. Forfeiture in its earliest applications was associated primarily with admiralty and the need to proceed against vessels as a means of acquiring jurisdiction and attaching property for the satisfaction and payment of fines. Although one

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145. *Id.* at 515-17 (Thomas, J., concurring in part and dissenting in part).

146. *Id.* at 515 (Thomas, J., concurring in part and dissenting in part) (footnote omitted).

147. *Id.* (Thomas, J., concurring in part and dissenting in part) (footnote omitted).

148. *See, e.g.*, United States v. Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) ("[K]eeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive.").

can easily over-rationalize the welter of forfeiture laws, there is a basis to view early manifestations as resting on demonstrated need.

What if courts applied a form of heightened review to forfeiture? What might the results be? Forfeitures would then be subject to close and careful scrutiny. They would be allowed only when the government established that the forfeiture was carefully tailored to serve substantial state purposes. Those purposes, as we have seen, relate to seizure of contraband, seizure of proceeds, and seizure of property used in crime either because it is a harm in itself or because it operates to punish the property owner.[149]

A heightened due process analysis would have three components. First, courts would strictly construe statutory bases for seizure and require, as some now do, that the statutory basis for forfeiture be clearly established.[150] Seizure would be limited to property clearly identified as contraband, proceeds, or the integral instruments of crime. Laws designed to confiscate the instruments of crime would be limited to property substantially connected to the illegal activity. Broad-based facilitation theories permitting seizure of property only remotely connected to criminality would be rejected. Such an approach would doom, for example, seizures of entire buildings, parcels of land, and businesses where criminal activities occurred or contraband was found on only part of the premises, or where the property was incidental to the occurrence of the illegal activities. It also would invalidate, for example, the seizures of entire farms including equipment and horses because the entire operation gave an air of legitimacy to the criminal activities taking place there.[151] Particularly close scrutiny would apply to seizures of real estate and houses because of the special solicitude the law shows toward

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149. *See supra* Part II.C.

150. *See, e.g.*, United States v. 28 Emery St., 914 F.2d 1, 3-4 (1st Cir. 1990) (requiring a "substantial connection" between the property forfeited and the illegal activity). However, such courts then apply the test to a broadly construed legislative facilitation theory: "any property involved in illegal activity in a way which facilitates that activity is forfeitable." United States v. $477,048.62, 754 F. Supp. 1467, 1473 (D. Haw. 1991).

151. *See, e.g.*, United States v. Rivera, 884 F.2d 544, 546 (holding that 27 quarter horses were forfeitable because they lent an air of legitimacy to a horse farm used as a site for drug dealing; the "cover" facilitated the illegal activity), *reh'g denied*, 889 F.2d 276 (11th Cir. 1989), *cert. denied*, 494 U.S. 1018 (1990). In addition, other cases would have to be reconsidered. *See, e.g.*, United States v. 1977 Lincoln Mark V. Coupe, 643 F.2d 154, 157 (3d Cir.), *cert. denied*, 454 U.S. 818 (1981) (holding a car forfeitable when its hood was raised and the scene served to deflect suspicion about the defendant's activities); *$477,048.62*, 754 F. Supp. at 1472 (asserting that the entire bank account was forfeitable because the legal money gave an air of legitimacy and "cover" to laundering of the illegal money).

such property and because "an individual's expectation of privacy and freedom from governmental intrusion in the home merits special constitutional protection."[152]

The second component of a heightened due process scrutiny would complement the Eighth Amendment's protection against excessive fines. As would be the case with an excessive fines analysis, the government would be required to establish that particular seizures substantially served the purposes of forfeiture law.[153]

Finally, a heightened substantive due process test would merge with heightened procedural due process requirements.[154] That is, the government would bear the burden of clearly proving both the statutory basis for its forfeiture and a substantial connection between the property forfeited and the purposes of the law.[155]

IV. PROCEDURAL RULES BASED ON REALITY

A. *Procedural Due Process*

In its recent decision in *United States v. James Daniel Good Real Property*,[156] the Supreme Court held that forfeitures of property must comply with procedural due process.[157] Specifically, the Court concluded that, absent exigent circumstances, the due process clause requires the government to afford notice and a meaningful opportunity to

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152. United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1264 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990).

153. *See supra* text accompanying notes 98-110.

154. *See infra* text accompanying notes 156-60.

155. Again, the continued vitality of the *Calero-Toledo* yacht case under either due process or excessive fines scrutiny is doubtful. The yacht was not truly an instrument of crime, only a convenient place for using drugs. The amount forfeited, the entire yacht, was stunningly disproportionate to any culpability or inattention of the owners or to any harm caused. *See Calero-Toledo*, 416 U.S. at 665.

156. 114 S. Ct. 492 (1993).

157. The Court specifically rejected the government's argument that forfeitures need only comply with the requirements of the Fourth Amendment. *Id.* at 500. Although the Court affirmed the idea that the Fourth Amendment is a limitation on forfeiture proceedings, it noted that the application of one constitutional provision to government action does not preclude the applicability of another. *See id.* With forfeitures, the Court noted, "the purpose and effect of the government's action in the present case go beyond the traditional meaning of search or seizure. Here, the government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself." *Id.*

be heard before seizing real property.[158] In so concluding, the Court applied the now-familiar interest balancing approach of *Mathews v. Eldridge*:[159]

> The *Mathews* analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose.[160]

Measuring the significance of the *Good* decision is a puzzle. On the one hand, the Court disregarded the relevance of a long history of judicial acceptance of summary *in rem* proceedings. It thereby opened the door to judging all forfeiture procedures under the modern due process calculus. It applied its prior notice and hearing rules to all real property, not just to houses or homes.

On the other hand, the actual protection extended to property owners was quite modest. Prior notice and opportunity to be heard applies only to real property. All other property, the Court readily concluded, is automatically covered by the seize-first-answer-questions-later approach of forfeiture.[161] And in the very same opinion expanding the reach of due process protections, albeit modestly, the Court refused to dismiss the forfeiture action because the government failed to comply with internal statutory notification and reporting requirements.[162] If an action is filed within the statutory five-year limitations period, as the case in *Good* barely was, the Court will not imply a dismissal remedy from rules designed to guide the internal discretion of government employees.[163] Although this result was unremarkable by itself, the Court gave no signal that it was troubled by the overall operation of forfeiture proceedings nor that it was poised to reexamine the entire procedural construct of forfeitures.

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158. *Id.* at 505.

159. 424 U.S. 319 (1976).

160. *Good*, 114 S. Ct. at 501.

161. *See id.* The Court stated: "[W]e tolerate some exceptions to the general rule requiring predeprivation notice . . . ." *Id.* However, the Court would not include real property within these exceptions: "Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance. . . . The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment." *Id.*

162. *Id.* at 507.

163. *Id.*

Were it to do so, the prime candidate for reconsideration would be the burden of proof and the shifting of the burden of persuasion to the property owner in forfeiture hearings. In federal and many state forfeiture proceedings, the government can seize property when it has probable cause to believe that the property was used or intended to be used to commit crime. The property owner must then, usually within a stunningly short period of time (ten to twenty days) file a notice that he wishes to contest the forfeiture. At a hearing on the matter, the property owner (or any other claimant of rights in the property) must shoulder the burden of persuasion. He must prove by a preponderance of the evidence either that the property was not contraband, proceeds, or the instrument of crime or, as to proceeds and instrumentalities, that he gave value for the property or was innocent of permitting it to be used for criminal ends.[164]

Forfeiture claimants have occasionally complained that the shift in the burden of proof in forfeiture proceedings, at odds with ordinary civil practice, is unfair and violates procedural due process.[165] The courts have routinely shrugged off these objections, citing statutory authority and long historical acceptance of the burden-shifting approach.[166] But if, as *Good* indicates, history is no longer determinative and the interest balancing of *Mathews* is the guide, the matter is open for reexamination.

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164. The Supreme Court recently curtailed the "relation back" doctrine and interpreted the statutory class of innocent owners to include all persons who acquired a bona fide interest in property before seizure. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1134 (1993).

165. *See, e.g.*, United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1267-68 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d Cir. 1990) (rejecting appellant's argument that the shifting of the burden of proof bypasses the safeguards of procedural rights present at the trial pertaining to the ultimate issue of guilt or innocence); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162-63 (2d Cir. 1986) (rejecting appellants' contention that due process requires an "immediate post-seizure probable cause hearing in advance of the forfeiture trial"); United States v. $2500, 689 F.2d 10, 12 (2d Cir. 1982), (rejecting appellant's argument that shifting the burden of proof violates due process and constitutes criminal punishment), *cert. denied*, 465 U.S. 1099, *reh'g denied*, 466 U.S. 994 (1984).

166. *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (indicating that acceptance of the burden shifting approach is too "firmly fixed" in this country's jurisprudence to now be displaced); *4492 S. Livonia Rd.*, 889 F.2d at 1267-68 (rejecting appellant's argument that the absence of procedural safeguards—such as the government's burden of proving guilt beyond a reasonable doubt—in civil forfeiture proceedings requires the government to establish probable cause on the basis of admissible evidence); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989) (declining to hold that burden shifting violates due process because other circuits reached the same conclusion); *see also* Reed & Gill, *supra* note 134, at 87-92 (discussing the different standards for the government's burden of proof in forfeiture cases, and arguing that a clear and convincing standard is the most appropriate).

Whether burden-shifting (and the standard of proof) raises a serious due process issue depends on the parties' respective interests, the chance of error, and who should bear the risk of a mistake being made. In litigation between private parties, the custom is to allocate the burden to the moving party on the theory that he is challenging the status quo. But, as the Supreme Court concluded in a recent case, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*,[167] ordinarily the allocation "does not raise an issue of due process."[168]

Concrete Pipe involved a business dispute in which an employer challenged the amount of its statutory liability for withdrawing from a multi-employer pension fund. Under the relevant statute, a trustee for the pension fund, relying on the calculations of a professional actuary, calculated the withdrawing employer's share of the plan's unfunded vested benefits.[169] The employer then shouldered the burden of proving the assessment was unreasonable. The Court saw the stakes in such a scheme to be quite modest. The employer's burden was only to "show that the combination of methods and assumptions employed . . . would not have been acceptable to a reasonable actuary."[170] Indeed, the fight between the parties was even narrower, because actuaries are constrained by professional norms and standards and, therefore, the issue was reduced to whether the actuary did or did not follow accepted practices.[171] "[A]t least where the interests at stake are no more substantial than . . . here" the court said, due process was not offended by saddling the employer with the burden of persuasion.[172]

The due process calculation can change, however, when the stakes are higher and, when, because the nature of the proofs is more open-ended and complex, the risk of an inaccurate determination grows. In *United States v. Salerno*,[173] for example, the fact that the government provided extensive procedural safeguards—including allocation of the burden to the government and proof by clear and convincing evidence—was critical to the Court's conclusion that preventative detention laws were

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167. 113 S. Ct. 2264 (1993).

168. *Id.* at 2286.

169. *See id.* at 2272-73.

170. *Id.* at 2286.

171. *See id.* at 2272-73 (discussing the methods and standards which must be employed by actuaries).

172. *Id.* at 2286.

173. 481 U.S. 739 (1987).

constitutional.[174] At stake was personal liberty and the outcome turned on proof of future dangerousness, a slippery fact to establish.

The interests at stake in a forfeiture proceeding lie somewhere between a narrow commercial dispute and the loss of personal liberty. Superficially, one factor supporting shifting the burden to the property owner is the rule that the party in the best position to know the facts should be required to prove them. The property owner seems best situated to prove that the property was not used in a criminal endeavor, or that the property owner did not have any knowledge of the nature of the property or how it was used. But a fuller appreciation of the realities of a forfeiture proceeding suggests that the due process calibration may require the government to prove improper use and lack of innocence.

The reality of forfeiture is that it is tied to criminal law violations. The property owner effectively stands accused of either criminality outright or indifference to it. The property owner thus risks the stigma associated with engaging in or being connected to criminal activity. Moreover, if the property owner is, in fact, implicated in criminality, defense of one's property may require the sacrifice of the privilege against self-incrimination. A property owner who invokes the privilege in a forfeiture proceeding loses the beneficial use of the privileged evidence.[175] Moreover, the factfinder may draw an adverse inference from a party's refusal to testify on Fifth Amendment grounds.[176]

The property owner also risks interests more important than mere commercial obligations. Property is being taken and all rights to it are lost. The property frequently includes real property and an individual's home. As the Court has stated: the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance."[177] And, although the government cannot finally extinguish one's rights in property absent an initial showing of probable cause, the reality is that the case is decided once the seizure takes place. Most people do not contest the forfeiture of

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174. *Id.* at 755.

175. *See, e.g.*, SEC v. Cymaticolor Corp., 106 F.R.D. 545, 549 (S.D.N.Y. 1985) (rejecting the contention that privileged evidence should not be precluded since it would not result in any surprise at trial); Duffy v. Currier, 291 F. Supp. 810, 815 (D. Minn. 1968) (holding that a defendant is entitled to invoke the privilege against self-incrimination, but must accept its effect on the pending civil action).

176. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). A property owner who fails to invoke the privilege will lose it as waived, and the waiver will extend not just to the civil proceeding but to any later criminal case. United States v. Kordel, 397 U.S. 1, 10 (1970).

177. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 501 (1993).

their property. Perhaps this is because most such property owners are guilty of using the property in illegal ways and sense futility, but many may be deterred by the lopsided procedural advantages currently enjoyed by the government. The property owner may make a base line cost-benefit calculation that, given the odds, the property may not be worth efforts to recover it.[178]

It becomes particularly important to put the government to its proofs if substantive due process and the protection against excessive fines are to be effectively applied. Substantive due process and avoiding excessive fines require the government to demonstrate a strong justification for

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178. In testimony before Congress, Elvin L. Martinez, a Florida State Representative, described the plight of the property owner who is stopped by police and has his property seized:

> I have heard much testimony in my role as chairman of the committee that innocent citizens are being stopped on highways based upon a so-called "drug smuggler's profile." The vast majority of these citizens are either Hispanic or Black.
>
> More often than not these individuals are being stopped on the pretext of having committed some minor traffic offense; the kind of offense which would ordinarily go unnoticed by the officer and for which motorists are rarely ticketed. Once stopped, these citizens are being stripped of their property based upon determinations of probable cause that frequently would not withstand judicial scrutiny. Please note that, because forfeiture is civil in nature, the standards for determining probable cause are much lower than they would be in a criminal proceeding. These citizens are being denied the procedural safeguards that we have come to expect as citizens of a democracy, where innocence is still the presumption.
>
> Because of the high cost of contesting seizures or because of the time constraints involved (a significant number of these persons reside in other states and do not have the resources to wait out these legal highwaymen), these citizens are being coerced into accepting lopsided settlements which result in financial windfalls to law enforcement agencies at the expense of persons whose only crime is traveling on the nation's highways. Moreover, the procedures for securing the return of seized property are unduly burdensome, and often result in waste to non-monetary assets.

Dept. of Justice Asset Forfeiture Program: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 102d Cong., 2d Sess. 102-03 (1992) (written statement submitted by Elvin L. Martinez).

One press investigation into California seizures reported that in more than 6000 forfeiture cases filed by local prosecutors in 1992, 94% involved the seizure of less than $5000. *Inequity Seen in Drug Forfeiture Law*, N.Y. TIMES, Sept. 3, 1993, at A17. The article quotes a forfeiture lawyer: "If it's less than a couple of thousand dollars, I tell people not to bother unless they've got some kind of iron-clad proof. And usually, when it's cash, you don't have it." *Id.* As the article correctly notes, the burden is on the property owner to prove they obtained the seized assets legally by producing bank statements or receipts. *See id.*

forfeiture and to prove a proportionate and tailored application in each case. In this area, substantive and procedural due process overlap and complement each other.[179]

Indeed, it may be a mistake to single out this or that procedure in a forfeiture regime and consider whether procedural due process is satisfied. It is the aggregate effect of forfeiture proceedings—summary seizures, minimalist government justification, shifting of burdens, unreasonable time limits for contesting forfeitures, generous time limits for prosecuting them, readily invoked default rules, and bond posting requirements[180]—which combine to make the process unfair. The Supreme Court of Florida recognized this when it set forth, under Florida constitutional law, the minimum procedural requirements necessary to make the *entire process* of forfeiture fair.[181]

The Florida high court concluded that "[i]n forfeiture proceedings the state impinges on basic constitutional rights of individuals who may never have been formally charged with any civil or criminal wrongdoing."[182] At stake, it said, are basic property rights including the special property and privacy interests in a home. Moreover, it found that the forfeiture remedy is a particularly harsh intrusion on those rights.[183] Therefore:

> "Due proof" under the [state forfeiture] Act constitutionally means that the government may not take an individual's property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime . . . . Forfeiture must be limited to the property or portion thereof that was used in the crime.[184]

The Florida court recognized an innocent owner defense, but required the property owner to prove by a preponderance of the evidence that he had

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179. *See supra* text accompanying notes 98-110, 156-60.

180. For an overview of forfeiture procedures, see KESSLER, *supra* note 1, §§ 2.01 to 2.05, at 2-1 to 2-13; David J. Taube, Note, *Civil Forfeiture*, 30 AM. CRIM. L. REV. 1025, 1031-45 (1993). Some courts compound these harsh procedures by readily finding waivers of rights and strictly applying procedural requirements. *See, e.g.*, United States v. Three Parcels of Real Property, 43 F.3d 388 (8th Cir. 1994) (upholding the trial court's order to strike a pro se claimant's claim for lack of compliance with the pleading rules and concluding that any right to a pre-seizure hearing was waived).

181. Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991).

182. *Id.* at 967.

183. *See id.* at 961 (stating that because "forfeitures are considered harsh exactions," forfeiture statutes should be strictly construed).

184. *Id.* at 968 (citations omitted).

no knowledge that the property was being used for criminal purposes.[185] The court also prescribed procedures for the restraint of property, filing deadlines, notice of forfeiture, and so on.[186]

B. *Forfeiture Paybacks to Law Enforcement—Eliminating Bias and the Appearance of Impropriety*

Law enforcement benefits directly from seizing assets through forfeiture. On the federal level, the Department of Justice Asset Forfeiture Program reported that, in 1992 net deposits to the Asset Forfeiture Fund equalled $531 million.[187] In 1993 net deposits totaled $555.7 million.[188] Since 1985, deposits to the fund have topped $3.2 billion.[189] Even this amount, however, does not reflect the full dimension of the sums the Federal Government has obtained through forfeiture. The Justice Department may elect to put forfeited assets directly into service. In 1993 alone, approximately $12.8 million worth of cars, boats, planes and other property were retained for official use by the Drug Enforcement Administration, the FBI, and other agencies.[190] In addition, the federal government may transfer forfeited property to other federal agencies or state and local law enforcement agencies. In 1993, approximately $10.2 million was so transferred.[191] Finally, not all federal agencies deposit money into the Asset Forfeiture Fund. Again, using 1993 figures, about $1.6 million went directly to the U.S. Marshals Service, and more money went to other federal agencies.[192] Monies from the fund are used for a variety of programs, including paying the salaries of U.S. Attorneys, providing money to state and local law enforcement agencies, and support for federal prisons.[193] Millions are spent on forfeiture-related expenses, including large payments to informants. [194]

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185. *See id.*

186. *Id.* at 967.

187. 1993 ANNUAL REPORT, *supra* note 14, at 38.

188. *Id.*

189. *Id.* at 5.

190. *Id.* at 17.

191. *Id.*

192. *Id.*

193. *See id.* at 15.

194. The Forfeiture Enabling Statute specifically permits forfeiture assets to be used to pay informants. 28 U.S.C. § 524 (1988 & Supp. V 1993). The Statement of Operations and Changes in Net Position for fiscal year ended September 30, 1993, lists payments for "Awards for Information" at $27,619,000. 1993 ANNUAL REPORT, *supra* note 14, at 64. The report does not, however, include the precise amount of federal

State and local jurisdictions have developed their own forfeiture programs and have acquired millions in cash and property. The total amount of forfeited assets from all jurisdictions is unknown. Press accounts in various states have revealed, however, that huge sums can be confiscated.[195] For example, between 1989 and 1992, the Sheriff's Office in Volusia County, Florida, seized $8 million in cash in roadside stops of motorists.[196] Although the office returned about half the money to property owners in settlements, it still netted about $4 million over the three-year period.[197]

It is appropriate to ask what influence all of this money and property has had on law enforcement behavior and whether law enforcement's direct and substantial pecuniary interest in the outcome of forfeiture raises a due process concern?

With the stakes so high, law enforcement agencies have sometimes become adversaries in pursuing forfeitable property. When more than one agency has participated in an investigation leading to forfeiture, there have been jurisdictional squabbles over who is entitled to keep what property and how proceeds are to be divided. The federal government has tried to impose some degree of harmony and cooperation among state and local agencies,[198] but where a division of spoils is at issue, some agencies have refused to cooperate and have even obstructed pursuit of cases in order to win control over forfeited assets.[199] Sometimes federal sharing programs have exacerbated tensions by making cooperation with the

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funds shared with states used for this purpose.

195. *See supra* notes 14-27 and accompanying text (describing how profitable forfeiture is). One press account observed:

> Even small amounts can loom large in cash-strapped police departments. Virginia's Forfeited Asset Sharing Program has netted $1.5 million for state and local law enforcement agencies since it was launched in July 1991, with about $100,000 a month now being distributed locally. The program has been described as most helpful to rural police departments.

Richard Miniter, *Property Seizures on Trial*, INSIGHT, Feb. 22, 1993, at 10.

196. Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A-1, A-10; Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A-1, A-16 [hereinafter *Tainted Cash*].

197. Brazil & Berry, *Tainted Cash*, *supra* note 196, at A-16.

198. *See, e.g.*, Mike Moore & Jim Mood, *The Challenge to States Posed by Federal Adoptive Drug Forfeitures*, CIVIL REMEDIES IN DRUG ENFORCEMENT REP., (National Ass'n of Att'ys Gen., Washington, D.C.), June-July 1992, at 2.

199. *See id.*

federal government more lucrative than cooperation with state agencies.[200]

The seizure of expensive homes, luxury cars, planes, and other assets has also tempted some law enforcement agencies to put property to use in corrupt or questionable ways. Forfeited property has paid for tennis club memberships for high-ranking law enforcement officials, provided expensive vehicles for personal use by prosecutors, and been sold for a fraction of its price to persons having ties to law enforcement personnel.[201]

Most troubling and most relevant to due process considerations, however, is growing evidence that the ease and profitability of forfeiture have refocused law enforcement away from apprehension and investigation of criminals to grabbing property. Former New York City Police Commissioner Patrick V. Murphy told Congress that "[t]he large monetary value of forfeitures . . . has created a great temptation for state and local police departments to target assets rather than criminal activity."[202] As one example, Murphy told of Florida drug agents who work the I-95 "cocaine corridor." The agents stop suspicious vehicles on only the southbound lanes, reasoning that those traveling south are more likely to have drug proceeds or cash and those traveling north are more likely to have the drugs.[203] Law enforcement can spend the forfeitable cash; it must destroy contraband drugs.

The significance of pursuing forfeiture for revenue is reflected in a 1990 memo in which the Attorney General of the United States exhorted United States Attorneys to increase forfeitures in order to meet Justice Department budgetary targets: "We must significantly increase production to reach our budget target . . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must

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200. *See id.* The federal program allows local agencies to turn over their forfeiture cases to the federal government. Once the federal government "adopts" a local seizure, the federal government subtracts minimal expenses and returns about 85% of the amount to the local law enforcement department. By this method, departments have been able to evade state legislative and constitutional requirements to pay forfeited amounts into the state treasury. *See* United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267, 272-73 (4th Cir. 1990) (federal adoption permissible even when local law enforcement agency is able to avoid state constitutional rule to pay all fines, penalties, and forfeitures toward support of free public schools).

201. *See* Jon Nordheimer, *Prosecutors are Reined in on Seizing Crimes' Assets*, N.Y. TIMES, Nov. 22, 1992, at 50 (describing allegations against Somerset County, New Jersey, Prosecutor Nicholas L. Bissell, Jr.).

202. Richard Miniter, *Ill-Gotten Gains*, REASON, Aug.-Sept. 1993, at 32, 34.

203. *Id.*

be made to increase forfeiture income during the remaining three months of 1990."[204]

Police actively have set out to create criminal opportunities in order to forfeit property, and they have pursued weak and questionable cases.[205] For example, police departments have set up sting operations in which they sell drugs to passers-by in automobiles and then seize the cars.[206] No criminal charges are brought; the objective is to obtain the property. Police have targeted individuals with expensive homes and used flimsy bases to conduct searches, hoping to find drugs.[207] Using drug courier profiles, police stop people in cars or airports or bus stations. If the person has a large amount of cash, the police seize it as "drug proceeds" and leave it to the owner to try to get it back.[208]

Courts have taken note of the government's "direct pecuniary interest in the outcome of [forfeiture] proceeding[s]."[209] Judges' unease with payback arrangements has led them, in some instances, to look more closely at the basis of a forfeiture or the adequacy of the procedures used to effect it.[210] No court, however, has found that payback arrangements, by themselves, violate due process of law. Although due process is compromised if a judge has, or appears to have, a direct

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204. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 n.2 (1993) (quoting 38 U.S. ATT'YS' BULL. 180 (1990)).

205. Government informants who are sometimes paid a percentage of the amounts forfeited through their efforts, are wise enough to set up drug deals in homes or cars rather than on the street. *See, e.g.*, United States v. 38 Whalers Cove Drive, 954 F.2d 29, 32 (2d Cir.) (indicating that the government requested that the illegal transaction take place inside the property which was later seized), *cert. denied*, 113 S. Ct. 55 (1992).

206. Strasser, *supra* note 27, at 26.

207. *See, e.g.*, SMITH, *supra* note 46, ¶ 1.02, at 1-23 (describing a case involving a ranch valued at between three and five million dollars).

208. *See, e.g.*, Jeff Brazil & Steve Berry, *'I Could Win the Battle but Lose the War,'* ORLANDO SENTINEL, June 15, 1992, at A-6 (reporting a case in which police seized life savings of $38,923 from a man who got back most of his money in a settlement whereby the Sheriff's Office kept $10,000 and the man's lawyer received one-third of his recovery); Miniter, *supra* note 202, at 3.

209. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 (1993) (footnote omitted).

210. *See, e.g., id.* (government's pecuniary interest buttressed the Court's conclusion that prior notice and a hearing are necessary before seizure of real property). *But see* Caplin & Drysdale v. United States, 491 U.S. 617, 629 (1989) (dismissing the government's self-interest in arguing against the seizure of proceeds in the hands of a defendant's attorney).

personal or pecuniary interest in the outcome of a case,[211] police and prosecutors are not similarly disabled. The theory is that police and law enforcement authorities only initiate action, they do not judge it. As the Court stated in *Marshall v. Jerrico, Inc.*:[212] "rigid requirements . . . designed for officials performing judicial or quasi-judicial functions are not applicable to those acting in a prosecutional or plaintiff-like capacity."[213] In *Marshall*, the court relied on the differing roles of prosecutor and judge to uphold civil penalties assessed by an administrative official.[214] Under the relevant law, sums collected as penalties were returned to the administrative agency as reimbursement for its costs of litigating. The Court looked closely at the reimbursement scheme and concluded that there was no "realistic possibility" it would distort judgment in the case.[215]

There are two reasons to fear, however, that the distorting influence of monetary rewards does carry over from law enforcement's initial seizure to a court's final judgment. First, for many people, the forfeiture seizure is tantamount to a forfeiture judgment. There will be no adversary proceeding because the claimant knows that, procedurally, the deck is stacked against him. Or, in many cases, the amount forfeited may not be worth the cost of the contest. Finally, the pressure to settle may be overwhelming. Not only can prosecutors bargain from procedural advantages which leave the claimant without use of his property and an uphill battle, they also can throw in promises not to prosecute for an underlying crime.[216] In some instances, the whole arrangement has about it the air of "let's make a deal," or worse, undue coercion. And, presumably, the more valuable the property, the greater the potential for coercion.

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211. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824-25 (1986) (examining the factors necessary to constitute an interest in the outcome of the case, and holding that the "tidy sum" ($30,000) received by the judge as a settlement in a separate case was "sufficient to establish the substantiality of his interest" in the *Lavoie* suit); Tumey v. Ohio, 273 U.S. 510, 531-32 (1927) (invalidating an Ohio procedure under which half of all criminal fines imposed by the mayor sitting as judge were paid to the mayor and township for their costs).

212. 446 U.S. 238 (1980).

213. *Id.* at 248.

214. *Id.* at 248-49.

215. *Id.* at 250.

216. As one observer noted, mandatory sentences and steep prison terms have "created powerful incentives for criminals to take any steps [such as agreeing to forfeiture] to avoid jail." *Use of Snitches out of Control, Study Finds*, L.A. TIMES, Feb. 13, 1995, at 21A.

A second concern is that, even if a forfeiture *is* tested at a hearing, the shifting of the burden of proof to the claimant may effectively insulate a seizure from meaningful scrutiny. The government, once having established the existence of bare-bones probable cause, effectively enjoys a presumption that its actions were correct.

The Supreme Court analyzed a similar burden-shifting process in the recent *Concrete Pipe* commercial dispute case.[217] Concrete Pipe objected to the procedures under which it was assessed liability for withdrawing from a group pension plan.[218] The procedures permitted the trustee for the plan, a person with obvious bias, to make the initial assessment of the employer's liability.[219] Thereafter, the employer could contest the assessment in a *de novo* hearing before an arbitrator. Concrete Pipe argued that because the statutory assessment was presumed correct unless the employer proved otherwise, the bias of the trustee was preserved in the later hearing.[220]

The Court acknowledged the substantiality of the issue and noted that courts of appeal were divided over how to resolve it.[221] Nevertheless, the Court held that, because no issues of law were presumed correct and because no factual issue was foreclosed from effective rehearing, the scheme was constitutional.[222] The precise test of *Concrete Pipe* is unclear. On the one hand, the Court appeared to endorse an inquiry focused on whether an initially biased determination operated to foreclose fair and effective consideration of factual issues at a later adversary hearing.[223] Due process would be violated only if a procedure operated as a bar that froze the initial decision (the "bar test"). On the other hand, the Court suggested that a procedure could violate due process if the initially biased determination made it appreciably more difficult to prove one's case at a later hearing.[224] Under such an approach, the Court would look at the nature of the issues at stake and the difficulty of later proving the relevant facts (the "burden test").

If the bar test applies, then the bias of forfeiture paybacks combined with a shift in burden to the forfeiture claimant will not violate due process. The claimant can, at the later forfeiture hearing, raise and

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217. 113 S. Ct. 2264 (1993).

218. *Id.* at 2270.

219. *Id.* at 2272-74. The procedures are part of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208.

220. *Concrete Pipe*, 113 S. Ct. at 2276.

221. *Id.* at 2278 n.13.

222. *Id.* at 2283.

223. *Id.* at 2277.

224. *Id.* (quoting Wilthrow v. Larkin, 95 S. Ct. 1456, 1470 (1975)).

adduce proofs on all aspects of the forfeiture and even do so before a jury in many instances. There is no foreclosure as such. If, however, the burden test applies, then forfeiture pay back schemes may taint the fairness of certain forfeitures. In *Concrete Pipe*, the matter was merely a commercial dispute over whether the amount of liability was determined in accordance with sound actuarial practice. No burden was placed on the company's ability to raise a challenge to the actuary's methods. The matter was straightforward and narrowly circumscribed. In forfeiture cases, however, the interests are complete loss of property, and the proofs may be complex and difficult. The proof goes to whether a person did or did not engage in or facilitate criminal activity and whether, to what degree, and to what extent particular property was connected to that criminality.

In some cases, the burden of proof might be virtually impossible to discharge. Consider the seizure of cash from a traveler who meets a "drug courier profile"[225] or who is simply a person identified as a drug dealer by an informant. Shifting the burden to the individual to prove his money is not drug proceeds and that he is not a drug dealer is difficult and manifestly unfair. In other cases, unfairness in burden-shifting may not matter. If the police seize a business as a situs of drug operations after observing repeated sales, finding a cache of drugs on the premises,[226] and arresting the owner for direct participation in the activity, burden-shifting will not likely be a serious impediment to a fair and unbiased assessment of evidence at the forfeiture hearing.

In the end, however, it is unclear whether there will be few or many cases in which bias or the appearance of bias carries over from the initial seizure to an adjudication of forfeiture. It will be difficult to establish that forfeiture paybacks, even if a bad idea, are facially unconstitutional. Therefore, in this area at least, reform may have to come from the legislature.[227]

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225. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 3-4 (1989) (describing the factors that caused the DEA to have a reasonable suspicion to stop the defendant on drug charges); Daniel R. Browing, *Is Drug War Eroding Rights? 'Profile' Use for Arrests Worries Some*, ST. LOUIS POST-DISPATCH, Jan. 30, 1989, at 1B.

226. Similar facts led to forfeiture in United States v. 427 & 429 Hall St., 842 F. Supp. 1421 (M.D. Ala. 1994).

227. Indeed on June 15, 1993, Representative Henry J. Hyde introduced a bill to reform civil asset forfeiture law at the federal level by placing the burden of proof on the government instead of the subject of the forfeiture and by authorizing appointment of counsel for indigent claimants. H.R. 2417, 103d Cong., 1st Sess. §§ 5, 6 (1993) (Civil Asset Forfeiture Reform Act); *see also* S. 1655, 103d Cong., 1st Sess. (the Senate counterpart to Representative Hyde's proposal introduced by Senator Jeffords on November 10, 1993). Representative Hyde and Senator Jeffords have, however, faced resistance. The Department of Justice successfully lobbied to keep forfeiture reform out

V. CONCLUSION

In recent cases, the Supreme Court has shown a new willingness to confront the injustices associated with civil asset forfeiture. The Court already has drawn some boundary lines based on the Excessive Fines Clause and modern procedural due process requirements. Most importantly, the Court has demonstrated that is prepared to put aside the legal fictions associated with forfeiture and to examine critically the historical rationales on which it is based.

The reality is that forfeiture is a harsh, oppressive, and sometimes disproportionate and irrational remedy. It may be appropriate to rely upon forfeiture in some circumstances in which it can be wisely and effectively deployed, but forfeiture also can work extreme injustice. The Constitution provides a familiar test to distinguish between these disparate outcomes: the government must fairly prove that particular forfeitures substantially serve legitimate state interests. This article has identified how the Excessive Fines and Due Process clauses might be more fully developed to force governments to do just that. Of course, not every unfairness associated with forfeiture can necessarily be policed by the Constitution. Paybacks of forfeiture money to law enforcement, for example, are likely to survive a direct constitutional challenge. In this and other areas of forfeiture practice, comprehensive reform ultimately lies with the bodies that unleashed and successively broadened this runaway remedy—Congress and the state legislatures.

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of the 1994 Omnibus Crime Act and opposed Representative Hyde's 1993 bill despite a 56-member bipartisan coalition for forfeiture reform. *See* Robert E. Bauman, *Take It Away*, NAT'L REV., Feb. 20, 1995, at 34, 38.