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FOR WANT OF A NAIL: FORFEITURE AND THE BILL OF RIGHTS

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For the past thirty-six months, some federal courts have leveled sharp criticism against federal prosecutors for their use, or, more appropriately, abuse, of the federal civil forfeiture statutes.[1] Most of the criticism has focused upon the government's use of the forfeiture provisions of 21 U.S.C. § 881, the primary federal civil drug forfeiture statute.

The government has had seemingly unfettered authority when it comes to civil forfeiture. After all, the property subject to forfeiture usually is owned by those nameless, faceless "drug dealers" who, as we, the people, often say, have no rights anyway. Or shouldn't. Greed, however, is still one of the seven deadly sins. Since 1985, the federal government has pocketed more than $3.2 billion in forfeited assets.[2] In its current inventory, the federal government has more than 31,698 pieces of property, real and personal, worth an estimated $1.9 billion.[3] From the business of the mechanic who repaired the drug dealer's cars to the

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1. *See, e.g.*, United States v. $31,990, 982 F.2d 851, 856 (2d Cir. 1993) (stating that the government "abused" civil forfeiture by relying on an "unrealistic" drug courier profile to support the seizure under 21 U.S.C. § 881(a)(6)); United States v. Lasanta, 978 F.2d 1300, 1304-05 (2d Cir. 1992) (rejecting the government's argument that it can seize property without a warrant in a civil forfeiture and stating that such a "relentless and imaginative" use of forfeiture would "leave the constitution itself a casualty"); United States v. Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 902-04 (2d Cir. 1992) (chastising the government for failing to use a "less-intrusive" action than seizing all the company's assets), *cert. denied*, 113 S. Ct. 1580 (1993); United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935 (N.D. Ala. 1994) (stating that "[t]he generic brief filed by the United States seems designed to justify 90% of all forfeitures," calling the government's actions "unfair" and "excessive," and granting summary judgment in favor of the property). *See generally* STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE (1993 & Supp. 1994); Steven L. Kessler, *Tide Is Turning in Federal Forfeiture Rulings*, N.Y. L.J., March 5, 1993 at 1.

2. 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 16 (1994).

3. *Id.* at 20.

$50,000 house occupied by the welfare wife and seven-year-old daughter while hubby/daddy serves a life sentence, forfeiture has become, well, routine. And, as with anything routine, comes an insensitivity about the plight of a person caught in a "labeling" process. In forfeiture actions, those claiming an interest in or ownership of the subject property lose their individual characteristics to those of the label, usually that of "criminal," "friend of drug dealer" or the like. Thus, a forfeiture which, if reviewed dispassionately, might not be pursued, becomes so routine that its initiators see nothing improper in its implementation. The "routine use of forfeited assets by prosecutors to fill their agency's coffers raises serious conflict-of-interest questions and, more fundamentally, undermines confidence in the integrity of their decision making."[4]

Most individuals would find it offensive for the government to take in forfeiture a $25,000 yacht because one marijuana cigarette was found at the bottom of the ship's laundry hamper.[5] Most would undoubtedly find taking an individual's property without at least some evidence of the owner's guilt of a crime at least somewhat troublesome. Concerns even have arisen in Congress, where opposition to governmental forfeiture tactics has found support from such unlikely bedfellows as conservative Republican Henry J. Hyde of Illinois, liberal Democrat John Conyers, Jr. of Michigan, and the American Civil Liberties Union.[6] Both Congressmen recently introduced legislation to curb seizures and make it more difficult for prosecutors to forfeit an individual's property.[7] Yet,

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4. Vito J. Titone, *Curtail Use of Civil Forfeiture*, N.Y. L.J., June 29, 1993, at 2.

5. Such a forfeiture was upheld in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

6. Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 115, 117-19 (1994).

7. Rep. Hyde introduced the Civil Asset Forfeiture Reform Act of 1993, H.R. 2417, 103d Cong., 1st Sess. (1993), which modifies the existing statutes in seven ways. The bill (1) switches the burden of proof from the property owner to the government to prove by clear and convincing evidence that the property is guilty; (2) provides for appointing counsel to indigents; (3) gives more protection to innocent property owners; (4) eliminates the cost bond requirement; (5) extends the time to challenge a forfeiture from 10 to 60 days; (6) creates a remedy for property damage caused by government negligence; and (7) allows for the release of property before the final disposition of the case. *See generally* George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 N.Y.L. SCH. L. REV. 121 (1994).

Rep. Conyers introduced the Asset Forfeiture Justice Act, H.R. 3347, 103d Cong., 1st Sess. (1993). The proposal is a culmination of his investigation, which included two sets of hearings. Conyers found "a pattern and practice of abuse" by "state and local law enforcement that is fostered by a federal program with a built-in financial incentive that cannot help but impact law enforcement priorities," and included within his legislative proposal comprehensive due process and oversight protections for individuals

until only recently, the courts had rejected most challenges to the federal forfeiture provisions. They had upheld the government's argument that forfeiture is civil and remedial, thereby not falling within the scope of the Eighth Amendment, which prohibits excessive and disproportionate fines and penalties.[8] Because, the argument went, civil forfeiture is traditionally *in rem*, directed against the "guilty" or "offending" property, it is not punitive and, therefore, falls outside the scope of the prohibitions of the Eighth Amendment. No more.

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subject to civil forfeiture and suggestions for the redistribution of seized assets. *See Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 5 (1992) (opening statement of John Conyers, Jr., Chairman).

The bill (1) prohibits the forfeiture of property unless the owner has been convicted of a crime upon which the forfeiture is based, thereby abolishing *in rem* forfeiture proceedings; (2) alters the relation-back doctrine to vest title to the subject property in the government only after a verdict in favor of the government, *see* United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993); (3) requires that the value of the seized property be equal to or less than the value of the property involved in the offense; *see* Austin v. United States, 113 S. Ct. 2801 (1993); (4) requires, in most cases, an adversarial hearing prior to property seizures, *see* United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993); (5) places time limitations upon the government; (6) raises to clear and convincing the requisite standard of proof, *see* Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991); (7) follows many state courts and establishes the right to a jury trial and adequate legal representation in civil forfeiture cases; (8) prohibits the forfeiture of any property which has been paid or pledged to pay attorney's fees, *see* Caplin & Drysdale v. United States, 491 U.S. 617 (1989); and (9) addresses other policy issues, such as adoptive seizures, distribution of forfeited assets, governmental use and payment of informants and damage claims by victims of civil forfeiture proceedings. For a critique of H.R. 3347, see Fishman, *supra*, at 141-47. For an overview of Representative Hyde's theories relating to forfeiture, see HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995); *see also* KESSLER, *supra* note 1, § 1.07.

8. U.S CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see, e.g.*, United States v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988) (holding that the Eighth Amendment does not apply to forfeiture actions brought under 21 U.S.C. § 881(a)(7)), *cert. denied*, 493 U.S. 954 (1989); United States v. 250 Kreag Rd., 739 F. Supp. 120 (W.D.N.Y. 1990) (same); United States v. 1988 Ford Mustang, 728 F. Supp. 495, 498 (N.D. Ill. 1989) (stating that the Eighth Amendment is inapplicable to forfeiture actions under 21 U.S.C. § 881(a)); United States v. 26.075 Acres, 687 F. Supp. 1005, 1012-14 (E.D.N.C. 1988) (holding forfeiture under 21 U.S.C. § 881(a)(7) does not violate the Eighth Amendment), *aff'd in part, rev'd in part sub nom.* United States v. Santoro, 866 F.2d 1538 (4th Cir. 1989), *cert. denied*, 498 U.S. 1126 (1991).

I. *AUSTIN V. UNITED STATES*

By a vote of 9-0, the United States Supreme Court finally called a spade a spade. The Court deemed forfeiture a punishment.[9] Thus, seizures and forfeitures may no longer be so disproportionate to the underlying illicit activity that they violate the constitutional ban on excessive fines.[10] There must now be some relationship between the gravity of an offense and the property seized.

In *Austin v. United States*, a South Dakota auto-body shop owner sold two grams of cocaine to an undercover federal agent.[11] A search of the body shop following the arrest revealed a small amount of drugs and approximately $4000 in cash.[12] The shop owner pled guilty to possession of cocaine with intent to distribute.[13] For his efforts, the shop owner lost his business and his mobile home, worth more than $38,000, to the government in forfeiture.[14] The United States Court of Appeals for the Eighth Circuit reluctantly upheld the forfeiture action, stating "we are troubled by the Government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the Government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."[15]

Judge Floyd R. Gibson, writing for a unanimous bench, expressed the court's opinion that "the Government is exacting too high a penalty in relation to the offense committed."[16] Nevertheless, the court found that precedent bound it to disregard the disproportionality argument under the Eighth Amendment in the context of civil forfeiture.[17]

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9. *See* Austin v. United States, 113 S. Ct. 2801 (1993), *rev'g* United States v. 508 Depot St., 964 F.2d 814 (8th Cir. 1992); *see also* Alexander v. United States, 113 S. Ct. 2766 (1993) (holding that, in RICO statute actions, the Eighth Amendment's Excessive Fines Clause bars criminal forfeitures that are disproportionate to the amounts of criminal proceeds).

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

11. *Id.* at 2803.

12. *Id.*

13. *Id.*

14. *See id.*

15. United States v. 508 Depot St., 964 F.2d 814, 818 (8th Cir. 1992).

16. *Id.*

17. *Id.* at 817.

The Supreme Court's opinion, written by Justice Blackmun, echoed Judge Gibson's concerns.[18] The Court found that the Eighth Amendment applied to both civil and criminal proceedings and that, both throughout history and today, forfeiture statutes were intended, at least in part, to punish the owner of the "offending" property.[19] Focusing upon forfeiture's effect on the property owner rather than the civil/criminal nature of the provision, the Court, for the first time, set a constitutional limitation on the government's power and authority to seize property.[20]

Most would characterize these conclusions as obvious. Of course forfeiture *punishes* the property owner. Remarkably, however, the Supreme Court had never so held.[21] Because civil forfeiture is based upon the legal fiction of guilty property, the owner or individual with an interest in the property has been given status only as a claimant, whose innocence is usually irrelevant and who bears virtually all of the burdens of proof. In fact, the rationale behind the civil/criminal dichotomy is twisted. "It [defies] common sense to prohibit disproportionate forfeiture of the property of a defendant who has been convicted of a criminal violation while placing no limits on the power of the government to seize any real estate related to an offense in an ostensibly civil *in rem* action."[22] If the property really is the offender, then there is no reason to consider the conduct of the property owner. As one district court put

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18. *Austin*, 113 S. Ct. at 2802. Justices White, Stevens, O'Connor, and Souter joined Justice Blackmun in his opinion. *Id.* Justice Scalia signed a separate concurrence. *See id.* at 2812-15. Justice Kennedy, joined by Justice Thomas and Chief Justice Rehnquist, filed a second concurring opinion. *See id.* at 2815-16.

19. The Justices disagreed as to the history and relevance of the historical fiction of *in rem* proceedings. *See id.* at 2808-09, 2813-15.

20. *Id.* at 2811-12.

21. The obvious had been expressed by only a handful of lower courts. *See* United States v. Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987) (criminal forfeiture under 21 U.S.C. § 1853 is a form of punishment subject to the Eighth Amendment); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (forfeiture provisions of RICO are meant to be punitive); United States v. Walsh, 700 F.2d 846, 857 (2d Cir.) (same), *cert. denied*, 464 U.S. 825 (1983); United States v. Regan, 726 F. Supp. 447, 457-60 (S.D.N.Y. 1989) (criminal forfeiture under RICO is "punishment"); *see also* United States v. $12,390, 956 F.2d 801, 807-12 (8th Cir. 1992) (Beam, J., dissenting in part) ("[C]ivil forfeitures are punitive in nature."); United States v. On Leong Chinese Merchants Ass'n Bldg., 918 F.2d 1289, 1298-99 (7th Cir. 1990) (Cudahy, J., concurring), *cert. denied*, 112 S. Ct. 52 (1991).

22. *On Leong Chinese Merchants*, 918 F.2d at 1299 (Cudahy, J., concurring) (citation omitted).

it: "This would indicate that at the edges, at least, the *in rem* fiction begins to break down."[23]

Justice Blackmun questioned the use of forfeiture's legal fiction as a matter of constitutional law. "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense."[24]

The Court concluded:

> [E]ven though this Court has rejected the "innocence" of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner. More recently, we have noted that forfeiture serves "punitive and deterrent purposes," and "imposes an economic penalty." We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment.[25]

Thus, remedial objectives alone do not discount the possibility that a civil forfeiture also may serve the additional punitive objectives of retribution and deterrence.

The Court left for lower court interpretation and, no doubt, future Court interpretation, a test to determine the excessiveness and disproportionate nature of a forfeiture.[26] In his concurrence, however, Justice Scalia said that the "relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?"[27] It remains to be seen if this becomes the test used by the courts, or if some hybrid balancing of the value and use of the property becomes the norm.

Justice Scalia also questioned the Court's focus on the property owner's culpability in determining whether forfeiture is punitive. Following an extensive discussion of the differences between *in rem* and

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23. United States v. 1988 Ford Mustang, 728 F. Supp. 495, 498 n.2 (N.D. Ill. 1989).

24. Austin v. United States, 113 S. Ct. 2801, 2810 (1993). Both sections of the statute in question, 21 U.S.C. § 881(a)(4), (7), contain "innocent owner" exemptions.

25. *Id.* at 2810 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686, 687 (1974)) (citations omitted).

26. *Id.* at 2812 ("Prudence dictates that we allow the lower courts to consider that question in the first instance.").

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

in personam forfeiture as they relate to the punishment,[28] he raised an interesting point: "If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture."[29]

According to Justice Scalia, the offense of which the owner/claimant has been convicted is not relevant to the forfeiture.

> Section 881 requires only that the Government show probable cause that the subject property was used for the prohibited purpose. The burden then shifts to the property owner to show, by a preponderance of the evidence, that the use was made without his "knowledge, consent, or willful blindness," or that the property was not so used. Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.[30]

Although leaving his answer for another time, Justice Kennedy was troubled by the issue of whether forfeiture would be permitted when the property owner committed no wrong of any sort, intentional or negligent, saying: "That for me would raise a serious question."[31] He also reserved judgment on whether an *in rem* forfeiture would always amount to an intended punishment of the owner of the forfeited property.[32]

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28. *Id.* at 2812-14 (Scalia, J., concurring in part and concurring in the judgment).

29. *Id.* at 2814 (Scalia, J., concurring in part and concurring in the judgment).

30. *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment) (quoting 21 U.S.C. § 881(a)(4)(c)) (citations omitted).

31. *Id.* at 2816 (Kennedy, J., concurring in part and concurring in the judgment).

32. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

Interestingly, before *Austin* was announced, the Northern District of New York struck down, as a violation of the Eighth Amendment, a forfeiture of a family residence based on a forty-five dollar, seven-gram marijuana sale on the premises and another six ounces of marijuana found inside the home.[33] Analyzing the facts before it, and using the three-prong test enunciated by the Second Circuit in *United States v. 38 Whalers Cove Drive*,[34] the court in *United States v. 835 Seventh Street*,[35] deemed forfeiture of the claimant's $69,778 equity in the home "clearly disproportionate," bordering on "aberrational," and in excess of any legitimate civil purpose for the forfeiture.[36] Because the law required forfeiture of all or nothing, the court erred on the side of protecting the owner's constitutional rights and dismissed the forfeiture action rather than overcompensate the government for implementing the drug laws.[37]

In *835 Seventh Street*, the issue was forfeiture of the claimant's home.[38] Thus, the court's disallowance of the entire forfeiture may have had something to do with a homestead-type analysis. At least five states have so held.[39]

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33. United States v. 835 Seventh St., 820 F. Supp. 688 (N.D.N.Y. 1993); *cf. In re* Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993) (holding that drug tax levied subsequent to a criminal prosecution is deemed punishment and violative of the Double Jeopardy Clause of the Fifth Amendment).

34. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992). In *38 Whalers Cove Drive*, the court invoked the test used by the Supreme Court in Solem v. Helm, 463 U.S. 277, 290-92 (1983), to determine whether the forfeiture was so disproportionate to the crime that it violated the Eighth Amendment. *38 Whalers Cove Drive*, 954 F.2d at 38. The *38 Whalers Cove Drive* court weighed: (1) the inherent seriousness and gravity of the crime; (2) sentences imposed within the jurisdiction for the underlying crime; and (3) sentences imposed in other jurisdictions for the offense. *Id.* at 38-39. The *38 Whalers Cove Drive* court upheld the forfeiture given its fact pattern; the *835 Seventh Street* court did not.

35. 820 F. Supp. 688 (N.D.N.Y. 1993).

36. *Id.* at 694.

37. *Id.* at 696-97; *see also* United States v. 318 S. Third St., 988 F.2d 822, 828 (8th Cir. 1993) (stating that the court has discretion to dismiss a forfeiture for gambling under 18 U.S.C. § 1955 if the forfeiture would be a disproportionate penalty, but may not subdivide the property to create a proportional forfeiture).

38. *835 Seventh St.*, 820 F. Supp at 689.

39. *See* Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992) (holding that the state civil forfeiture provision violated the state constitution's homestead provision); People v. 1403 E. Parham St., 621 N.E.2d 1026 (Ill. App. Ct. 1993) (same); *In re* Bly, 456 N.W.2d 195 (Iowa 1990) (same); Kansas *ex rel.* Braun v. Tract of Land in the Northwest Quarter of Section Four, 840 P.2d 453 (Kan. 1992) (same); State *ex rel.* Means v. 10 Acres of Land, 877 P.2d 597 (Okla. 1994) (same) (relying heavily upon State *ex rel.* McCoy v. Lot 1, Block 7, 831 P.2d 1008 (Okla. Ct. App. 1992)).

In addition, the *835 Seventh Street* court used as part of its analysis the federal sentencing guidelines and the range, especially relating to the fines the defendant would have been subject to in the underlying criminal case.[40] Because of the discrepancy between this range and the penalty of forfeiture, the court dismissed the government's forfeiture action in full.[41] The tests used by the district court may be a starting point for the test left open by the *Austin* Court.

A. *The Impact of* Austin

With the Supreme Court having overcome its fixation that civil forfeiture is remedial in nature, *Austin* probably will instill an element of moderation in the prosecution of forfeiture cases. Extreme and weaker cases, such as "drive-by" cocaine sales,[42] probably will be dropped, with the government concentrating its efforts on those properties with a greater nexus and financial correlation to the underlying criminal activity. That, of course, assumes the government sees the errors of some of its ways. In a statement predicting victory in the circuit court, the Department of Justice said that it anticipated "no significant change in day-to-day operations."[43] "The department has exercised restraint in enforcing civil forfeiture laws and will continue to do so."[44] So much for the leopard and his spots. One thing is for certain, however: The Court's decision will encourage more challenges to the government's seizure and forfeiture procedures.

It also is clear that *United States v. Halper*[45] now applies in forfeiture cases. In *Halper*, the Supreme Court addressed what it characterized as an unresolved problem: "whether and under what

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40. *835 Seventh St.*, 820 F. Supp. at 694.

41. *See id.* at 694, 697.

42. In these cases, the government seizes an automobile where its only connection to a crime is its use to transport its owner to the location where the owner purchased narcotics. Those cases in which the car is used to transport or import narcotics probably will not be affected.

43. Steven L. Kessler, *Forfeiture and the Eighth Amendment*, N.Y. L.J., July 26, 1993, at 1, 4 (quoting a statement from the U.S. Department of Justice issued while *Austin* was pending before the Eighth Circuit).

44. This despite the results of a 10-month study by *The Pittsburgh Press* finding that 80% of people who lost property to the federal government were never charged with a crime. The study also found that most seized items were not yachts and other luxury goods belonging to drug lords but rather modest homes, cars, and savings accounts of ordinary people. Andrew Schneider & Mary P. Flaherty, *Government Seizures Victimize Innocent*, PITT. PRESS, Aug. 11, 1991, at A1, A8.

45. 490 U.S. 435 (1989).

circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause [of the Fifth Amendment]."[46] In *Halper*, a civil defendant alleged that he could not be prosecuted for a "civil" violation of the federal False Claims Act[47] after he had already been criminally prosecuted for the same conduct as a criminal false-claims offender under 18 U.S.C. § 287.[48] The Supreme Court agreed.[49]

In reaching its conclusion, the *Halper* Court declined to follow the government's contention that "punishment" in the relevant sense is meted out only in criminal proceedings, and that "whether proceedings are criminal or civil is a matter of statutory construction."[50] The Court distinguished a prior opinion as not dealing with the "'humane' interests safeguarded by the Double Jeopardy Clause."[51] After reviewing its prior precedent, the Court drew the following line: "[I]t follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[52]

The *Halper* Court did not hold that remedial civil sanctions which "carry the sting of punishment" are therefore criminal.[53] Rather, it stated "merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated."[54] Thus in a civil suit in which the financial sanction bore no rational relation to the government's losses, the Court held that the *civil* sanction imposed criminal punishment for purposes of triggering the Double Jeopardy Clause of the Fifth Amendment. [55]

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46. *Id.* at 446.

47. 31 U.S.C. §§ 3729-3731 (1988 & Supp. V 1993).

48. *Halper*, 490 U.S. at 437.

49. *Id.* at 449.

50. *Id.* at 447.

51. *Id.* (distinguishing United States v. Ward, 448 U.S. 242 (1980)).

52. *Id.* at 448.

53. *Id.*

54. *Id.* at 447 n.7.

55. *See id.* at 450-52; *see also* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). In *Browning-Ferris*, the Court returned to the borderline between civil and criminal law and questioned whether the Excessive Fines Clause of the Eighth Amendment applied to punitive damage awards in state civil actions. While the opinion answered this question in the negative, its reasoning sheds further light on the dividing line between civil and criminal actions under the Constitution.

According to the *Browning-Ferris* opinion, although punitive damages are clearly punitive and serve public interests other than that of compensating tort victims, they are

The *Austin* court relied heavily upon *Halper* to reach its result.[56] If civil forfeiture now constitutes punishment, and double jeopardy bars a subsequent prosecution, to paraphrase Edward G. Robinson, Mother of Mercy, is this the end of Civil Forfeiture?[57] To quote another cult figure, Garth, from *Wayne's World*, "Not!"[58] Litigants will simply focus their energies on the definition of excessiveness.

The majority opinion in *Austin* provided no guidance for the lower courts, giving them a clean slate with which to start. Possible factors the courts may employ and weigh include the property owner's potential gain from the offense; other punishments imposed by the trial court upon the owner, including incarceration and fines; the range of punishment the owner/offender was subject to for the criminal offense; the risk of harm to society from the owner/offender's conduct; and, of course, the traditional nexus test as set forth by Justice Scalia in his *Austin* concurrence.[59] This list is by no means exhaustive. The courts may also look at the laundry list of factors articulated by the Third Circuit in analyzing excessiveness under the Racketeer Influenced and Corrupt Organizations statute.[60] Indeed, the final test will undoubtedly be a combination of factors, such as the test used by the court in *835 Seventh Street*.[61] The ultimate test, like those dealing with the innocent owner and other forfeiture-related defenses and provisions, will be bantered about until the Supreme Court makes a final determination.

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pursued by private parties, not government entities. *Id.* at 275. Of course, punitive damage awards are enforced by the states. But, according to the Supreme Court: "Here the government of Vermont has not taken positive steps to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual." *Id.*

The *Browning-Ferris* Court went on to distinguish the *Halper* case as one involving the government's effort to exact punishment in a civil action, whereas the plaintiff in *Browning-Ferris* was a private party who would obtain the punitive award. *Id.* at 275 n.21.

56. *See* United States v. R.R. #1, Box 224, 14 F.3d 864, 872-73 (2d Cir. 1994) (referring to Justice Scalia's concurring opinion in *Austin*, 113 S. Ct. at 2813-15).

57. LITTLE CAESAR (First National/Warner Bros. 1930) (the original quote is, "Mother of Mercy, is this the end of Rico?" Apparently, Robinson was referring to another character, not the federal racketeering statute.).

58. WAYNE'S WORLD (Paramount 1992).

59. *See* Austin v. United States, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in part and concurring in the judgment).

60. *See* United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993).

61. 820 F. Supp. 688 (N.D.N.Y. 1993); *see supra* notes 33-41 and accompanying text.

There also may be a noticeable rise in criminal forfeiture prosecutions, such as those under 21 U.S.C. § 853 and 18 U.S.C. § 982, such that the government will bypass these headaches altogether.

Another interesting result of *Austin* and its progeny may be its effect upon double jeopardy cases.[62]

B. *Issues Left Open by* Austin

After *Austin*, the question remained open whether forfeiture of proceeds can be excessive and constitute punishment. Recall that *Austin* dealt with forfeiture of conveyances[63] and real property[64] not with the forfeiture of currency.[65] If the courts extend the *Austin* analysis to

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62. For an extensive discussion of double jeopardy and its relation to civil forfeiture, see KESSLER, *supra* note 1, § 8.02[8]; *see also* Ellen Silverman Zimiles, *Do* Halper *and* Austin *Put Civil Forfeiture in Double Jeopardy?*, 39 N.Y.L. SCH. L. REV. 189 (1994).

63. 21 U.S.C. § 881(a)(4) (1988). The statute states, in part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession of [controlled substances] . . . .

Id.

64. 21 U.S.C. § 881(a)(7) (1988). The statute states:

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

Id.

65. 21 U.S.C. § 881(a)(6) (1988). The statute states:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds

currency, they will have the added problem of deciding what action to take after a determination of excessiveness or disproportionality. Will the amount of the forfeiture be reduced? Should all the money be returned? What if property must be sold to divide the booty proportionately? Who bears the loss or the burden? Does the claimant lose the property in a sale, for example, and then get the remaining, excessive amount back? Should the court ask the jury for a type of special verdict, determining the percentage of the money that is tainted? These are just a handful of issues that remain unanswered and ripe for litigation after *Austin*.

Also open to attack is the constitutionality of the burdens of proof under the civil forfeiture statutes. If civil forfeiture is now punitive, the burdens should be similar to those in criminal cases, with the onus on the government to prove the "guilt" by the highest standard rather than on the claimants to prove their innocence.

Query, too, whether the courts will stretch the *Austin* analysis to punitive damages. Punitive damages are awarded in civil cases and are, by definition, punitive. Will their application now be governed by the Excessive Fines Clause? If so, will that be the link the courts need to limit the exorbitant tort damage awards which have excited displeasure in both the lay and legal communities? One difficulty may be that in tort cases and others involving punitive damage awards, the parties usually do not include the government or stem from a unilateral governmental taking. Thus, in those cases there is no governmental activity, such as taking without compensation, on which the Eighth Amendment can attach. Be sure that more about this will be discussed in the months ahead.

C. *The Lower Courts Deal with* Austin

The courts have begun focusing on several of these issues and a trend is visible. One court that has addressed the issue of whether *Austin* applies to prosecutions pursuant to § 881(a)(6) has resolved it in the negative.[66] The court rationalized that, "[i]f an item is a proceed of an illegal drug transaction, its forfeiture is exclusively remedial, as it cannot be considered punishment to take away something the claimant never

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

Id.

66. *See* United States v. $288,930, 838 F. Supp. 367, 370 (N.D. Ill. 1993); United States v. West Side Bldg. Corp., 843 F. Supp. 377 (N.D. Ill. 1993).

legitimately owned."[67] The court also distinguished proceeds forfeiture from forfeitures pursuant to § 881(a)(4) and (a)(7), those involved in *Austin*, as follows:

> The forfeiture of legitimately owned property in *Austin* was a punishment because the claimant was deprived of the rights that the claimant had in the property. In this case, the forfeiture of allegedly illegally obtained property is not a punishment because a claimant does not rightfully own the forfeited property.[68]

In *United States v. Tilley*,[69] the Fifth Circuit ruled that a prior civil forfeiture of "proceeds" was not punishment under *Halper* and, consequently, did not preclude a subsequent prosecution based upon the same underlying offense.[70] *Tilley* involved the forfeiture of proceeds of drug trafficking pursuant to 21 U.S.C. § 881(a)(6).[71] Although the Fifth Circuit held that the forfeiture of *proceeds* was entirely remedial and thus not punishment, the court observed that if the prior proceeding had involved punishment, double jeopardy would have applied and would have barred the pending criminal trial.[72] The court clearly implied that it would have found the criminal action barred by double jeopardy if the forfeiture had not involved proceeds.[73] "We should make clear, however, that the sanction in *Halper* did not involve the proceeds from the crimes charged and the fact that the property forfeited in today's case constitutes unlawful proceeds is crucial to our analysis."[74] Two Illinois

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67. *West Side Bldg. Corp.*, 843 F. Supp. at 383. *But see* United States v. Pole No. 3172, 852 F.2d 636, 640 (1st Cir. 1988) (rejecting government's argument that the entire property was forfeitable because some of the mortgage payments were made with drug money and holding only the proportion of the property equal to the percentage of the principal paid on the mortgage could be forfeited by the government).

68. *$288,930*, 838 F. Supp. at 370.

69. 18 F.3d 295 (5th Cir. 1994).

70. *Id.* at 299-300.

71. *Id.* at 297.

72. *Id.*

73. *Id.* at 298-99.

74. *Id.* at 298; *see also* State v. Clark, 875 P.2d 613, 619 (Wash. 1994) (finding the real property forfeitures involved constituted "punishment" for purposes of federal double jeopardy analysis, the court stated that it was not deciding whether "forfeiture of property acquired through proceeds traceable to a criminal violation to be 'punishment' under the Fifth Amendment").

district court cases[75] and a Missouri appellate court[76] reached similar conclusions.

But the Ninth Circuit, in *United States v. $405,089.23*, rejected the Fifth Circuit's reasoning in *Tilley*.[77] The court found that *Austin* explicitly refused to apply *Tilley*'s "case-by-case" approach.[78] Instead, the *Austin* court adopted a "categorical approach to 'punishment' determinations in the forfeiture context," requiring a reviewing court to look "to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit."[79] Because the *Austin* Court did not distinguish between drug proceeds and non-drug proceeds, the Ninth Circuit found, any determination of whether forfeiture constitutes punishment must look to the broader punitive purposes of the forfeiture statute as a whole.[80]

In concluding that forfeitures under § 881(a)(6) constitute punishment, the *$405,089.23* court noted that the *Austin* Court relied upon three facts in determining that forfeitures under § 881(a)(4) and (a)(7) were punishment: (1) the historical understanding of forfeiture as punishment, (2) the clear focus of § 881(a)(4) and (a)(7) on the culpability of the owner (both provide a defense for innocent owners) and (3) the evidence that Congress understood those provisions as serving to deter and punish.[81] The Ninth Circuit concluded that, as these three factors apply equally to forfeitures under § 881(a)(6), *Austin* requires courts to view forfeitures under § 881(a)(6) as punishment.[82]

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75. United States v. $45,140, 839 F. Supp. 556, 558 (N.D. Ill. 1993) (holding that, if money constitutes the proceeds of a drug transaction, it is illegal to possess and its forfeiture is not punishment; but if the money is merely used to facilitate a drug purchase, it is not illegal to possess and its forfeiture is at least partly punitive); United States v. $288,930, 838 F. Supp. 367, 370 (N.D. Ill. 1993) (holding that forfeiture of allegedly illegally obtained property, such as the proceeds from drug sales under § 881(a)(6), is not punishment because the claimant does not rightfully own the forfeited property).

76. State v. Meister, 866 S.W.2d 485, 490-91 (Mo. Ct. App. 1993) (holding that a person who received money in exchange for contraband drugs has no constitutionally protected property interest in the proceeds superior to the state's statutory interest).

77. 33 F.3d 1210, 1220 (9th Cir. 1994).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1220-21.

82. *Id.* at 1221.

Following *$405,089.23*, an Illinois district court, in *United States v. 4204 Thorndale Avenue*,[83] again confronted the issue and accepted the Ninth Circuit's reasoning that forfeitures under § 881(a)(6) are not solely remedial, because "forfeitures under § 881(a)(6) are not limited to the proceeds of illegal activity."[84] Interestingly, however, the *4204 Thorndale Avenue* court, although finding the Eighth Amendment analysis applicable, held that the claimant failed to meet the Seventh Circuit's standard of showing a "gross proportionality between the penalties and the offenses committed to establish a constitutional violation."[85] Therefore, the applicable forfeiture did not constitute punishment in violation of the Excessive Fines Clause.[86]

At least one limitation has been imposed on the scope of *Austin*. In *McNichols v. Commissioner of Internal Revenue*,[87] the court held that *Austin* did not apply to a civil income tax case.[88] It stated that neither *Austin*'s holding nor its statements that a forfeiture can be excessive under the Eighth Amendment "are or should be applicable to any actions other than forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7)."[89]

The district courts are split regarding whether the *Austin* analysis applies to proceedings under the False Claims Act.[90] In *United States v. Education Department Network*,[91] the court said no, finding that since the award sought by the government under the Act is remedial, it could not be "excessive" under *Austin*.[92] This holding is ironic, in light of the fact that the Act was the subject of the Supreme Court's decision in *Halper*.[93]

In *United States ex rel. Smith v. Gilbert Realty Co.*,[94] the court found *Austin* applicable to a *qui tam* action brought pursuant to the Act.[95]

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83. No. 92 C 3744, 1994 WL 687628 (N.D. Ill. Dec. 7, 1994).

84. *Id.* at *10.

85. *Id.* (citing United States v. 6250 Ledge Rd., 943 F.2d 721, 728 (7th Cir. 1991); United States v. Vriner, 921 F.2d 710, 712-713 (7th Cir. 1991)).

86. *Id.* at *11.

87. 13 F.3d 432 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 2705 (1994).

88. *Id.* at 434.

89. *Id.* The court also distinguished the facts of its case, in which the appellant had signed a plea agreement agreeing to the forfeiture, with those of *Austin*, and found no Eighth Amendment violation.

90. 31 U.S.C. §§ 3729-3731 (1988 & Supp. V 1993).

91. No. 89-7780, 1993 U.S. Dist. LEXIS 18013 (E.D. Pa. Dec. 20, 1993).

92. *Id.* at *17.

93. 490 U.S. 435 (1989).

94. 840 F. Supp. 71 (E.D. Mich. 1993).

95. *Id.* at 74.

Looking to the facts of the case, that is, the low level of actual damages, less than $2000, in relation to the more than $290,000 sought by the government, the court held that the damages sought constituted "punishment" under *Halper*,[96] *Browning-Ferris Industries of Vermont v. Kelco Disposal*,[97] and *Austin*. It was therefore appropriate for the court to consider the excessiveness of the punishment.[98]

It appears that the courts applied *Austin* to cases that were not yet final when *Austin* was decided.[99]

D. *The Lower Courts Tackle Excessiveness and Disproportionality*

So what will the *Austin* test shape up to be? Between the language in Justice Scalia's opinion and theories adopted under other analyses, the district and circuit courts have begun taking a stab at the challenge. In an attempt to provide "guidance" to the lower court, the Third Circuit suggested first that, whatever the analysis, it should be different from that applied to monetary fines.[100] One factor which the court said may be appropriate when making the excessiveness determination is whether the relationship of the property to the offense was "close enough to render the property, under traditional standards, 'guilty' and hence forfeitable."[101] Formulating the test, however, has been difficult for the lower courts. Their tests have run the gamut. A review of the decisions is instructive.[102]

The first cases to apply *Austin* used Justice Scalia's nexus test as a starting point and found the forfeiture appropriate under the facts. In both

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96. 490 U.S. 435 (1989).

97. 492 U.S. 257 (1989).

98. *Gilbert Realty Co.*, 840 F. Supp. at 74.

99. *See, e.g.*, United States v. R.R. #1, Box 224, 14 F.3d 864, 873 n.9 (3d Cir. 1994) (citing United States v. Borromeo, 1 F.3d 219 (4th Cir. 1993)).

100. *R.R. #1, Box 244*, 14 F.3d at 873.

101. *Id.* (quoting Austin v. United States, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in part and concurring in the judgment)).

102. Additionally, on January 7, 1994, the Justice Department issued a 63-page memorandum, ostensibly to "provide guidance and uniformity in responding to excessiveness challenges" stemming from *Austin* and Alexander v. United States, 113 S. Ct. 2766 (1993). *See* KESSLER, *supra* note 1, at App. E4-2 (reprinting the memorandum). Although the memorandum takes a "hard line" approach to defenses based on *Austin* and *Alexander*, that description is clearly an understatement. *Id.* § 8.02[5]. The Department of Justice actually advises that "only in the rarest and most extreme cases" should forfeitures be held to violate the Excessive Fines Clause. *Id.* at App. E4-58.

In Re King Properties[103] and *United States v. 2828 North 54th Street*[104] the property owners had used their homes as the bases of substantial drug operations. Large amounts of drugs and drug paraphernalia were found in both homes.[105] Under these facts, the Supreme Court of Pennsylvania and the United States District Court in Wisconsin had little trouble concluding that forfeiture of the properties was appropriate.[106] The same analysis was followed in *United States v. 9638 Chicago Heights*,[107] where the court also limited its inquiry to the relationship between the defendant property and the offense.[108]

But in what always must be a fact intensive analysis, the courts have started to use other factors or combinations of factors to determine the excessiveness of a particular forfeiture. In *United States v. 427 & 429 Hall Street*,[109] the court articulated a two-step balancing test for determining whether a forfeiture pursuant to § 881(a)(4) and (a)(7) violates the Excessive Fines Clause.[110] The test incorporated both Justice Scalia's "instrumentality" test as well as a proportionality test.[111] According to the court, the government must first show a "substantial connection" between the defendant property and the drug trafficking in question.[112] If it does, the burden shifts to the claimant to show that the forfeiture of the subject property is a "grossly disproportionate" punishment, given the nature of the drug trafficking involved.[113] Factors courts should use in their determinations include the amount of drugs involved, their value, the trafficking's timespan, and the effect of the

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103. 635 A.2d 128 (Pa. 1993).

104. 829 F. Supp. 1071 (E.D. Wis. 1993).

105. *2828 N. 54th St.*, 829 F. Supp. at 1073; *King Properties*, 829 A.2d at 129.

106. *2828 N. 54th St.*, 829 F. Supp. at 1073; *King Properties*, 829 A.2d at 133.

107. 27 F.3d 327 (8th Cir. 1994).

108. *Id.* at 330-31.

109. 853 F. Supp. 1389 (M.D. Ala. 1994).

110. *Id.* at 1398.

111. *Id.*

112. *Id.* at 1399.

113. *Id.* It is interesting to note that the same judge who wrote the decision in *427 & 429 Hall St.*, 853 F. Supp. 1389, had, only months earlier, used only the instrumentality test as the sole factor in deciding the issue of excessiveness under the Eighth Amendment. *See* United States v. 427 & 429 Hall St., 842 F. Supp. 1421, 1429 (M.D. Ala. 1994).

distribution on individuals and on the community.[114] The claimant's culpability, however, is irrelevant to the excessive fine analysis.[115]

A similar test was adopted in *United States v. 13143 S.W. 15th Lane*.[116] The court, citing *427 & 429 Hall Street*, used the two-pronged test to decide the issue of excessiveness.[117] However, contrary to *427 & 429 Hall Street*, the court, in a footnote, expressly stated that it "does not mean to foreclose other factors from being considered in an Excessive Fines analysis."[118] The court recognized that other cases "may present factual circumstances which require either a deviation from or additions to" the two-pronged test.[119] This is important, emphasizing the fact-specific nature of an excessiveness analysis and that the court, despite "precedent" to the contrary, did not mean to limit the trier of fact in its review. A broader analysis, including other factors, was not, therefore, precluded by the Florida court.

In *State v. 392 South 600 East*,[120] the Utah Supreme Court sidestepped enunciating a test for determining excessiveness. However, the court did acknowledge that the proper test involves an analysis of more than just instrumentality,[121] although the analysis must begin with a "basic 'substantial connection' or 'instrumentality' analysis."[122] Because the court found the government's proof failed to meet the substantial connection test, it declined to further define the appropriate Excessive Fines Clause analysis.[123] However, the court emphasized that the instrumentality test "is the beginning point, rather than the sole criterion."[124] Like the *13143 S.W. 15th Lane* court, the court left open "what other factors . . . may be comprehended by an excessive fines analysis."[125]

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114. *427 & 429 Hall St.*, 853 F. Supp. at 1400.

115. *Id.*

116. 872 F. Supp. 968 (S.D. Fla. 1994).

117. *Id.* at 973.

118. *Id.* at 973 n.8.

119. *Id.*

120. 886 P.2d 534 (Utah 1994).

121. *Id.* at 541 (holding that "the connection between the property and the offense is not the sole criterion for determining whether a given forfeiture is constitutionally excessive").

122. *Id.*

123. *Id.* at 452.

124. *Id.*

125. *Id.*

Proportionality is becoming a more prominent part of the test. The Eleventh Circuit, in *United States v. 18755 North Bay Road*,[126] held that forfeiture of an elderly couple's $150,000 home, after a conviction for holding illegal weekly poker games there, would impose a disproportionate penalty given the relatively small scale of the gambling operation and, therefore, violated the Excessive Fines Clause.[127]

In *United States v. 1988 White Jeep Cherokee*,[128] the district court noted that "the principle of proportionality still survives."[129] The court reiterated the conclusions reached by the Third Circuit in *United States v. Sarbello*:[130]

> "We note that a district court's proportionality analysis, while it will not in every case be extensive or encompass the three factors set forth in *Solem*, must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. . . . The language of the eighth amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime."[131]

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126. 13 F.3d 1493 (11th Cir. 1994).

127. *Id.* at 1498.

128. No. 1993-132, 1994 U.S. Dist. LEXIS 6813 (D.V.I. Apr. 25, 1994).

129. *Id.* at *10.

130. 985 F.2d 716 (3d Cir. 1993).

131. *1988 White Jeep Cherokee*, No. 1993-132, 1994 U.S. Dist. LEXIS 6813 at *11-12 (quoting United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993) and referring to Solem v. Helm, 463 U.S. 277 (1983)) (involving an Eighth Amendment challenge to a RICO forfeiture, in which the Court held that "the eighth amendment requires that a criminal RICO forfeiture order be justly proportioned to the charged offense," and elaborated that "some proportionality analysis is required upon the defendant's prima facie showing that the [forfeiture] is grossly disproportionate, or bears no close relation, to the seriousness of the crime").

The court also noted that the Fourth Circuit has expressed the view that proportionality remains relevant to determining whether a forfeiture violates the Eighth Amendment.[132]

The district court in *United States v. 429 South Main Street*,[133] also used proportionality as part of its test relating to the question of excessiveness.[134] The Ohio court found that the forfeiture of a residence valued at more than $83,000 was not excessive despite the fact that the underlying criminal activity consisted of three sales of marijuana for a total of ninety-five dollars.[135] It was persuaded by the fact that the owner whose criminal acts led to the forfeiture could have been imprisoned for ten years and fined $500,000 on each count.[136]

A federal court in Michigan that recently analyzed a forfeiture action applied both Justice Scalia's 'instrumentality' test and the 'proportionality' test in analyzing the forfeiture before it.[137]

The most comprehensive analysis to date of the excessiveness issue may be found in *United States v. 6625 Zumirez Drive*.[138] There, in a case applying an Eighth Amendment analysis to an action brought pursuant to the civil forfeiture provision of the federal money laundering statute,[139] the court weighed three factors, none of which was dispositive, to determine the excessiveness of the forfeiture: (1) the inherent gravity of the offense compared with the harshness of the penalty, (2) whether the property was an integral part of the commission of the

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132. *Id.* at *12 (stating that "'an inquiry into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture would seem to be in order'" and that "'the proportional relationship of the value of proceeds to the harm occasioned by a defendant's criminal conduct may, in a given case, be relevant under the Supreme Court's approach in *Austin*'") (quoting United States v. Borromeo, 1 F.3d 219, 221 (4th Cir. 1993)).

133. 843 F. Supp. 337 (S.D. Ohio 1993).

134. *Id.* at 341.

135. *Id.* at 342.

136. *Id.*

137. United States v. 11869 Westshore Drive, 848 F. Supp. 107, 110-11 (E.D. Mich. 1994) (holding that the forfeiture of a residence valued at $85,000 residence was not a disproportionate penalty, given the street value of drugs tied to property on which house was located and applicable federal criminal fine of up to $250,000); *see also* State v. Clark, 875 P.2d 613, 619 (Wash. 1994) (en banc) (stating that the difference between the equity in the claimant's property—$30,921—and the government's cost of prosecution and investigation—$26,000—constituted "rough remedial justice" and, therefore, was not an excessive fine).

138. 845 F. Supp. 725 (C.D. Cal. 1994).

139. 18 U.S.C. § 981(a)(1)(c) (1988 & Supp. V 1993).

crime and (3) whether the criminal activity involving the subject property was extensive in terms of time and/or spatial use.[140] This test appears to be a strong, objective test. Note, too, that at least one element deals with the gravity of the offense and its relation to the forfeiture penalty.[141] The court also stated the obvious: that even though forfeiture can apply where the claimant is acquitted of the criminal charges, "the actions of a claimant adjudged innocent are necessarily less serious than those of a claimant who has been found guilty."[142] The *Zumirez* analysis is extensive and thorough and should be reviewed by every practitioner researching the issue of excessiveness.

Interestingly, the *427 & 429 Hall Street* court called the *Zumirez* test too subjective for its taste because it gave paramount importance to "the personal, subjective feelings of the individual judge as to simply 'what seems right' on a case by case basis, rather than giving objective guidance to the court in an effort to achieve consistent application of the law."[143] The court added that the test also may place too heavy a burden on the government.[144]

Subsequent decisions fail to confirm that view. Thus far, at least five courts have adopted the *Zumirez* approach, resulting in split decisions. Two other courts have adopted a modified *Zumirez* analysis.

In *United States v. Rural Route 1, Mound Road*,[145] the court found Justice Scalia's "suggestion" to be "one relevant factor" in testing excessiveness and adopted it as the second of the multi-factor test fashioned in *Zumirez*.[146] In holding that the forfeiture was not excessive where the claimants' equity in the subject property was only approximately $25,000 more than the value of the narcotics involved,[147] the court emphasized that the nature of an excessive fines inquiry is fact intensive.[148] "[A]t this stage," and given the facts before it, the court denied claimants' motion to dismiss on excessiveness grounds.[149]

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140. *6625 Zumirez Drive*, 845 F. Supp. at 732.

141. *See id.*

142. *Id.* at 736.

143. United States v. 427 & 429 Hall St., 853 F. Supp. 1389, 1398 (M.D. Ala. 1994).

144. *See id.*

145. No. 90-C-4722, 1994 U.S. Dist. LEXIS 6433 (E.D. Ill. May 12, 1994).

146. *Id.* at *6.

147. *Id.* at *8.

148. *Id.* at *5.

149. *Id.* at *11.

In *United States v. 24124 Lemay Street*,[150] the court found that the three-factor inquiry in *Zumirez* was "the most appropriate test for determining whether the forfeiture in the present case violates the Eighth Amendment."[151] The court noted that the test applies the relevant factors necessary for making an excessiveness determination under the Eighth Amendment and, as such, gives "'renewed significance to the Eighth Amendment's Excessive Fines Clause and will have the added benefit of checking the government's potential for abusive use of the civil forfeiture statutes.'"[152] Under the facts before it, the court held that forfeiture of claimant's home was not excessive under the Eighth Amendment.[153]

Another federal judge in California followed the lead of *Zumirez*, finding that "application of the factors established in *6625 Zumirez* well serves the requirement for Eighth Amendment scrutiny established in *Austin*."[154]

The Illinois Court of Appeals used what is best described as a modified *Zumirez* test in analyzing the excessiveness issue. In *People ex rel. Waller v. 1992 Oldsmobile Station Wagon*,[155] the court found it "inevitable" that some consideration of the extent to which the forfeited property facilitated the offense would "be relevant to the determination of excessiveness."[156] A related concern raised by the court was the number of occasions the property has been used in connection with illegal activities.[157] "We share the concern of the United States Court of Appeals for the Eighth Circuit that 'any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.'"[158]

That court also included in its analysis the degree of the property owner's culpability, the value of the property, and the relative seriousness of the offense:

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150. 857 F. Supp. 1373 (C.D. Cal. 1994).

151. *Id.* at 1382.

152. *Id.* (quoting United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 735 (C.D. Cal. 1994)).

153. *24124 Lemay St.*, 857 F. Supp. at 1383.

154. United States v. 3636 Roselawn Ave., No. CV 92-2034, 1994 WL 524985, at *1 (C.D. Cal. Apr. 14, 1994).

155. 638 N.E.2d 373 (Ill. App. Ct. 1994).

156. *Id.* at 376.

157. *See id.*

158. *Id.* (quoting United States v. 508 Depot St., 964 F.2d 814, 818 (8th Cir. 1992), *rev'd sub nom.*, Austin v. United States, 113 S. Ct. 2801 (1993)).

> "Excessive" is defined as "exceeding the usual, proper or normal. * * * EXCESSIVE implies an amount or degree too great to be reasonable or acceptable." . . . By definition, a determination of "excessive" punishment includes a consideration of the amount of punishment in relation to the seriousness of the offense: the punishment should fit the crime. We do not mean to imply that a precise mathematical ratio can be established between the seriousness of the owner's involvement in the crime and the value of the property. Rather, each case must be considered on its own facts.[159]

The court remanded the case to the lower court for a determination of the issues in light of its decision.[160]

In *United States v. 2408 Parliament*,[161] the court also used a three-pronged inquiry, but not the one utilized in *Zumirez*. Here the court's first two prongs relate to factual determinations, while the third requires balancing factual determinations with equitable considerations.[162] The court must first determine how extensive the use of the property in the underlying crime was and the value of the property.[163] Then, given these determinations, the court must decide whether the forfeiture is an excessive penalty.[164] In answering these questions, the court noted that it should look to the totality of the circumstances in the case before it. No one fact or determination should end the inquiry.[165] In the case at bar, the court held that forfeiture of an $87,000 piece of property was not unconstitutionally excessive in light of the defendant's use of the property to grow more than 400 marijuana plants, the high street value of the marijuana generated from the plants, and the maximum fine of $2 million applicable to growing more than 100 marijuana plants.[166]

In *Thorp v. State*,[167] the Georgia Supreme Court, in an exceptionally thoughtful opinion, adopted the *Zumirez* test. The court found that an evaluation of the three general factors enunciated in *Zumirez* "well serves the scrutiny demanded by the Excessive Fines Clause" and serves as

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159. *Id.* (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 432 (1990)).

160. *See id.* at 377.

161. 859 F. Supp. 1075 (E.D. Mich. 1994).

162. *Id.* at 1077-78.

163. *Id.* at 1078.

164. *Id.*

165. *Id.*

166. *Id.*

167. 450 S.E.2d 416 (Ga. 1994).

"minimal guidelines for excessiveness inquiries in the State."[168] The court had no difficulty finding that a proportionality analysis "is necessary" to determine whether an *in rem* forfeiture is excessive.[169]

Finally, in an eloquent analysis of the issues, U.S. District Judge William M. Acker of the Northern District of Alabama cited *Zumirez* favorably in concluding that a claimant's home should be given greater protection in any excessive fines analysis: "Obviously, the harshness of taking the roof from over the head of a person, even a wrongdoer, is something that must be carefully examined if the Eighth Amendment is to be given meaning, as it was unanimously in *Austin*, even over the strong resistance of the United States."[170]

Judge Acker's opinion in *United States v. 461 Shelby County Road 361* is filled with wonderful thoughts and wanderings as the court ferreted its way through various aspects of forfeiture. For example, the court examined the government's approach to post-*Austin* cases:

> In both *Austin* and *Alexander*, the United States strenuously argued to the Supreme Court that the Eighth Amendment has no application to forfeiture proceedings, which are *in rem*. The reaction of all nine justices to this argument amounted to a stunning rejection of the United States' position, after which the United States has retreated to the position that "only in the rarest and most extreme cases" should forfeiture be held to violate the Excessive Fines Clause and therefore that proposed forfeitures should be upheld unless they "would shock the conscience." Whether the United States would have a jury decide whether its collective conscience is shocked, or whether the court's conscience should be the conscience to be or not to be shocked, remains a matter of speculation. The generic brief filed by the United States seems designed to justify 90% of all forfeitures. Because the instant case is a *civil* case, *Alexander* is only of secondary or collateral interest. Yet, the United States argues broadly in an attempt to build a dam to staunch the flood of resistance to forfeitures in both the criminal and the civil contexts.[171]

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168. *Id.* at 420.

169. *Id.* at 418-19.

170. United States v. 461 Shelby County Rd. 361, 857 F. Supp. 935, 938 (N.D. Ala. 1994).

171. *Id.* at 937.

The court could not understand an approach, such as that presented by the government, which sought, at all costs, to avoid "proportionality" as the controlling criterion for judging the question of excessiveness:[172]

> [T]he word 'excessive' necessarily implies an analysis based on an exercise of judicial discretion relating the degree of an individual owner's criminal culpability to the severity of the punishment represented by the value of his property to be divested. This has always been the analysis for applying the Excessive Fines Clause.[173]

The court, almost rhetorically, cited Third and Eleventh circuit cases, among others, which had already used proportionality as their controlling factor in examining excessiveness.[174] It found that the ability of the offender to pay must be a factor in any excessiveness analysis:

> Simply put, courts cannot order a culprit to pay more money in fines or restitution than he can reasonably be expected to pay, no matter how heinous his crime. This principle rarely comes into play in forfeiture cases because the mere fact that the wrongdoer owns the property to be forfeited proves his ability to turn it over, no matter what it is worth. But, this principle does dominate the excessiveness inquiry if the property to be forfeited is the offender's homestead, property historically given a high degree of protection. It is much more likely that the taking of the homeplace would constitute an excessive fine than the taking of other property of equal value. Society already has more homeless people than it wants or can take care of, and this court is wary of adding the [claimants] to the list of the homeless. It makes this court wince to think of the [claimants], who have regularly made their home mortgage payments, being forced into the street while their mortgage payments enure to the benefit of the United States.[175]

The court also used as its statement of facts a report, drafted by the U.S. Probation Service at the request of the court, which had concluded that the claimants had been sufficiently punished in the criminal

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172. *Id.*

173. *Id.*

174. *See id.* at 937-38 (citing United States v. R.R. #1, Box 224, 14 F.3d 864, 974-76 (3d Cir. 1994); United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1498 (11th Cir. 1994)).

175. *Id.* at 938.

proceedings.[176] Adopting the report, the court held that the forfeiture of claimants' home based upon the sale of marijuana on five occasions and cocaine on two occasions to an undercover agent at their home was "shocking" to its conscience.[177] The court stated:

> This court does not mean to condone what [the claimants] did, but the fact that drug trafficking cannot be condoned does not lead inexorably to the taking away of the only residence of two small drug traffickers long after those traffickers have paid their debts to society and have cooperated fully with law enforcement.[178]

Calling the government's actions "unfair" and "excessive," the court granted summary judgment in favor of the property.[179]

Recently, the Illinois Supreme Court in *People ex rel. Waller v. 1989 Ford F350 Truck*,[180] adopted a multifactor proportionality test. Finding that a test that turns exclusively on the relationship between the forfeited property and the offense is "patently inadequate and necessarily conflates the eighth amendment excessive fine analysis with the determination of whether the property is subject to forfeiture in the first instance," the court held that the *Zumirez* test was fine but that it was too restrictive.[181] It held that the trial court should not be precluded from considering factors not specifically listed in the three-prong *Zumirez* test.[182]

Austin's footnote fifteen, however, did not deter the Fourth Circuit from focusing its test for weighing forfeitures under the Eighth Amendment upon the instrumentality. In *United States v. Chandler*,[183] the Fourth Circuit held that the only relevant inquiry in determining excessiveness is the closeness of the relationship between the property and the offense.[184] The court adopted 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, (2) the role and culpability of the owner and (3) the possibility of separating offending property that can

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176. *See id.* at 940.

177. *Id.*

178. *Id.*

179. *Id.*

180. 642 N.E.2d 460 (Ill. 1994).

181. *Id.* at 466.

182. *Id.*

183. 36 F.3d 358 (4th Cir. 1994).

184. *Id.* at 364 ("The question of excessiveness is thus tied to the 'guilt of the property' of the extent to which the property was involved in the offense, and not its value.").

readily be separated from the remainder."[185] The court said: "In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following [five] factors," none of which is dispositive, but which, under the totality of the circumstances, would enable the court to conclude that "the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended."[186] These factors are:

> (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.[187]

The *Chandler* court limited its application to the Cruel and Unusual Punishments Clause of the Eighth Amendment and not to the Excessive Fines Clause, the subject of *Austin*. Thus, the court found: "While the principle of proportionality is traditionally associated with discussions of whether punishment is cruel and unusual . . . we believe that it is not applicable when considering the excessiveness of a forfeiture of specifically identified property."[188] Consequently, the court approved the forfeiture of a thirty-three-acre tract of land where the farm house was used to sell narcotics, the land helped shield the farm house and transactions from public view, and the property owner was intimately involved in the extensive drug activity.[189]

Remarkably, though, the courts which have adopted Justice Scalia's approach have outright rejected any inclusion of factors such as proportionality within their analysis. Supporters of the instrumentality test, too, have been passionate about keeping "morality" outside the forfeiture picture.[190] It should not be surprising, therefore, that most support for Scalia's approach has come from the government. Those

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185. *Id.* at 365.

186. *Id.*

187. *Id.*

188. *Id.* at 365-66.

189. *Id.* at 366.

190. *See* Cameron H. Holmes, *Excessive-Fine Analysis Gels in 4th Cir.* Chandler *Opinion*, MONEY LAUNDERING L. REP., Dec. 1994, at 1, 3.

supporting instrumentality as the sole criterion seem to have forgotten to read the majority opinion in *Austin*.[191]

Notably, some courts have refrained altogether from articulating a test, or have defined a test only to state that it is inconclusive and open for future modification.[192] This is not what the Supreme Court had in mind.

As virtually all of the courts addressing these issues have agreed, however, there is no one method of analysis.[193] As illustrated, others include balancing the crime committed against the nature and value of the property sought to be forfeited,[194] analyzing the difference between the value of the instrumentality sought to be forfeited and the amount needed to "effectuate the legitimate remedial purposes of the forfeiture,"[195] and assessing the personal benefit reaped by the defendant, the defendant's motive and culpability and the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct.[196] One court has even suggested adopting the standard used in *Solem v. Helm*,[197] a case decided under the Cruel and Unusual Punishments Clause of the Eighth

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191. *Austin*, 113 S. Ct. at 2812, n.15. The Court stated:

> Justice SCALIA suggests that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense. . . . We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

Id.; *see also* Thorp v. State, 450 S.E.2d 416 (Ga. 1994) (discussing thoroughly the instrumentality and proportionality prongs of an excessive fines analysis).

192. *See, e.g.*, United States v. 13143 S.W. 15th Lane, 872 F. Supp. 968, 973 (S.D. Fla. 1994) (stating that the court was not bound to follow the instrumentality test set out by Justice Scalia in *Austin* because it is part of a concurring opinion); *In re* Forfeiture of One 1993 Dodge Intrepid, 645 So.2d 551 (Fla. Dist. Ct. App. 1994); State v. 392 S. 600 E., 886 P.2d 534 (Utah 1994).

193. Austin v. United States, 113 S. Ct. 2801, 2812 n.15 (1993) ("We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of . . . property was excessive."); *see* United States v. R.R. #1, Box 224, 14 F.3d 864, 873 (3d Cir. 1994); United States *ex rel.* Smith v. Gilbert Realty Co., 840 F. Supp. 71, 74 (E.D. Mich. 1993); United States v. $288,930, 838 F. Supp. 367, 370 (N.D. Ill. 1993).

194. *See R.R. #1, Box 224*, 14 F.3d at 873; *Gilbert Realty Co.*, 840 F. Supp. at 74-75; *West Side Bldg. Corp.*, 843 F. Supp. at 383-84.

195. United States v. Borromeo, 1 F.3d 219, 221 (4th Cir. 1993).

196. *R.R. #1, Box 224*, 14 F.3d at 875 (quoting the test used in United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993), which analyzed a criminal RICO forfeiture in light of the Excessive Fines Clause).

197. 463 U.S. 277 (1983).

Amendment.[198] In *Solem*, the Supreme Court identified three objective criteria for use in an Eighth Amendment proportionality analysis: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[199] Even the *Solem* Court, however, specifically noted that "no one factor will be dispositive in a given case."[200] The Supreme Court said that, in weighing these factors, a court should take into account the "absolute magnitude of the crime" and the "culpability of the offender."[201] At least two federal courts, however, have held that *Solem* has been placed in doubt by *Harmelin v. Michigan*.[202]

In *United States v. Monroe*,[203] a pre-*Austin* decision, the court found that the forfeiture of the defendant's real property, in addition to a ten-year prison sentence, did not constitute an Eighth Amendment violation because the forfeiture and imprisonment were not disproportionate to the defendant's crimes.[204] In coming to its conclusion, the court considered, among other things, the maximum fine and term of imprisonment the defendant *could* have received.[205]

The bottom line appears to be that the courts are just now feeling their oats with respect to this issue. It is difficult to conceive a test limited to the instrumentality prong. At minimum, *Austin*'s footnote fifteen illustrates the majority's clear refusal to put its imprimatur on Justice Scalia's test.[206] In fact, it appears to disapprove the idea that that test is the only appropriate criteria for determining if a civil forfeiture is

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198. *See* United States v. Busher, 817 F.2d 1409, 1415-16 (9th Cir. 1987).

199. 463 U.S. at 292.

200. *Id.* at 290 n.17.

201. *Id.* at 293. Note that, in the criminal forfeiture context of Alexander v. United States, 113 S. Ct. 2766 (1993), the Court did not establish a test for excessiveness, but made a point of emphasizing that the issue of excessiveness should be considered "in the light of the extensive criminal activities which petitioner apparently conducted through [his] racketeering enterprise over a substantial period of time" rather than on the basis of what the petitioner called "a few materials the jury ultimately decided were obscene." *Id.* at 2776; *see infra* Part II.

202. United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994); United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (citing Harmelin v. Michigan, 111 S.Ct. 2680 (1991)).

203. 866 F.2d 1357 (11th Cir. 1989).

204. *Id.* at 1367.

205. *See id.*

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

excessive.[207] Knowing that the Eighth Circuit would have to apply an excessiveness test on remand, the majority stated that the Court of Appeals was not limited to Justice Scalia's test but could consider other factors as well.[208]

Further, Justice Scalia's instrumentality test is based on the same legal fiction—that the property is considered the offender in all *in rem* forfeiture cases—questioned by the *Austin* Court.[209] The majority in *Austin* recognized that civil in rem forfeitures are not predicated solely on the notion that the property is guilty.[210] "The Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent."[211] In fact, the majority predicated the applicability of the excessiveness prohibition on the ground that the forfeiture served to punish the owner.[212]

In addition, as that dreaded common sense dictates, and as some of the courts discussed above have found, the very word "excessive" plainly contemplates some comparison of the fine to the conduct sought to be punished to determine if the fine violates the Eighth Amendment. In this regard, one commentator said that "it is difficult to imagine . . . how a fine could ever be found 'excessive' without some analysis of the relationship between the penalty and the offense for which it is imposed."[213] Indeed, Justice White, in the context of a dissent in a cruel and unusual punishment case, indicated his view that the word "excessive" implies a proportionality requirement and that such a requirement for the Eighth Amendment might indeed stem from the Excessive Fines Clause and not the Cruel and Unusual Punishments Clause.[214]

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207. *See id.*

208. *Id.* at 2812.

209. *Id.* at 2813-14 (Scalia, J., concurring in part and concurring in the judgment).

210. *See id.* at 2808-10.

211. *Id.* at 2809.

212. *Id.* at 2807-10; *see also The Supreme Court—Leading Cases*, 107 HARV. L. REV. 144, 205-14 (1993).

213. Lyndon F. Bittle, Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CAL. L. REV. 1433, 1450 (1987) (citing United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987)).

214. Harmelin v. Michigan, 111 S. Ct. 2680, 2709 (1991) (White, J., dissenting).

Also, although *Alexander v. United States* involved a criminal in personam forfeiture, it supports the conclusion that the word "excessive" connotes a proportionality review.[215]

Finally, as one court put it, there is more reason to apply a proportionality analysis in forfeiture cases than in punishment cases because in the former the government stands to benefit from the revenue raised whereas in the latter the government must bear the expense of the imprisonment.[216]

The Third Circuit sounded a smart note of caution, when it said that, in this complex web of burdens of proof and other requirements, the district courts should "avoid conflating the Eighth Amendment inquiry with § 881(a)(7)'s nexus requirement, although the two share some characteristics."[217] It is enough that there is confusion regarding the standard of probable cause. The *Austin* analysis should not be compounded with it.

E. *Who Should Decide What Is Excessive?*

The Third Circuit has addressed the issue of who decides what is excessive. In *United States v. R.R. #1, Box 224*,[218] the Third Circuit suggested that considering the present uncertainty of the law and the

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215. In *Alexander*, discussed *infra* Part II, the defendant argued that "the forfeiture . . . —considered atop his 6-year prison term and his $100,000 fine—[was] disproportionate to the gravity of his offenses and therefore violate[d] the Eighth Amendment, either as a 'cruel and unusual punishment' or an 'excessive fine.'" *Alexander*, 113 S. Ct. 2766, 2775 (1993). The Eighth Circuit had ruled that a proportionality review of the forfeiture did not have to be conducted because a proportionality review was not necessary for a "sentence less than life imprisonment without the possibility of parole." Alexander v. Thornburgh, 943 F.2d 825, 836 (8th Cir. 1991). The Supreme Court ruled that that statement only was relevant to the Eighth Amendment's prohibition against cruel and unusual punishments but not the prohibition against excessive fines. *Alexander*, 113 S. Ct. at 2775. It further stated that "it is in light of the extensive criminal activities which petitioner apparently conducted . . . over a substantial period of time that the question of whether or not the forfeiture was 'excessive' must be considered." *Id.* at 2776. The Court remanded the case to the circuit court to consider Alexander's argument. If proportionality was not required by the Excessive Fines Clause, then the proper disposition of the case would have been to affirm the circuit court as to Alexander's proportionality contention. Moreover, the Court's statement that the proper inquiry had to focus on the extent of Alexander's criminal activities indicates that a proportionality review was appropriate.

216. Thorp v. State, 450 S.E.2d 416, 419 (Ga. 1994); *cf. Harmelin*, 111 S. Ct. at 2693 n.9.

217. United States v. R.R. #1, Box 224, 14 F.3d 864, 873 (3d Cir. 1994).

218. *Id.* at 864.

interest of judicial efficiency, the courts should "consider submitting the question to a jury on a special interrogatory and then alternately treating the answer as non-binding and decide the excessiveness question itself."[219] An interesting mix. The court quoted the Seventh Circuit, which found that "'the infusion of the earthy common sense of a jury might upon occasion mitigate appropriately the harsh impact sometimes characteristic of *in rem* procedure.'"[220] For a claimant's peers to decide the issues of proportionality and excessiveness, at least at the outset, seems to be the logical and proper choice.

II. *ALEXANDER V. UNITED STATES*

The First and Eighth amendments were the subject of a second Supreme Court opinion issued on the final day of the 1992-93 term. In *Alexander v. United States*,[221] the petitioner, owner of numerous businesses dealing in sexually explicit materials, was convicted of, among other things, violating federal obscenity laws and RICO.[222] The obscenity convictions, based upon a finding that seven items sold at several stores were obscene, were the predicates for his RICO convictions.[223] In addition to imposing a six-year prison term and a $100,000 fine, the district court ordered petitioner, as punishment for the RICO violations, to forfeit his businesses and almost $9 million allegedly acquired through racketeering activity.[224] In affirming the forfeiture order, the Eighth Circuit rejected petitioner's arguments that RICO's forfeiture provisions constituted a prior restraint on speech and were overbroad.[225] "'The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents.'"[226] The court also held that the forfeiture did not violate the Eighth Amendment, concluding that proportionality review is not required of any sentence less than life imprisonment without the possibility of parole.[227] Although several

219. *Id.* at 876.

220. *Id.* (quoting United States v. 1976 Mercedes Benz 280S, 618 F.2d 453, 469 (7th Cir. 1980)).

221. 113 S. Ct. 2766 (1993).

222. *Id.* at 2769.

223. *Id.*

224. *Id.* at 2769-70.

225. Alexander v. Thornburgh, 943 F.2d 825, 834-35 (8th Cir. 1991).

226. *Id.* at 835 (quoting Fort Wayne Books, Inc. v. Indiana, 486 U.S. 46, 60 (1989)).

227. *Id.* at 836.

courts previously had raised the Eighth Amendment as a possible prohibition to a RICO forfeiture where the scope of the forfeiture would be "grossly disproportionate" to the criminal misconduct involving the enterprise's assets,[228] the Eighth Circuit did not consider whether the forfeiture was disproportionate or "excessive."[229]

In an opinion written by Chief Justice Rehnquist, the five-justice majority held that the government did not violate the defendant's First Amendment rights to free speech when its agents seized virtually all of the defendant's assets.[230] The Court rationalized that no rights were violated because the seizure was related to previous RICO violations.[231]

As to the Eighth Amendment argument, however, the Court was unanimous.[232] It found that the Eighth Amendment's Excessive Fines Clause "'limits the Government's power to extract payments as punishment for an offense.'"[233] The Court held that the *in personam* criminal forfeiture at issue under RICO was clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine."[234]

In analyzing the Eighth Amendment issues, the Court found an important distinction between the respective clauses of the amendment. The Court stated that, unlike the Cruel and Unusual Punishments Clause—which is concerned with matters such as the duration or conditions of confinement—"the Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as

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228. *See* United States v. Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987); United States v. Walsh, 700 F.2d 846, 857-58 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); United States v. Regan, 726 F. Supp. 447, 457-60 (S.D.N.Y. 1989).

229. *Alexander*, 943 F.2d at 835-36.

230. *Alexander*, 113 S. Ct. at 2770-75.

231. *Id.* at 2772-73.

232. The dissenters vigorously opposed the majority's First Amendment analysis. *See id.* at 2776-86 (Kennedy, J., dissenting). However, they had no objection to remanding the case for further consideration under the Eighth Amendment. *Id.* at 2786 (Kennedy, J., dissenting). The dissenters argued, however, that it was unnecessary to reach the Eighth Amendment issue in light of their opinion that the government action was unconstitutional under the First Amendment. *Id.* (Kennedy, J., dissenting).

233. *Id.* at 2775 (quoting Austin v. United States, 113 S. Ct. 2801, 2805-06 (1993)).

234. *Id.* at 2775-76.

punishment for some offense."[235] RICO's *in personam* criminal forfeiture "is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"[236] Accordingly, the Court held, the forfeiture aspects under RICO should be analyzed under the Excessive Fines Clause.[237] It stated that it was "preferable" that the question of excessiveness be addressed by the lower court in the first instance.[238] Interestingly, the Court made a point of emphasizing that the issue of excessiveness should be considered "in the light of the extensive criminal activities which petitioner apparently conducted through [his] racketeering enterprise over a substantial period of time" rather than on the basis of what the petitioner called "a few materials the jury ultimately decided were obscene."[239] Given the way the Court framed the issue for review by the Court of Appeals, it appears unlikely that the instant forfeiture would be found to be constitutionally "excessive."

In his dissent, Justice Kennedy noted that the threat of disproportionate and unconscionable consequences is not just to what the majority considered "smut" peddlers.[240] "Any bookstore or press enterprise could be forfeited as punishment for even a single obscenity conviction."[241] Thus, taking the new ruling to its logical conclusion, if a store sold something deemed "offensive" by local authorities, the government could legally confiscate the entire business.

Alexander raises concerns because the Court appears to be permitting consideration of uncharged acts and crimes the defendant has not been convicted of in the determination of excessiveness. What makes the Court's analysis even more disturbing is that *Alexander* involved an action brought under RICO's *in personam* criminal forfeiture provisions. The

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235. *Id.* at 2755 (quoting *Austin*, 113 S. Ct. at 2805-06 (emphasis and internal quotation marks omitted)); *accord* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 n.6 (1989) ("At the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense").

236. *Alexander*, 113 S. Ct. at 2775; *accord Austin*, 113 S. Ct. 2801. Unlike 21 U.S.C. § 881, the civil *in rem* statute at issue in *Austin*, RICO forfeiture is criminal and *in personam*. *See* 18 U.S.C. § 1963 (1988 & Supp. V 1993). Accordingly, there was no question as to the applicability of the Eighth Amendment. In the criminal forfeiture context, it has long been held that forfeitures, like other fines and penalties, are punitive in nature, thereby falling within the reach and scope of the Eighth Amendment. *See* KESSLER, *supra* note 1, § 1.03.

237. *Alexander*, 113 S. Ct. at 2776.

238. *Id.*

239. *Id.*

240. *Id.* at 2783 (Kennedy, J., dissenting).

241. *Id.* (Kennedy, J., dissenting).

defendant's guilt in the underlying criminal action is a prerequisite to a criminal forfeiture judgment.[242] It is, therefore, unclear as to how the Court will harmonize these two aspects of criminal forfeiture in the future.

Few would object to the forfeiture of the illegal materials and any ill-gotten gains, including the proceeds derived therefrom. The difficulty arises when the sale of seven obscene items is permitted to serve as the basis for the destruction of more than 100,000 books, magazines, and videotapes and the forfeiture of all of the shops and vehicles owned by the defendant, as well as nine million dollars.

There is an adage that a truly democratic society must find a proper balance between freedom and security. In a completely free society, no one is safe. In a truly safe society, no one is free. It is hoped that, on remand, the permissive nature of forfeiture's history will not close the lower court's eyes to what amounts to a blatant abuse of governmental power and prevent it from striking a balance between our desire for security and our need for freedom. "The fault, dear Brutus, is not in our stars, But in ourselves . . . ."[243] Cloaking outrageous behavior in the clothes of a free and safe society must not become our excuse to regress back to the "good ol' days" when kings were gods and we were safe from everyone, except ourselves.

III. PRETRIAL RESTRAINT OF SUBSTITUTE ASSETS

Mention should be made of what promises to be one of the next issues for the Supreme Court to address in the forfeiture context, namely, the pretrial restraint of substitute assets.

Congress has empowered the courts to order the forfeiture of any property belonging to the defendant, up to the value of the subject property, in lieu of such property.[244] These are substitute assets, that is, assets that bear no relationship to the criminal activity but which can be used to satisfy a forfeiture judgment if the assets relating to the crime have already been dissipated. This sounds a lot like a money judgment, and has been analyzed as such.

In *In re Assets of Billman*,[245] the court examined the question of whether substitute assets could be restrained pending trial and ruled in the

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242. *See* 18 U.S.C. § 1963(c) (1988).

243. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, at 584 (The Shakespeare Head Press Oxford ed., Dorset Press 1988).

244. 21 U.S.C. § 853(p) (1988). *But cf.* United States v. Roberson, 897 F.2d 1092, 1097 (11th Cir.) (limiting maximum amount of substitute property forfeiture to amount prosecution could show defendant actually paid for property used in crime), *reh'g denied en banc*, 907 F.2d 1145 (11th Cir. 1990).

245. 915 F.2d 916 (4th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991).

affirmative. With an eye toward the "remedial purposes" of the forfeiture statute[246] notwithstanding the literal language of the statute and the provision's legislative history,[247] the court read the provision allowing for a restraining order in conjunction with the substitute assets provision and concluded that together the provisions called for the preservation and restraint of substitute assets pending trial.[248] The court said that "a forfeiture money judgment can be satisfied out of any of the defendant's assets."[249] Because RICO forfeitures constitute *in personam* punishment, and because a final forfeiture judgment could be satisfied from any of a defendant's assets, the court reasoned that the pre-conviction restraint provisions must be construed broadly to accomplish the purpose of preserving, before trial, all assets that might ultimately be subject to forfeiture, including substitute assets.[250] The Second Circuit used similar reasoning in *United States v. Regan*[251] to interpret 18 U.S.C. § 1963(m)(5).[252]

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246. 21 U.S.C. § 853(o) (1988) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").

247. *See* S. REP. NO. 520, 97th Cong., 2d Sess. 10 n.18 (1982). As part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207, 3207-13, the RICO statute, 18 U.S.C. § 1963, was amended with what appeared to be clear and unambiguous provisions. 21 U.S.C. § 853(e) dealt with pre-trial restraint, expressly limiting its application to traceable proceeds. By contrast, substitute assets were included only in subsection (p), which characterizes assets forfeitable following conviction.

248. *Billman*, 915 F.2d at 921; *see also* United States v. Swank Corp., 797 F. Supp. 497 (E.D. Va. 1992); United States v. Skiles, 715 F. Supp. 1567 (N.D. Ga. 1989) (holding in the drug trafficking context that the government is allowed to restrain "additional" assets, pre-trial, to ensure sufficient assets for forfeiture).

249. *Billman*, 915 F.2d at 920 (citing United States v. Ginsburg, 773 F.2d 798, 800-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986)).

250. *Id.*

251. 858 F.2d 115 (2d Cir. 1988).

252. *Id.* at 121. The court stated in dictum:

> Although [18 U.S.C. § 1963(m)(5)] concerns the ultimate forfeiture, it surely suggests that restraining orders entered before forfeiture should be concerned with preserving assets equivalent in value to the potentially forfeitable property, and not necessarily the precise property. We believe, therefore, that where the nature of the defendants' forfeitable property makes the imposition of a restraining order burdensome on third parties, the district court should, as an alternative, restrain [substitute] assets of the defendant equal in value to that of the unrestrained forfeitable property.

Id.; *see also In re* Assets of Parent Indus., Inc., 739 F. Supp. 248, 255-56 (E.D. Pa. 1990) (assuming that § 1963(m) substitute assets can be subject to pretrial restraints). Section 1963(n)(5) has been relettered, and is now § 1963(m)(5).

The constitutionality of restraining "substitute assets" has been affirmed by several district courts.[253] The rationale presented is that it must "ensure the fullest possible satisfaction of any forfeiture order that the court ultimately might order."[254] Any other reading of the statute would "circumvent Congress's express intent by disposing of forfeitable assets between the time of indictment and the time of trial."[255] That result, the courts have held, is not justifiable.[256]

Recently, however, the Third, Fifth and Ninth circuits have rejected the reasoning of *Billman* and held that substitute assets cannot be seized prior to trial. In *United States v. Floyd*,[257] the Fifth Circuit found that 18 U.S.C. § 853(a) "plainly states what property may be restrained before trial" and does not include substitute assets.[258] "To allow the government to freeze . . . untainted assets would require us to interpret the phrase 'property described in subsection (a)' to mean property described in subsection (a) *and (p)*."[259]

A contrary holding would not only violate the statute's plain language and legislative intent, but might also raise constitutional issues. As the unanimous *Floyd* court held:

> The government's contention that it has the power to seize property that is not evidence of a crime nor the fruits of a crime hints of writs of assistance. At the least it poses Fourth

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253. *See* United States v. Wu, 814 F. Supp. 491, 493 (E.D. Va. 1993); United States v. Floyd, 814 F. Supp. 1355 (N.D. Tex.), *rev'd*, 992 F.2d 498 (5th Cir. 1993) (holding that 21 U.S.C. § 853(e) allows government to apply for pretrial restraint of substitute assets that would be subject to post-conviction forfeiture under § 853(p)); United States v. Swank Corp., 797 F. Supp. 497, 501 (E.D. Va. 1992). *But see* United States v. Chinn, 687 F. Supp. 125 (S.D.N.Y. 1988) (holding that assets defendant acquired prior to any alleged involvement with RICO enterprise could not be restrained under RICO prior to conviction, although such assets could be subject to forfeiture upon conviction). The *Chinn* decision, however, pre-dated the Fourth Circuit's opinion in *Billman*, and the *Billman* court expressly criticized the *Chinn* court's reasoning. *See Billman*, 915 F.2d at 919.

254. *Wu*, 814 F. Supp. at 493.

255. *Floyd*, 814 F. Supp. at 1359; *see Swank Corp.*, 797 F. Supp. at 501 (stating court has "no choice but to continue to restrain assets . . . if there is to be any reasonable likelihood that an order of forfeiture against [defendant] could ever be satisfied"); *Skiles*, 715 F. Supp. at 1567.

256. *Floyd*, 814 F. Supp. at 1359.

257. 992 F.2d 498 (5th Cir.), *rev'g* 814 F. Supp. 1355 (N.D. Tex. 1993).

258. *Id.* at 502.

259. *Id.* (interpreting 21 U.S.C. § 853(e)(1), the substantive terms of which are in material part identical to those under 18 U.S.C. § 1963(d)(1)).

> Amendment concerns sufficient to avert any temptation we might have to engage in interpretative handsprings to effectuate a legislative purpose the Congress did not express.[260]

In *In re Assets of Martin*,[261] the Third Circuit joined the Fifth Circuit in disallowing substitute assets as part of pre-trial RICO restraints on tainted property.[262] Interpreting 18 U.S.C. § 1963(a) and (d), the court held:

> We, like the *Floyd* court, find the plain language of the statute so clearly dispositive that ordinarily we would not consider legislative history. However, in light of the circumstance that our result conflicts with *Billman*, we have examined the legislative history, which demonstrates, were there any doubt, that the *Floyd* court's reading of the statutory language is correct.[263]

According to the *Martin* court, *Billman* found,[264] and *Regan* suggested,[265] that the congressional purpose underlying asset forfeitures would demand that pre-conviction and pre-indictment restraints include subsection (m) substitute assets, as well as the subsection (a) assets specified in the statute.[266] "However, legislative history establishes the contrary—a clear congressional purpose to exempt subsection (m) substitute assets from any pre-conviction or pre-indictment restraints."[267] In *Martin*, "a statute obviously intended by Congress not to subject substitute assets to the effect of pretrial restraints somehow was metamorphosed by the government into a medium for reaching the excluded assets."[268]

Finally, the court harmonized its result with the Supreme Court's "cautious interpretation of the scope of forfeiture provisions" in *Austin* and *Alexander*.[269] In *Alexander*, the majority found that forfeiture of the defendant's bookstore businesses did not offend the First Amendment as a prior restraint of speech because the forfeiture order only "deprive[d the

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260. *Id.*

261. 1 F.3d 1351 (3d Cir. 1993).

262. *Id.* at 1359.

263. *Id.*

264. *See id.* at 1358.

265. *See id.* at 1359.

266. *See id.*

267. *Id.*

268. *Id.* at 1361 (footnote omitted).

269. *Id.* at 1360.

defendant] of specific assets that were found to be related to his previous racketeering violations."[270] That rationale, the *Martin* court said, would not support the forfeiture of § 1963(m) substitute assets if those assets were expressive materials.[271] The court stated: "Indeed, consideration of forfeiture in the context of substitute assets, which was not required in *Alexander*, might well support the argument of the *Alexander* dissenters that, in some circumstances at least, forfeiture inappropriately is applied to expressive materials without some prior determination of obscenity."[272]

The court viewed the *Austin* decision as an attempt to "keep prosecutorial zeal for [forfeitures] within particular boundaries."[273] Going beyond the plain meaning of the statute would not further such a purpose.

In *United States v. Ripinsky*,[274] the Ninth Circuit also used the plain meaning of the statute to deny the pre-trial seizure of substituted assets.[275] Employing "precisely the same" analysis relied upon by the *Floyd* and *Martin* courts, the court held that "while § 853(o) does 'command for a liberal construction,' it does not 'authorize us to amend by interpretation.'"[276] If Congress deems it appropriate to subject substitute assets to pre-trial restraint, the court said, it can amend the statute.[277]

Questions remain. For example, in *United States v. Swank Corp.*,[278] the court expressly left open whether the restraining of the corporate assets of a businessman's privately owned corporation for a relatively minor drug crime might violate the Eighth Amendment ban on excessive fines.[279]

Restraint of substitute assets also poses a threat to an individual's rights under the Fifth and Sixth amendments. With the Third, Fifth and Ninth circuits now at odds with the Second and Fourth circuits, it is hoped that the Supreme Court will grant review and address this issue soon.

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270. Alexander v. United States, 113 S. Ct. 2766, 2771 (1993).

271. *Martin*, 1 F.3d at 1360.

272. *Id.* (footnote omitted).

273. *Id.* at 1361.

274. 20 F.3d 359 (9th Cir. 1994).

275. *See id.* at 363.

276. *Id.* (quoting United States v. Floyd, 992 F.2d 498, 502 (5th Cir. 1993)).

277. *Id.*

278. 797 F. Supp. 497 (E.D. Va. 1992).

279. *Id.* at 504 (stating that nothing in its opinion "foreclose[d] the possibility that a given use of the forfeiture statutes may violate the Excessive Fines Clause of the Eighth Amendment").

IV. FORFEITURE AND THE FIFTH AMENDMENT

The Eighth Amendment is not the only portion of the Bill of Rights getting attention in the context of civil forfeiture. The Fifth Amendment's grant of due process was the subject of a 1993 forfeiture-related opinion from the Supreme Court.[280]

As we know, the Supplemental Rules for Certain Admiralty and Maritime Claims, together with the Federal Rules of Civil Procedure, govern the procedures in civil forfeiture proceedings. These rules are detailed and old. Although many types of forfeiture were abolished by the first Congress of the United States in 1790,[281] the forfeiture tradition was maintained through the maritime and customs laws. This is why some of the more powerful federal forfeiture laws today are codified in the admiralty laws.[282]

One peculiarity amidst the particulars embedded in the rules is that there is no requirement that an owner or party interested in property subject to forfeiture be given notice or a hearing prior to the property's seizure.[283] Many circuit and district courts had authorized pre-seizure notice and opportunity to be heard, at least where real property was concerned.[284] But in the centuries since our Constitution has protected

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

281. *See, e.g.*, Act of Apr. 30, 1790, § 24, 1 Stat. 117 (currently codified at 18 U.S.C. § 3563).

282. *See* KESSLER, *supra* note 1, § 1.02 (discussing the historical perspective of forfeiture).

283. For an excellent review of the law as it relates to the right to a pre-seizure hearing, see United States v. 8215 Reese Rd., 803 F. Supp. 175, 178 (N.D. Ill. 1992) (discussing how pre-seizure judicial notice and hearing might in some instances prejudice the government and frustrate the objectives of forfeiture); *see also* United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993) (holding that the government is authorized to seize property without judicial process when the Attorney General has probable cause to believe that property is subject to forfeiture under 21 U.S.C. § 881).

284. *See, e.g.*, United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992); United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 904-05 (2d Cir. 1992); United States v. S. Livonia Rd., 889 F.2d 1258, 1262-65 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (2d. Cir. 1990); Richmond Tenants Org., Inc., v. Kemp, 956 F.2d 1300, 1306-08 (4th Cir. 1992); *8215 Reese Rd.*, 803 F. Supp. at 178-79; United States v. 632-36 Ninth Ave., 798 F. Supp. 1540, 1552 (N.D. Ala. 1992); United States v. 14128 S. Sch. St., 774 F. Supp. 475, 478-80 (N.D. Ill. 1991); United States v. 185 & 191 Whalley Ave., 774 F. Supp. 87, 89-91 (D. Conn. 1991); United States v. Certain Real Property Located on Hanson Brook, 770 F. Supp. 722, 730 (D. Me. 1991); United States v. 850 S. Maple, 743 F. Supp. 505, 509-11 (E.D. Mich. 1990); United States v. Parcel 1, 731 F. Supp. 1348, 1352-53 (S.D. Ill. 1990); *see also* United States v. 92 Buena Vista Ave., 937 F.2d 98, 101 (3d Cir. 1991), *aff'd on other grounds*, 113 S. Ct. 1126 (1992)

our citizens from deprivation of life, liberty *or property* without due process of law, the Supreme Court had never seen fit to extend these protections to everyone. That, however, changed on December 13, 1993.

A. *United States v. James Daniel Good Real Property*

On that date, in a 5-4 decision, the Court in *United States v. James Daniel Good Real Property*[285] ruled that, absent exigent circumstances, the Due Process Clause of the Fifth Amendment requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.[286] Distinguishing between protections afforded by the Fourth and Fifth Amendments, both of which may be implicated by the seizure of property, Justice Kennedy, writing for the majority,[287] rejected the government's argument that it need only comply with the Fourth Amendment when seizing forfeitable property.[288] According to the Court, the Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, but it does not follow that the Fourth Amendment is the sole constitutional provision in question.[289] The Court held that when the government seizes property not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, thereby going "beyond the traditional

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(stating in dicta that government's seizure may have been unlawful, but nonetheless this did not require dismissal of the forfeiture proceedings provided that probable cause to seize the premises could be supported by untainted evidence); Dep't of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). The courts that have held that due process does not require notice and opportunity to be heard prior to the seizure of real property in the context of a civil forfeiture proceeding have failed to engage in any analysis or discussion of the governmental and private interests involved, or failed to consider the significant differences between real property and personal property. *See, e.g.*, United States v. 4880 S.E. Dixie Highway, 838 F.2d 1558 (11th Cir. 1988); United States v. 900 Rio Vista Blvd., 803 F.2d 625, 632 (11th Cir. 1986).

285. 114 S. Ct. 492 (1993).

286. *Id.* at 505. The Court did not expressly address the requisite procedures for pre-forfeiture seizures of real property in the context of criminal forfeiture under statutes such as 21 U.S.C. § 853 and 18 U.S.C. § 1963. The Court noted, however, that such seizures are reserved for situations in which the government "persuades a district court that there is probable cause to believe that a protective order 'may not be sufficient to assure the availability of the property for forfeiture.'" *Id.* n.3 (quoting 21 U.S.C. § 853(f)).

287. Justices Blackmun, Stevens, Souter and Ginsburg joined in the majority opinion.

288. *Good*, 114 S. Ct. at 499.

289. *Id.* at 499 (citing 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965)) (holding that the exclusionary rule applies to civil forfeiture).

meaning of search or seizure," the the government's action must also comply with the Due Process Clauses of the Fifth and Fourteenth amendments.[290]

The facts relating to the criminal activity in *Good* were by most accounts unexceptional. On January 31, 1985, Hawaii police officers executed a search warrant at Good's home.[291] The police recovered about eighty-nine pounds of marijuana, marijuana seeds, vials containing hashish oil, and drug paraphernalia.[292] Six months later, Good pleaded guilty to promotion of a harmful drug in the second degree, was sentenced to one year in jail and five years' probation, and was fined $1000.[293] Good also was forced to forfeit to the state $3187 in cash found on the premises.[294]

Four and one-half years later, the United States filed an *in rem* action in the district court, seeking forfeiture of Good's house and land, on the ground that the property had been used to commit or facilitate the commission of a federal drug offense.[295] Following an *ex parte* proceeding, a United States Magistrate Judge issued a warrant authorizing the government to seize the property, which they did without either prior notice to Good or an adversarial proceeding.[296] In his claim for the property and answer to the government's complaint, Good asserted that he was deprived of his property without due process of law and that the action was invalid because it had not been timely commenced.[297] The district court ordered the forfeiture of the property.[298]

The Ninth Circuit reversed in part, holding that seizure without prior notice and a hearing violated the Due Process Clause of the Fifth Amendment.[299] The court stated that before the government could seize property, the owner had a due process right to notice and a hearing, except in "extraordinary situations" which may require a "special need for very prompt action."[300] Finding very ordinary circumstances in the

290. *Id.* at 500.

291. *Id.* at 497.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* The forfeiture was effectuated under 21 U.S.C. § 881(a)(7). *Id.*

296. *Id.* at 497-98.

297. *Id.* at 498.

298. *Id.*

299. United States v. James Daniel Good Real Property, 971 F.2d 1376 (9th Cir. 1992).

300. *Id.* at 1383 (citing Fuentes v. Shevin, 407 U.S. 67, 91 (1972)).

seizure of Good's home, the court noted: "The house is not going anywhere."[301] The house could not "be driven away and . . . find itself in another jurisdiction by sundown."[302] The Supreme Court granted certiorari.[303]

Justice Kennedy's opinion focused on the real property aspects of the facts. After discussing the historical importance of property rights, the Court distinguished its landmark opinion in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[304] which involved the forfeiture of personal property—a yacht—virtually without affording any constitutional safeguards to the yacht's owner.[305] The difference, Justice Kennedy wrote, is that seizure of real property does not fall within the "extraordinary situation" permitting seizure prior to notice and a hearing, as defined in *Mathews v. Eldridge*.[306] Only extraordinary circumstances "where some valid governmental interest is at stake" can justify the failure to provide pre-seizure notice and hearing in the context of a civil forfeiture proceeding.[307]

In determining whether the exigent circumstances exception—dispensing with notice and a hearing—applies in the context of real property forfeiture, the Court applied the *Mathews* test.[308] That test includes four factors to be considered in determining whether due process was afforded: (1) the significance of the property interest involved; (2) the risk of erroneous deprivation given the procedures actually employed; (3) the probable value of additional procedural safeguards; and (4) the government's interest in pre-notice seizure.[309]

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301. *Id.* at 1384.

302. *Id.* at 1382. The court remanded the case for a determination of whether the action was untimely, although filed within the five-year period provided by 19 U.S.C. § 1621, because the government failed to follow the internal notification and reporting requirements of §§ 1602-1604. *Id.* at 1384.

303. United States v. James Daniel Good Real Property, 113 S. Ct. 1576 (1993).

304. 416 U.S. 663 (1974).

305. *Good*, 114 S. Ct. at 499.

306. *Id.* at 501 (applying the three-part test for determining the exception to the general rule requiring pre-forfeiture notice and hearing set forth in Mathews v. Eldridge, 424 U.S. 319 (1976)). For the *Mathews* test, see *infra* text accompanying note 309.

307. *Good*, 114 S. Ct. at 501 (quoting Fuentes v. Shevin, 407 U.S. 67, 82 (1972), quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677-80 & n.14 (1974).

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

309. *See Mathews*, 424 U.S. at 335.

In *Good*, each factor was addressed individually.[310] The Court found that the defendant's right to maintain control over his home, and to be free from governmental interference, was a private interest of historic and continuing importance that weighed heavily in the *Mathews* balance and, in the instant case, in favor of the defendant.[311] The seizure deprived Good of "valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents. All that the seizure left him, by the Government's own submission, was the right to bring a claim for the return of title at some unscheduled future hearing."[312] Even if Good's loss was "only" the monthly rental income from the house, "[i]t cannot be classified as *de minimis* for purposes of procedural due process."[313] The Court then expressed concern that the practice of *ex parte* seizure creates an unacceptable risk of error, since the proceeding affords little or no protection to an innocent owner, who may not be deprived of property under § 881(a)(7).[314] Because the government, when seeking a warrant, is not required to offer any evidence regarding the question of innocent ownership or other potential defenses a claimant might have, "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[315]

Regarding the government's interest in seizing property before a hearing, the Court found that, at least in the context of real property, the governmental interest at stake does not present a "pressing need" for prompt action.[316] Because real property cannot abscond, a court's jurisdiction can be preserved without prior seizure simply by posting notice on the property and leaving a copy of the process with the occupant. In addition, as a general matter, a showing of exigent circumstances seems unlikely when a person's home is at stake because, unlike some forms of property, a home cannot be readily moved or

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310. *Good*, 114 S. Ct. at 501-02.

311. *Id.* at 501.

312. *Id.*

313. *Id.*

314. *Id.* at 501-02.

315. *Id.* at 502 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) (footnotes omitted)).

316. *Id.*

dissipated.[317] Moreover, the government's wait of four and one-half years after discovering the unlawful use of the property before instituting the forfeiture action belied any claim of exigency.

Another key to the Court's holding was the finding that the government's legitimate interests at the inception of a forfeiture proceeding—preventing the property from being sold, destroyed, or used for further illegal activity before the forfeiture judgment—could be secured through measures less intrusive than seizure, such as a *lis pendens* notice to prevent the property's sale, a restraining order to prevent its destruction, and search and arrest warrants to forestall further illegal activity.[318] Because a claimant is already entitled to a hearing before final judgment, requiring the government to postpone seizure until after an adversary hearing creates no significant administrative burden. Moreover, any harm from the delay is minimal compared to the injury occasioned by erroneous seizure.

> Given the congested civil dockets in federal courts, a claimant may not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented."[319]

The Court concluded that no plausible claim of executive urgency, including the government's reliance on forfeitures as a means of defraying law enforcement expenses, justified the summary seizure of real property under § 881(a)(7).[320]

The Court also addressed a statute of limitations issue, holding unanimously that a forfeiture action filed within the statutory five-year

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317. *Cf.* United States v. $8850, 461 U.S. 555, 562 n.12 (1983) (holding that to require federal customs officials to conduct a hearing "would make customs processing entirely unworkable"); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974) ("[P]reseizure notice and hearing might frustrate the interests served by [forfeiture] statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.").

318. *Good*, 114 S. Ct. at 503-04.

319. *Id.* at 502 (quoting Connecticut v. Doehr, 501 U.S. 1, 3 (1991)).

320. *Id.* at 505.

time period may not be dismissed on the basis of the government's failure to comply with the internal timing requirements of the statute at issue.[321]

Justices Scalia and O'Connor joined Chief Justice Rehnquist in his dissent,[322] in which they objected to "this ill-considered and disruptive decision."[323] Giving *Mathews* a narrow reading and interpreting *Calero-Toledo* differently from the majority, the dissenters, looking at the issues from a Fourth Amendment perspective, found it "paradoxical indeed to hold that a criminal defendant can be temporarily deprived of liberty on the basis of an *ex parte* probable cause determination, yet respondent Good cannot be temporarily deprived of property on the same basis."[324] The dissent analogized this case to tax-related proceedings, stating that since the Court had upheld pre-hearing seizures for "summary seizure of property to collect the internal revenue of the United States,"[325] the same should be done in *Good*.[326] The majority's decision "does not merely discard established precedence regarding excise taxes, but deals at least a glancing blow to the authority of the Government to collect income tax delinquencies by summary proceedings."[327]

Justice Rehnquist also objected to the limitation placed by the majority on *Calero-Toledo*, stating that real property, like moveable property, "could easily be destroyed or damaged to prevent [it] from falling into the hands of the Government" if pre-seizure notice were required.[328] He expressed "grave doubts" as to whether the majority's decision would alleviate the hardships of innocent individuals in civil forfeiture cases.[329] "[W]hatever social benefits might flow from the decision are more than offset by the damage to settled principles of constitutional law which are inflicted to secure these perceived social benefits."[330]

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321. *Id.* at 505-07. The Court held that Congress's failure to specify a consequence for noncompliance with the timing requirements of 19 U.S.C. §§ 1602-1604 implied that Congress did not intend to require dismissal of a forfeiture action for such noncompliance. *Id.* at 507.

322. *Id.* at 507. (Rehnquist, C.J., dissenting). Justice O'Connor filed a separate dissent. *Id.* at 511-14. Justice Thomas also dissented separately. *Id.* at 515-17.

323. *Id.* (Rehnquist, C.J., dissenting).

324. *Id.* at 508 (Rehnquist, C.J., dissenting).

325. *Id.* at 509 (Rehnquist, C.J., dissenting) (quoting Fuentes v. Shevin, 407 U.S. 67, 92 (1972)).

326. *Id.* at 509-10 (Rehnquist, C.J., dissenting).

327. *Id.* at 509 (Rehnquist, C.J., dissenting).

328. *Id.* (Rehnquist, C.J., dissenting).

329. *Id.* at 511 (Rehnquist, C.J., dissenting).

330. *Id.* (Rehnquist, C.J., dissenting).

B. *The Impact of* Good

The good part of *Good* is that, barring exceptional circumstances, notice and a hearing are required prior to seizure of real property in narcotics-related civil forfeiture cases.[331] Providing an adversarial hearing reduces the possibility that the government will seize the property of innocent owners,[332] that it will seize property when the requisite criminal activity has never occurred,[333] that it will seize property without sufficient nexus to criminal activity,[334] or that it will seize a tract of land beyond that part of the land involved in the criminal activity.[335] The Due Process Clause's guarantee that the individual can argue his or her case to a judge serves as a small but significant check against governmental error.[336]

The Court also reconsidered the statement in *Calero-Toledo* that governmental forfeitures are less suspect because they are "not initiated by self-interested private parties."[337] As the Court noted regarding the *Good* forfeiture, the government is a self-interested public party.[338] The Drug Enforcement Administration may share in the proceeds of forfeiture, and the proceeds may be rebated to local authorities.[339] As the Court previously held in *Harmelin v. Michigan*,[340] "it makes sense to scrutinize governmental action more closely when the State stands to

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331. *Id.* at 505.

332. United States v. 121 Van Nostrand Ave., 760 F. Supp. 1015, 1029 (E.D.N.Y. 1991) ("Without . . . an opportunity [for a pre-seizure hearing] there would be a serious risk that an owner or occupant could be erroneously deprived of a domicile.").

333. United States v. 110 Collier Drive, 793 F. Supp. 1048, 1051 (N.D. Ala. 1992) (holding that the amount of drugs found in a defendant's house and car did not support a felony charge of drug possession under federal law).

334. United States v. 28 Emery St., 914 F.2d 1, 6 (1st Cir. 1990) (finding that evidence did not create a link between the property and drug trafficking substantial enough to forfeit defendant's house). *But see* United States v. Daccarett, 6 F.3d 37, 56 (2d Cir. 1993) (holding that the government need not demonstrate a "substantial connection" between the seized property and illegal drug activity to justify the seizure of property, only a "nexus").

335. *Good*, 114 S. Ct. 492, 501-02 (1993).

336. *See 121 Van Nostrand Ave.*, 760 F. Supp. at 1035 (holding that a claimant may present affirmative defenses at a probable cause hearing).

337. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974).

338. *Good*, 114 S. Ct. at 502.

339. 21 U.S.C. § 881(e) (1988 & Supp. V 1993).

340. 111 S. Ct. 2680 (1991).

benefit."[341] The *Good* decision may reduce the temptation and the incentive for abuse by the government.

After *Good*, the *Mathews* test is better defined and it appears that there is no longer any doubt that the Fifth Amendment applies to civil forfeiture cases. There is more work for title insurers and their attorneys, who must now begin drafting clauses to cover situations which will become more common with the increase in litigation stemming from *Good*.

There are, however, other pieces to the decision which might be of importance to the practitioner. For example, what is the scope of the hearing? Will the government be permitted to establish probable cause based exclusively on hearsay evidence such as affidavits? If so, the hearing would be meaningless.[342] Because "[a] fundamental requirement of due process is 'the opportunity to be heard,'"[343] lack of an adversarial hearing on the restraint issue would constitute a violation of due process.[344] At the very least, the government should be required to present the witnesses whose testimony supports the affidavits.

V. CONCLUSION

In *Good*, Justice Kennedy framed succinctly the most important issue in forfeiture cases: "The question before us is the legality of the seizure, not the strength of the Government's case."[345] Often, prosecutors and judges are distracted by the facts of the underlying criminal activity. This opinion, focusing on procedures in a case filed years after the defendant had completed serving his sentence, highlights what criminal practitioners have known all along: Constitutional protections and fair procedures are not confined to the innocent alone. This, coupled with the Court's

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341. *Id.* at 2693 n.9.

342. *See* United States v. Monsanto, 924 F.2d 1186, 1191 (2d Cir.) (holding that due process requires a pre-trial, post-attachment hearing in order to continue restraining assets needed to retain counsel of choice), *cert. denied*, 112 S. Ct. 383 (1991).

343. *Id.* at 1195 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)). The Second Circuit further found that the opportunity to be heard must be granted "at a meaningful time and in a meaningful manner." *Id.* at 1198 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

344. *Id.* at 1195; *see also* United States v. Millan-Colon, 836 F. Supp. 994 (S.D.N.Y. 1993).

345. *Good*, 114 S. Ct. at 505.

decision in *Austin*[346] that civil forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) are punitive and subject to the limitations of the Eighth Amendment's Excessive Fines Clause, places civil forfeiture proceedings in their proper context.[347] The Court has seen the quacking duck of civil forfeiture for what it really is: a criminal punishment in which the claimant/owner/mortgagee/lienholder should be able to stand before the court with rights and protections comparable to those given to citizens who are subject to loss of life or liberty, those *other* two protections guaranteed under the Fifth Amendment. As the majority in *Good* stated:

> The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ."[348]

As the Norwegians might say: *La lekene begynne!* [Let the games begin!]

346. Austin v. United States, 113 S. Ct. 2801 (1993); *see also* Alexander v. United States, 113 S. Ct. 2766 (1993) (deeming the Eighth Amendment a possible prohibition to a RICO forfeiture when the scope of the forfeiture would be "grossly disproportionate" to the criminal misconduct involving the enterprises' assets).

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

348. *Good*, 114 S. Ct. at 500-01 (quoting Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972)).