NOTE

AUSTIN v. UNITED STATES[1]: FORFEITURE AS PUNISHMENT AND THE IMPLICATIONS FOR WARRANTLESS SEIZURES

I. INTRODUCTION: ASSET SEIZURE BASED ON SUSPICION OF DRUG TRAFFICKING; 21 U.S.C. § 881(b)(4)[2]

On February 27, 1991, Willie Jones prepared to board an airplane at Nashville's Metro Airport to fly to Houston, intending to purchase flowers and shrubs for his landscaping business.[3] The small growers with whom he regularly transacted business preferred cash. Therefore, Mr. Jones was carrying $9000, part of which he used to purchase his airline ticket.[4] Because Mr. Jones was a black man traveling to a southern city carrying only an overnight bag, and because he appeared nervous, he fit a drug courier profile. Therefore, Drug Enforcement Administration ("DEA") agents stopped and searched him.[5] The agents accused Mr. Jones of intending to use the cash to purchase drugs, and they seized the money.[6] The agents gave Mr. Jones a receipt for an unspecified amount of currency, and told him he was free to leave.[7]

21 U.S.C. § 881(b)(4) provides the Attorney General with authority to seize property subject to § 881 forfeiture[8] without a warrant when she or an

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[1] 113 S. Ct. 2801 (1993).

[2] 21 U.S.C § 881(b)(4) (1988) authorizes the Attorney General to seize property whenever he "has probable cause to believe that the property is subject to civil forfeiture under this subchapter." Such property includes "conveyances . . . which are used, or are intended for use, to transport" controlled substances, "books, records, and research . . . which are used, or intended for use" for trafficking in controlled substances, and "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance." 21 U.S.C. § 881(a) (1988).

[3] *See* Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 705 (M.D. Tenn. 1993).

[4] *Id.* at 700-01.

[5] *Id.* at 703-04.

[6] *Id.* at 704-05.

[7] *Id.* at 707. Mr. Jones' account was related in Mary Pat Flaherty & Andrew Schneider, *Government Seizures Victimize Innocent*, PITTSBURGH PRESS Aug. 11, 1991, *reprinted in* Mary Pat Flaherty & Andrew Schneider, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS (reprint) at 3.

[8] 21 U.S.C. § 881(a) (1988) authorizes the forfeiture of:

(4) [a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation,

authorized agent believes that there is probable cause that the property is connected to drug trafficking. When such warrantless seizures are made, proceedings to forfeit the property must be instituted promptly.[9] In cases where the seized property is derivative contraband,[10] 19 U.S.C. § 1615, as incorporated into 21 U.S.C. § 881,[11] specifies that the burden of proving that the seized property was not connected with drug trafficking lies with the claimant. The government need only show that probable cause exists to warrant the seizure in order to shift the burden of proving otherwise to the claimant.[12]

In Mr. Jones' case, and in thousands like his,[13] people who have property seized without any prior judicial proceeding bear the burden of proving their innocence the very first time they have an opportunity to be heard by a court. There is no presumption of innocence at the outset of the forfeiture proceed-

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sale, receipt, possession, or concealment of [controlled substances] . . .
(7) [a]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

[9] 21 U.S.C. § 881(b) (1988).

[10] "[P]roperty innocent by itself but used in perpetration of an unlawful act." BLACK'S LAW DICTIONARY 322 (6th ed. 1990). This is in contrast to contraband per se which is illegal to possess.

[11]
The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws . . . shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof.

21 U.S.C. § 881(d) (1988).

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In all suits or actions. . .brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof . . . .

19 U.S.C. § 1615 (1988), incorporated expressly into 21 U.S.C. § 881(d). *See* United States v. One 1982 Chevrolet Corvette, 976 F.2d 392 (8th Cir. 1992); United States v. $149,442.43 in United States Currency, 965 F.2d 868 Cir. 1992); Schrob v. Catterson, 948 F.2d 1402 (3d Cir. 1991); United States v. 116 Emerson St., 942 F.2d 74 (1st Cir. 1991); United States v. One 1979 Cadillac Coupe de Ville, 833 F.2d 994 (D.C. Cir. 1987); United States v. $41,305 in United States Currency and Traveler's Checks, 802 F.2d 1339 (11th Cir. 1986).

[13] *See* Flaherty & Schneider, *supra* note 7.

ing. The government, on the other hand, need only clear the minimal hurdle of showing that probable cause existed to seize assets in order to work a forfeiture of the assets. By marshaling far less evidence than would be required to obtain a criminal conviction of the claimant, the government can satisfy its burden of showing that title to the seized assets should be forfeited to the government. This perversion of the traditional criminal law doctrine of presumption of innocence has been justified for centuries by the fictional characterization of the proceeding as one in rem, a civil proceeding against the property. This legal fiction results in the government instituting a suit in equity against the property itself in order to adjudicate the forfeiture of title to the government.

In June 1993, the Supreme Court decided *Austin v. United States*,[14] in which it characterized forfeiture of real property as punishment that is subject to the Eighth Amendment's Excessive Fines Clause.[15] The Eighth Amendment protects criminal defendants by assuring that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[16] While the full panoply of constitutional protections afforded criminal defendants is not available in the civil forfeiture context,[17] previous Supreme Court decisions have held that Fourth Amendment and Fifth Amendment protections must be observed in civil forfeiture proceedings.[18] The *Austin* holding now includes the Eighth Amendment's Excessive Fines protection in the category of constitutional protections that must be observed when imposing punitive remedies in civil forfeitures.

II. Scope of This Note

Statutes authorizing the seizure of assets involved in drug trafficking are justified by, *inter alia*, the public interest in removing the derivative contraband res which either facilitated or was tainted by the criminal activity.[19] However, the public also has a strong interest in ensuring that constitutional protections implicated in criminal proceedings are not sidestepped by the long-standing legal fiction that forfeitures are civil proceedings.

In *Austin*, the Court reiterated that it has never expressly ruled on the constitutionality of seizing the assets of a "truly innocent owner."[20] Austin's

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[14] 113 S. Ct. 2801 (1993).

[15] *Id.* at 2812.

[16] U.S. Const. amend. VIII.

[17] *See* United States v. One 1982 Chevrolet Crew-Cab Truck, 810 F.2d 178, 183 (8th Cir. 1987).

[18] United States v. Riverbend Farms, Inc., 847 F.2d 553, 558 (9th Cir. 1988) (asserting that "[c]ivil forfeiture statutes . . . are . . . considered 'quasi-criminal' and implicate certain constitutional rights") (citing United States v. United States Coin & Currency, 401 U.S. 715, 721-22 (1971), and Boyd v. United States, 116 U.S. 616, 634 (1886)).

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

[20] Austin v. United States, 113 S. Ct. 2801, 2809 n.10 (1993).

guilty plea obviated the need for such a decision. Justice Kennedy, concurring, pointed out that this question may eventually have to be addressed.[21] In reaching its decision, the *Austin* Court reviewed cases considering warrantless seizures and the subsequent forfeitures of the seized assets. Each of these cases was predicated upon a prima facie showing of the commission of an offense. This review of forfeiture case law and Justice Kennedy's concurring comment support an argument that punitive forfeiture of assets is unconstitutional when the government has not proven the commission of a criminal offense. The category of constitutionally suspect seizures embraces those made solely on the determination by a police officer on the scene that probable cause for a seizure and subsequent forfeiture exists, despite the absence of prima facie evidence of criminal activity.

This Note will summarize the *Austin* opinion, and will review the forfeiture cases relied upon by the Court which addressed questions concerning the owner's responsibility for the use of his property and the burden of showing that a crime was committed. After describing the problem of warrantless forfeitures based on suspicion of criminal activity, this Note will discuss the implications of *Austin*'s holding that forfeiture is punishment and is subject to the Eighth Amendment. Finally, it will argue that forfeitures conducted pursuant to 21 U.S.C. § 881(b)(4), based on allegations of criminal activity and the belief that the seized assets are intended to be used to further that activity, cannot withstand constitutional scrutiny.

III. THE HOLDING IN *AUSTIN*: FORFEITURE AS PUNISHMENT

Petitioner Austin, claimant in the case, pleaded guilty to possession of cocaine with intent to distribute after selling two grams of the drug to an undercover law enforcement officer.[22] Austin was sentenced to seven years imprisonment.[23] The United States filed an in rem action in the United States District Court for the District of South Dakota seeking forfeiture of Austin's mobile home and business, an auto body shop, pursuant to 21 U.S.C. § 881(a)(4) and (a)(7).[24] The government alleged that both properties were subject to forfeiture because the claimant, after agreeing to sell two grams of cocaine to an undercover law enforcement officer at his place of business, retrieved the cocaine from his home and returned to the shop to complete the sale.[25] While executing a search warrant of both the shop and the home, state authorities discovered small amounts of marijuana and cocaine, a handgun, drug paraphernalia and $4700 in currency.[26] As is typical in forfeiture pro-

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[21] *Id.* at 2816.

[22] *Id.* at 2803.

[23] *Id.*

[24] *See supra* note 8.

[25] Austin v. United States, 113 S. Ct. 2801, 2803 (1993).

[26] *Id.*

ceedings, the government's motion for summary judgment was granted.[27] Austin was divested of title to several thousands of dollars worth of property as punishment for selling several hundreds of dollars worth of illicit narcotics. The Court of Appeals for the Eighth Circuit "reluctantly agreed with the government"[28] and affirmed the district court's grant of summary judgment. The Supreme Court granted certiorari to resolve an apparent conflict with the Court of Appeals for the Second Circuit over the question of whether the Eighth Amendment limits the government's power to seize property under § 881.[29]

The United States argued that the Excessive Fines Clause is not applicable to statutory in rem forfeitures because that clause is limited to criminal punishment imposed by the government.[30] The government further argued that the Eighth Amendment could apply to a forfeiture proceeding only if forfeiture was recognized as a criminal punishment when the Amendment was adopted, or if the particular forfeiture proceeding was so punitive as to be considered a criminal proceeding. Absent the applicability of either of these exceptions to the traditional characterization of forfeiture proceedings as civil in nature, the government argued that the Eighth Amendment was not implicated.[31]

The Court disagreed, pointing out that unlike some provisions of the Bill of Rights, such as the Fifth Amendment's Self-Incrimination Clause, the Eighth Amendment has no express limitation to criminal cases.[32] The Court observed that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."[33] Rejecting the government's civil/criminal distinction, the Court's analysis focused instead on whether the forfeiture statutes are intended to be punitive, both historically and presently in the specific instance of § 881.[34]

The Court's analysis included an examination of the history of forfeiture.

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[27] *Id.* at 2801. *See* Henry C. Darmstadter & Leslie J. Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 41 (1987) (explaining that summary judgments are typical in forfeiture proceedings when the property owner is unable to rebut the evidence of probable cause offered by the government).

[28] United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992).

[29] *Austin*, 113 S. Ct. at 2804.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 2804-05.

[33] *Id.* at 2805 (citing United States v. Halper, 490 U.S. 435, 447-48 (1989)).

[34] *Id.* at 2806. Though not cited by the *Austin* court, a similar analysis has been undertaken to determine whether a sanction imposed in contempt proceedings is to be considered criminal or civil for purposes of Fourteenth Amendment applicability. "[T]his Court has judged that conclusions about the purposes for which relief is imposed are properly drawn from an examination of the character of the relief itself," rather than an underlying state statutory characterization. Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 636 (1988).

The Court noted forfeiture's multiple origins in English law including forfeiture as a deodand,[35] forfeiture upon conviction of a felony or treason,[36] and statutory forfeiture "of offending objects used in violation of the customs and revenue laws."[37] Only the last of these concepts took hold in the United States.[38] The First Congress passed several laws subjecting ships and their cargoes to forfeiture when the cargoes violated customs laws.[39] The Court cited several early statutes which listed forfeiture along with other punitive measures for the commission of various customs offenses.[40]

Relying on early statutes to find that forfeiture was historically considered punitive, the Court then considered whether forfeiture can properly be considered punitive today under 21 U.S.C. § 881.[41] The Court pointed to the innocent owner defense[42] of § 881 as confirmation that its drafters intended to impose forfeiture as a punitive measure.[43] This defense is not found in traditional forfeiture statutes and, by focusing on the owner's culpability, tends to make the statute's purpose seem punitive.[44] The Court conceded that forfeiture also serves a remedial purpose in the case of contraband per se, possession of which is unlawful.[45] However, this was distinguished from the punitive aspect of forfeiture in cases of derivative contraband: the conveyances, monies, or real property used to facilitate the drug transactions.[46]

In addition to examining the historical origins of forfeiture and the statute at issue in the case, the Court reviewed case law addressing the question whether forfeiture is viewed as punitive or remedial. These sources informed the Court's reasoning which concluded that forfeiture constitutes "payment to a sovereign as punishment for some offense."[47]

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[35] "At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." Austin v. United States, 113 S. Ct. 2801, 2806 (1993) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-81 (1974)).

[36] *Id.* at 2806.

[37] *Id.* at 2806-07 (citing *Calero-Toledo*, 416 U.S. at 682).

[38] *Id.* at 2807.

[39] *Id.*

[40] *Id.* at 2807-08. (citing Act of July 31, 1789, ch. 35, § 12, 1 Stat. 29, 39 (repealed 1790); Act of Aug. 4, 1790, ch. 35, §§ 13, 22, 27, 28, 1 Stat. 144, 157, 161, 163 (repealed 1799)).

[41] *Id.* at 2810.

[42] "[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6) (1988).

[43] Austin v. United States, 113 S. Ct. 2801, 2811 (1993).

[44] *Id.* at 2810-11.

[45] *Id.* at 2811.

[46] *Id.*

[47] *Id.* at 2812 (citing Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

IV. REVIEW OF FORFEITURE CASE LAW RELIED ON BY THE *AUSTIN* COURT

The *Austin* Court reviewed earlier Supreme Court forfeiture case law to find precedent that forfeiture had long been viewed as imposing punishment, at least in part, upon the owner of property tainted by criminal activity.[48] *Peisch v. Ware*[49] is the earliest case cited by the *Austin* Court in support of that proposition.[50] *Peisch* involved the attempted forfeiture by the United States of goods recovered by salvors from an abandoned vessel adrift in the Delaware Bay.[51] When the owners and salvors were unable to come to an accord on the division of cargo, lodged temporarily in the custody of a revenue officer, the salvors took possession of the goods by force of a writ of replevin issued by a state court.[52] The goods were untaxed distilled spirits, as such they were contraband per se. Their possession without the appropriate tax stamps constituted prima facie evidence of a criminal act.

On that basis, the United States made out a libel[53] for the forfeiture of the salvaged cargo.[54] The Court denied the forfeiture, holding that punishment could not be imposed under the relevant statute[55] if the conduct was neither intentional nor the result of negligence on the part of the owner of the goods.[56] This argument logically follows from a consideration of forfeiture as punishment for an offense. It also accords with the principle of legality[57] which mandates that conduct which will result in a sanction must fairly be known to the accused to be illegal.[58]

Section 881 provides, similar to the statute in *Peisch*, for the forfeiture of conveyances, monies, and real property.[59] These may be seized when probable cause exists that they are intended for use in drug trafficking.[60] *Peisch* teaches

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[48] *Id.* at 2808.

[49] 8 U.S. (4 Cranch) 347 (1808).

[50] Austin v. United States, 113 S. Ct. 2801, 2808 (1993).

[51] *Peisch*, 8 U.S. (4 Cranch) at 359-60.

[52] *Id.*

[53] The initiatory pleading in an admiralty action, corresponding to a complaint in a civil proceeding. BLACK'S LAW DICTIONARY 916 (6th ed. 1990).

[54] *Peisch*, 8 U.S. (4 Cranch) at 358-9.

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> [A]nd if any casks, chests, vessels, or cases, containing distilled spirits, wines or teas, which by the foregoing provisions ought to be marked and accompanied with certificates, shall be found in possession of any person unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture.

Act of March 2, 1799, ch. 22, § 43, 1 Stat. 626, 660 (1799).

[56] *Peisch*, 8 U.S. (4 Cranch) at 364-65.

[57] This principle is often expressed by the Latin phrase *nullum crimin sine lege, nulla poena sine lege* (no crime or punishment without law). Wayne R. LaFave & Austin W. Scott, Jr., CRIMINAL LAW. 195 (2d ed. 1986).

[58] *Peisch*, 8 U.S. (4 Cranch) at 360.

[59] 21 U.S.C. § 881(a) (1988 & Supp. V 1993).

[60] 21 U.S.C. § 881(b)(4) (1988). *See supra* note 2.

that forfeiture must be limited to those cases where means for preventing the forfeiture are available to the owner.[61] Such means presumably include not engaging in prohibited activity or taking reasonable precautions to prevent others from using his property to facilitate commission of a crime. Applying *Peisch*'s teaching to the example of a traveler embarking on a trip with an amount of cash sufficient for both the cost of the trip and its legitimate objective, it is obvious that the traveler has no such means with which to prevent seizure of the cash. He cannot take reasonable precautions to prevent allegations from being made that he intends to use the cash for drug trafficking.

Innocence of the owner was rejected as a defense to forfeiture in *In re Palmyra*.[62] Justice Story's opinion established the proposition that, as regards in rem forfeitures, "[t]he thing is here primarily considered as the offender . . . the offence is attached primarily to the thing."[63] The case involved the capture of the vessel Palmyra by another vessel in accordance with a statute authorizing the President "to instruct the commanders of the public armed vessels of the United States to . . . seize . . . any armed vessel . . . the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression . . . upon any vessel of the United States."[64] The statute further provides that such vessels "shall be adjudged and condemned to their use, and that of the captors after due process and trial in any court having admiralty jurisdiction . . . and the same court shall thereupon order a sale and distribution thereof accordingly."[65]

The Palmyra asserted herself to be a privateer.[66] Upon her capture, she was sent to Charleston, South Carolina, where a libel was made out for her forfeiture.[67] The owners of the Palmyra succeeded in having the libel dismissed in the district court. On appeal by both parties, the circuit court affirmed the acquittal of the vessel but assessed damages against the captors.[68] The captors and the United States appealed to the Supreme Court. The Palmyra's owners argued that the suit could not be maintained because a valid libel could not be made out. This was so, the owners asserted, because no personal conviction of the offenders had been obtained.

Reviewing the evidence in the record to support the allegations made in the

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[61] *Peisch*, 8 U.S. (4 Cranch) at 364.

[62] 25 U.S. (12 Wheat.) 1 (1827).

[63] *Id.* at 14.

[64] Act of Mar. 3, 1819, ch. 77, § 2, 3 Stat. 510, 512-13 (1819) (codified as amended at 33 U.S.C. § 382 (1994)).

[65] Act of Mar. 3, 1819, ch. 77, § 4, 3 Stat. 510, 513 (1819) (codified as amended at 33 U.S.C. § 384 (1994)).

[66] *In re Palmyra*, 25 U.S. (12 Wheat.) at 8. A privateer is "[a] vessel owned, equipped, and armed by one or more private individuals, and duly commissioned by a belligerent power to go on cruises and make war upon the enemy, usually by preying on his commerce." BLACK'S LAW DICTIONARY 1195 (6th ed. 1990).

[67] *In re Palmyra*, 25 U.S. (12 Wheat.) at 8.

[68] *Id.* at 9.

libel, the Court found a prima facie case of the commission of piratical aggression by the Palmyra.[69] The Court determined that the evidence on its face supported a finding of criminal activity and noted the absence of a statutory crime punishing piratical activity in personam. For these reasons, the Court rejected the innocence of the owner as a defense to a libel for forfeiture.[70] The *Palmyra* Court stated that "no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature."[71] However, the holding must be confined to the facts of the case which involved prima facie evidence of a crime. The *Austin* Court acknowledged as much, noting that the *Palmyra* opinion did not go as far as justifying forfeiture where "the owner had done all that reasonably could be expected to prevent the unlawful use of his property."[72]

In *Boyd v. United States*,[73] the Court considered the implications of the Fourth Amendment's prohibition against unreasonable searches and the Fifth Amendment's protection against self-incrimination for the question whether forfeiture is punitive. The Court found that the two provisions illuminate each other.[74] *Boyd* involved a general state statute authorizing *subpoenas duces tecum*[75] which was expressly excluded from applicability to criminal cases. The government sought the forfeiture of imported plate glass for failure to pay appropriate customs duties, while waiving criminal indictment of the owner.[76] Pursuant to the statute in question, the government sought to compel the claimant to produce certain records regarding the glass, records which may have implicated the claimant in criminal activity.[77] The Court ruled that compelling production of the records would violate the Fourth Amendment prohibition against unreasonable searches and seizures.[78] The Court stated "[w]e are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."[79]

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[69] *Id.* at 13-14.

[70] *Id.* at 15.

[71] *Id.*

[72] Austin v. United States, 113 S. Ct. 2801, 2809 (1993).

[73] 116 U.S. 616 (1886).

[74] *Id.* at 633.

[75] Court process compelling production of certain documents which are material and relevant to pending judicial proceedings. BLACK'S LAW DICTIONARY 1426 (6th ed. 1990).

[76] *Boyd*, 116 U.S. at 617.

[77] *Id.* at 618.

[78] *Id.* at 634-35 (equating the violation of the Fifth Amendment by compelling production of business records with a violation of the Fourth Amendment. This aspect of *Boyd*, that a compelled production of business records is a violation of the Fifth Amendment, is no longer accepted by the Court. *See* Fisher v. United States, 425 U.S. 391 (1976). The *Boyd* Court's conclusion that the punitive nature of forfeiture implicates the Fourth and Fifth Amendments is still current. *See infra* note 83.

[79] *Boyd*, 116 U.S. at 633-34.

Observing that unreasonable searches are "almost always made for the purpose of compelling a man to give evidence against himself," the Court found the statute invalid as applied.[80] The Court further elaborated:

> If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,--that is, civil in form,—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens . . . ? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.[81]

One commentator has characterized later Court decisions as backing away from the "compelling logic" of *Boyd*.[82] The *Austin* Court may have given new vitality to that ruling by mentioning it in a footnote,[83] and by relying on the rationale of *One 1958 Plymouth Sedan v. Pennsylvania*,[84] a decision which relied heavily on *Boyd*.

The *Austin* Court cited *One 1958 Plymouth Sedan* in response to the government's argument that forfeiture under § 881 should be considered remedial rather than punitive because it removes the instrumentalities of the drug trade, "thereby protecting the community," and serves to compensate law enforcement authorities.[85] *One 1958 Plymouth Sedan* rejected the argument that forfeiture of derivative contraband is remedial.[86] In that case, state liquor enforcement officers stopped the claimant's automobile without a warrant and, in the rear trunk, they discovered untaxed liquor, contraband per se under Pennsylvania law.[87] The issue on appeal was the admissibility of the contraband liquor as evidence in the forfeiture proceedings against the automobile.[88] Citing the reasoning in *Boyd* regarding the compulsory production of incriminating records, the Court held that the exclusionary rule, grounded in the Fourth Amendment's prohibition of unreasonable search and seizure as applied to the States by the Fourteenth Amendment, is to be observed in forfeiture proceedings.[89] The Court ruled that the automobile, as derivative contraband, was subject to the exclusionary rule.[90] The automobile could not be forfeited for having been used illegally without being admitted into evidence in the forfeiture proceeding. The Court distinquished derivative contraband from

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[80] *Id.* at 633.

[81] *Id.* at 634.

[82] Darmstadter & Mackoff, *supra* note 22, at 46.

[83] Austin v. United States, 113 S. Ct. 2801, 2804-05 n.4 (1993) (noting limitations on the applicability of the Fifth Amendment to forfeiture proceedings, including, inter alia, "where the owner faced the possibility of subsequent criminal proceedings").

[84] 380 U.S. 693 (1965).

[85] *Austin*, 113 S. Ct. at 2811 (quoting Brief for United States at 32).

[86] *One 1958 Plymouth Sedan*, 380 U.S. at 699-701.

[87] *Id.* at 694.

[88] *Id.* at 695-96.

[89] *Id.* at 702.

[90] *Id.*

contraband per se, which is subject to mandatory forfeiture under Pennsylvania law,[91] noting that "[t]here is nothing even remotely criminal in possessing an automobile."[92] In *Austin*, Justice O'Connor pointed out that the same was true of the properties at issue in that case.[93]

A common thread running through these cases is the premise of the commission of an offense. The offense is shown either by the seizure of contraband per se, or by conduct and admissions constituting a prima facie case, as in the case of the vessel Palmyra.[94] In contrast, in a case like Mr. Jones', no direct evidence of criminal activity exists. However, as the next section discusses, the application of 21 U.S.C. § 881 may result in what the Court views as "punishment" being levied in cases where large amounts of cash are seized on the mere allegation of criminal activity and a reason to believe that the cash is connected to that activity.

V. THE PROBLEM: WARRANTLESS SEIZURES BASED ON SUSPICION OF DRUG RELATED ACTIVITY

A. *Burdens and Burden Shifting*

The Attorney General is authorized to seize property suspected of being connected with drug trafficking or possession when she, or an authorized agent, believes that probable cause of such a connection exists.[95] The amount of evidence required to establish probable cause is typically the hornbook standard: "[a] reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion."[96] If the government meets this burden, a rebuttable presumption is raised that the property is "guilty" or "tainted" by its connection to drug activity, and thus is forfeited to the government.[97] This presumption may be overcome if the claimant shows by a preponderance of the evidence that the property is not connected to any drug trafficking or related activity.[98]

In the case of a warrantless seizure, the claimant is allowed an opportunity

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[91] *Id.* at 699 (citing PA. STAT. ANN. Tit. 47, § 6-602(e) (Purdon 1964 Cum. Supp.) (amended 1994)). Contraband per se is also forfeitable under federal law. *See, e.g.*, 21 U.S.C. § 881(a)(1) (1988) (allowing the forfeiture of controlled substances).

[92] One 1958 Plymouth Sedan, 380 U.S. at 699.

[93] Austin v. United States, 113 S. Ct. 2801, 2811 (1993).

[94] *In re* Palmyra, 25 U.S. (12 Wheat.) 1 (1827). SEE SUPRA text accompanying note 62.

[95] 21 U.S.C § 881(b)(4) (1988).

[96] United States v. $38,600 in United States Currency, 784 F.2d 694, 697 (5th Cir. 1986) (quoting United States v. $364,960 in United States Currency, 661 F.2d 319, 323 (5th Cir. Unit B 1981)); United States v. One 1983 Homemade Vessel Named Barracuda, 625 F. Supp. 893, 898 (S.D. Fla. 1986); United States v. $53,661.50 in United States Currency, 613 F. Supp. 180, 184 (S.D. Fla. 1985).

[97] 21 U.S.C. § 881(d) (1988). *See* quote cited *supra* note 11.

[98] *See* statutes and cases cited *supra* note 12.

to rebut the presumption of the property's "guilt" at a subsequent forfeiture proceeding.[99] The government is required to institute this proceeding "promptly" following the warrantless seizure.[100] The statute does not express a fixed length of time between the seizure and the institution of proceedings that constitutes "promptness". Delays of several months are not uncommon,[101] and delays of one year have been tolerated without question by the courts.[102] The reasonableness of the delay is evaluated by reference to four factors adopted from an analysis applied to delay in the institution of criminal proceedings: the length of the delay, the proffered reason for the delay, the claimant's assertion of his right, and the prejudice, if any, to the claimant.[103] If the value of the asset is less than $500,000 or the asset is currency in any amount, notice of the forfeiture proceeding may be given by publication.[104] The claimant can sue to initiate the proceeding, but must post a bond in the amount of $5,000 or ten percent of the assets at issue, whichever is less.[105] The burden of posting the required bond may be prohibitive in cases where the operating capital or primary working assets of a business have been seized.

The claimant is further disadvantaged by the judicially granted allowance given to the government to rely solely on circumstantial evidence at the subsequent forfeiture proceeding.[106] Because the forfeiture proceeding is a proceeding in equity, a finding of probable cause does not turn on the admissiblity of evidence, but is based only on the court's evaluation of the sufficiency and reliability of the government's evidence.[107] While the exclusionary rule applies to evidence obtained illegally in violation of the Fourth Amendment,[108] hearsay evidence may be considered by the court.[109] Individuals like Mr. Jones are subject to being stopped and questioned if they fit the profile of a drug courier, a practice tolerated by the Court.[110] A search may be conducted if the officer

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[99] *See* statutes and cases cited *supra* note 12.

[100] 21 U.S.C. § 881(b) (1988).

[101] *See* United States v. One 1973 Buick Riviera Auto., 560 F.2d 897, 901 (8th Cir. 1977).

[102] United States v. $8,850 in United States Currency, 461 U.S. 555 (1983).

[103] *Id.* at 564 (adopting the test set forth in Barker v. Wingo, 407 U.S. 514 (1972)). *See also* Nnadi v. Richter, 976 F.2d 682 (11th Cir. 1992); United States v. One 1987 Ford F-350 4x4 Pickup, 739 F. Supp 554 (D. Kan. 1990).

[104] 19 U.S.C. § 1607(a)(1) (1988 & Supp V 1993).

[105] 19 U.S.C. § 1608 (1988).

[106] *See, e.g.*, United States v. $364,960 in United States Currency, 661 F.2d 319, 324-25 (5th Cir. Unit B 1981). *See also* United States v. Roth, 912 F.2d 1131, 1134 (9th Cir. 1990) (involving probable cause which was shown by the aggregate of the evidence).

[107] Unted States v. 7715 Betsy Bruce Lane, 906 F.2d 110, 113 (4th Cir. 1990).

[108] One 1958 Plymouth Sedan v. Pa., 380 U.S. 693, 695 (1965).

[109] United States v. 526 Liscum Drive, 866 F.2d 213, 217 n.3 (6th Cir 1988).

[110] *See* United States v. Sharpe, 470 U.S. 675, 702 (1985) (Marshall, J., concurring) (discussing, without questioning, the use of drug courier profiles as a predicate to stopping a person for questioning).

thinks his safety is at risk.[111] The discovery of large amounts of cash constituting the only physical evidence of drug trafficking has been likened to the possession of burglary tools.[112] However, unlike burglary tools, which may serve no lawful purpose under the circumstances and are considered by the courts as tending to establish criminal intent,[113] large amounts of cash should not be seen as indicative of criminal intent absent corroborating direct evidence. Unfortunately, at least one court has speculated to the contrary.[114] The discovery of cash and other circumstantial evidence may be sufficient to meet the government's burden of establishing probable cause for the seizure. A drug trafficking suspect's property or cash is subject to a warrantless seizure despite a complete absence of direct evidence linking him to the alleged criminal act.

A Second Circuit decision, *United States v. $37,780 in United States Currency*, has given the government even greater latitude in meeting its burden in forfeiture proceedings.[115] The court ruled that the government need not show that probable cause for a warrantless seizure existed at the time the seizure was made.[116] Rather, the government may have the benefit of time after the seizure to search for evidence necessary to sustain its burden.[117]

In *$37,780 in U.S. Currency*, the claimant, Hernandez, was stopped at the Buffalo, New York airport as he prepared to board a plane for New York City.[118] Security officers using x-ray security scanning equipment observed what appeared to be large amounts of cash in his briefcase.[119] In response to questioning by DEA agents, Hernandez explained that he intended to use the cash to open a restaurant in New York City.[120] He also stated that the money was supplied by his mother, that he was driven to the airport by a woman he did not know well, and that he has never been arrested on drug charges.[121] Hernandez changed several aspects of his story during questioning.[122] Based on his possession of the large amount of currency and his varying responses to

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[111] Terry v. Ohio, 392 U.S. 1, 27 (1968). *See also* Adams v. Williams, 407 U.S. 143, 145-46 (1972) (asserting that a frisk may be conducted based on less than probable cause).

[112] *See* United States v. Tramunti, 513 F.2d 1087, 1105 (2d Cir. 1975).

[113] MODEL PENAL CODE § 5.01(2)(e) (1985).

[114] "It may well be that through the byzantine world of forfeiture law, congress and the courts have implicitly created a rebuttable presumption that the possession of large amounts of cash is *per se* evidence of illegal activity." United States v. $37,780 in United States Currency, 920 F.2d 159, 162 (2d Cir. 1990).

[115] 920 F.2d 159 (2d Cir. 1990).

[116] *Id.* at 163.

[117] *See also* United States v. One 1987 Mercury Marquis, 909 F.2d 167, 169-70 (6th Cir. 1990).

[118] *$37,780 in United States Currency*, 920 F.2d at 160.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 161.

[122] *Id.*

questioning, the DEA seized Hernandez's cash but did not arrest him.[123]

Subsequent to the seizure, DEA agents discovered that Hernandez had previously been convicted on drug charges and was currently under investigation for drug related activities.[124] This additional evidence was presented at the forfeiture proceeding.[125] The district court granted Hernandez's motion for summary judgment, ruling that the government had to establish probable cause on the basis of evidence existing at the time of the seizure.[126] The Court of Appeals for the Second Circuit reversed, ruling that the government need only show that probable cause for the seizure is supported by evidence marshaled by the time of the subsequent forfeiture proceeding.[127]

The Court of Appeals based its decision on an earlier Second Circuit ruling in a case where the filing of a forfeiture complaint by the government preceded the seizure.[128] The necessity of showing that probable cause exists when a forfeiture complaint is filed prior to a seizure is obvious. That requirement seems inappropriate, however, as the basis for ruling that where a forfeiture proceeding follows a warrantless seizure, the government need only show that probable cause exists at the later time of the proceeding. According to the Second Circuit court's reasoning, it is immaterial whether the proceeding is instituted before or after the seizure. In either case, the government only needs to meet its burden at the time of the forfeiture proceeding. As a result, in the case of a warrantless seizure, the government will have the advantage of time to bolster its case against the claimant.

B. *Broader Due Process Implications*

Due Process implications beyond the presumption of innocence in forfeiture cases were recently addressed in *United States v. James Daniel Good Real Property*.[129] A five-to-four majority held that the seizure of real property and the house thereon, without notice and a pre-seizure hearing, violated the Fifth Amendment's protection against deprivation of property without due process.[130] In *James Daniel Good Real Property*, the property owner pleaded

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[123] *See id.*

[124] *Id.*

[125] *Id.*

[126] *See id.*

[127] *Id.* at 163-64.

[128]

> In a case where seizure of the property followed the filing of a forfeiture complaint and was pursuant to a warrant, we held that the government "need not demonstrate probable cause until the forfeiture trial" . . . The same rule applies in a case such as this, where the property has been seized by the government prior to filing a complaint.

Id. at 163 (citing United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986)).

[129] 114 S. Ct. 492 (1993).

[130] *Id.*

guilty to state criminal charges after marijuana and other drug contraband were found on his premises.[131] Four-and-a-half years after the initial search of the house, the United States filed an in rem forfeiture action pursuant to 21 U.S.C. § 881(a)(7).[132] The District Court granted summary judgment to the government, denying the claimant's assertion that due process entitled him to a pre-seizure notice and hearing.[133] On the due process issue, the Court of Appeals for the Ninth Circuit unanimously reversed, finding a constitutional violation.[134]

The Supreme Court affirmed the Ninth Circuit's ruling in an opinion focusing primarily on the immovable nature of the real property at issue. On that basis, the case was distinguished from previous cases involving seizure of personal property without notice.[135] The Court cited *Calero-Toledo v. Pearson Yacht Leasing Co.* in which, without prior notice to the owner-lessor, the government seized a yacht aboard which a single marijuana cigarette was found.[136] The Court noted that the seizure "foster[ed] the public interest in preventing continued illicit use of the property."[137] The *James Daniel Good Real Property* Court noted *Calero-Toledo*'s focus on the necessity of protecting the district court's jurisdiction by preventing the vessel's removal, destruction, or concealment upon notice of forfeiture proceedings against it.[138] Such concerns are not present in the case of real property.[139]

The Court also distinguished several century-old cases in which seizure of real property for the collection of debts or revenue owed to the United States was justified on the basis of executive urgency.[140] While a plausible claim of urgency in the collection of revenues owed to the government may be made, as "[t]he prompt payment of taxes . . . may be vital to the existence of a government,"[141] the Court stated that no such urgency can be claimed to justify the *ex parte* seizure of real property.[142]

In reaching its decision, the Court applied the balance-of-interests test for-

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[131] *Id.* at 497.

[132] *Id.*

[133] *Id.* at 498.

[134] *Id.* SEE United States v. James Daniel Good Real Property, 971 F.2d 1376 (9th Cir. 1992).

[135] United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499-500 (1993).

[136] 416 U.S. 663 (1974).

[137] *Id.* at 679.

[138] *See James Daniel Good Real Property*, 114 S. Ct. at 502-03 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974)). *See also* United States v. 66 Pieces of Jade & Gold Jewelry, 760 F.2d 970 (9th Cir. 1985) (noting that the court's subject matter jurisdiction is dependent on its continuing control over the property).

[139] *James Daniel Good Real Property*, 114 S. Ct. at 503.

[140] *Id.* at 504.

[141] *Id.* (quoting Springer v. United States, 102 U.S. 586, 594 (1880)).

[142] *Id.* at 505.

mulated in *Mathews v. Eldridge*.[143] The Court found the private interest of a property owner in the enjoyment of his property is one of "historic and continuing importance."[144] This interest outweighed the public interest in the district court's maintenance of jurisdiction, as well as the government's interest in preventing the sale, destruction, or continued use of the property for drug trafficking, which could be prevented by other means.[145] The Court noted that transfer of the property may be accomplished by a notice of *lis pendens* as provided by state law,[146] and that prevention of further criminal use may be achieved by ordinary law enforcement activities.[147] Finally, the Court found that the risk of erroneous deprivation by ex parte seizure is "unacceptable," as evinced by the inclusion of an innocent owner defense to forfeitures under 21 U.S.C. § 881.[148] The Court found significant added value in the additional procedure of preseizure notice and hearing.[149] "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."[150]

It should be noted that the property interest in question in *Mathews* was continued access to Social Security disability payments, a federal government entitlement.[151] This is in contradistinction to real or personal property, to which the claimant holds title. The *Mathews* test may be appropriate in forfeiture proceedings following warrantless seizures, but courts should be required to weigh heavily the claimant's private interest in keeping both title to and possession of his assets.

The Supreme Court recognized the importance of this private interest in *United States v. 92 Buena Vista Avenue*,[152] an earlier § 881 forfeiture case. In that case, the government sought forfeiture of a house purchased with money

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[143] *Id.* at 501. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). To determine whether Due Process requires an evidentiary hearing prior to the deprivation of some property interest, where a post-deprivation hearing is available, the court balances (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation brought about by the existing procedures and the probable value of additional procedural safeguards, and 3) the public interest to be served by the action. *Mathews*, 424 U.S. at 335.

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

[145] *Id.* at 503.

[146] *Id.* (citing HAW. REV. STAT. § 634-51 (1985)).

[147] *Id.* at 504

[148] *Id.* at 501-02. "[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6) (1988 & Supp. V 1993).

[149] *James Daniel Good Real Property*, 114 S. Ct. at 501-02.

[150] *Id.* at 502 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951)).

[151] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[152] 113 S. Ct. 1126 (1993).

received by the claimant as a gift.[153] The funds were alleged to be the proceeds of drug trafficking.[154] The claimant professed ignorance regarding the origin of the funds and raised the innocent owner defense.[155] The United States argued that the claimant held no interest in the real property in question at the time of the forfeiture proceeding, because the government's interest as acquired by forfeiture "related back" to the time of the commission of the drug offense.[156] The government argued that because the claimant held no interest and was thus not an "owner" at the time of the forfeiture proceeding, she could not avail herself of the innocent owner defense provided in the statute.[157] The Supreme Court rejected this contention, noting that the government's argument led to the conclusion that no claimant could ever raise the innocent owner defense, a result which the Congress could not have intended.[158]

Kennedy v. Mendoza-Martinez[159] provides additional support for the recognition of due process implications in forfeiture proceedings. In *Mendoza-Martinez*, the government sought, in accordance with the Immigration and Nationality Act of 1952, to forfeit the defendants' citizenship for remaining outside of the United States' jurisdiction to avoid military service during wartime.[160] The Court found that the forfeiture of citizenship constituted punishment and it stated that "[i]f the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further."[161]

The broader due process implications in forfeiture cases addressed by *James Daniel Good Real Property*, *92 Buena Vista Avenue*, and *Mendoza-Martinez* are particularly relevant in cases of warrantless seizures on suspicion of drug related criminal activity. Apart from the perversion of the presumption of innocence, the importance of notice in the case against a person in jeopardy of serious loss and the opportunity to meet it is as great when the asset is a large amount of cash or a conveyance as when it is real property. Admittedly, protection of the court's jurisdiction over removable assets is problematic. The following section suggests possible solutions and seeks to draw conclusions from the *Austin* Court's view of forfeiture as punishment and the *James Daniel Good Real Property* Court's due process ruling regarding forfeiture.

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[153] *Id.* at 1130.

[154] *Id.*

[155] *Id.*

[156] *Id.* at 1134.

[157] *Id.* at 1131.

[158] *Id.* at 1135.

[159] 372 U.S. 144 (1963).

[160] *Id.* at 147.

[161] *Id.* at 167.

VI. THE *AUSTIN* DECISION'S IMPLICATIONS FOR WARRANTLESS SEIZURES

A. *The* Austin *Holding Broadly Viewed*

The *Austin* Court unanimously concluded that asset forfeiture constitutes "payment to a sovereign as punishment for [an] offense . . . and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause."[162] The distinction between civil and criminal proceedings is transcended by the punitive nature of forfeiture.[163]

A broad reading of *Austin* will have far-eaching effects on forfeiture law. It is tempting to simply conclude that because forfeiture is punishment imposed by a sovereign, the constitutional protections for criminal proceedings must apply. Forfeiture, however, has a long history as a civil proceeding which cannot easily be disregarded. The Austin Court conceded that forfeiture of contraband per se may be remedial and so the proceedings to accomplish forfeiture must be acknowledged to be civil in nature. However, *Austin* also restated the *One 1958 Plymouth Sedan* Court's rejection of the characterization of forfeiture of conveyances as remedial.[164] Like an automobile, possession of cash is not even remotely criminal and its forfeiture, absent a connection to criminal activity, is not remedial. Forfeiture of such items as an automobile and cash in the absence of either contraband per se or some prima facie evidence of drug trafficking must be purely punitive.

Where forfeiture is regarded as civilly imposed punishment for the commission of an offense, the burden of proof in a civil proceeding must necessarily be met before the punishment may be imposed. Generally, a civil plaintiff must make at least a prima facie showing to support his claim in order to survive the defendant's motion for a directed verdict or dismissal.[165] Until such a showing is made, no burden shifts to the defendant to prove his innocence of the plaintiff's allegations.

By contrast, a forfeiture proceeding as currently conducted only requires the government to produce evidence beyond mere suspicion.[166] The government need not produce prima facie evidence that the goods sought to be forfeited are connected in some way to criminal activity.[167] Moreover, under 21 U.S.C. § 881, and incorporated 19 U.S.C. § 1615, the government does not have to prove the factual occurrence of criminal activity.[168] The government need only allege that criminal activity was intended and show probable cause that the

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[162] Austin v. United States, 113 S. Ct. 2801, 2812 (1993) (quoting Browning-Ferris v. Kelco Disposal, 492 U.S. 257, 265 (1989)).

[163] *Id.*

[164] *Id.* at 2811 (citing One 1958 Plymouth Sedan v. Pa., 380 U.S. 693, 699 (1965)).

[165] BLACK'S LAW DICTIONARY 1190 (6th ed. 1990).

[166] *See supra* part V.A.

[167] *See* United States v. Route 2, Box 61-C, 727 F. Supp. 1295, 1298 (W.D. Ark. 1990) (holding that property is subject to civil forfeiture even if its owner is never called to defend against criminal charges).

[168] *See supra* notes 11-12.

property in question "has been or is intended to be used" in connection with that activity.[169] Even when the government attempts a criminal prosecution, acquittal of the defendant is not a bar to the civil forfeiture of his assets.[170]

The implications of a broad reading of *Austin* for forfeiture proceedings are self-evident. If forfeiture is generally regarded as punishment, then warrantless seizures, as currently authorized by § 881, impose such punishment on a claimant before the plaintiff government has met the civil pleading burden ordinarily required. The government avoids the burden of making a prima facie case of criminal activity while gaining the benefit of possession of the seized asset. Stated conversely, someone like Willie Jones must prove his innocence regarding the drug trafficking allegation in order to avoid the punishment of having his cash forfeited to the government. When the government meets its evidentiary burden of demonstrating only "more than mere suspicion," the burden shifts to the defendant to overcome the presumption of liability.[171]

Observance of traditional civil procedure for imposing punishment by forfeiture must require that the burden remain with the government to make out a sufficient case to support the forfeiture. Evidence of the commission of a drug trafficking crime and its nexus to the asset must be presented. Only then may the burden shift to the claimant to disprove the government's case.

Further implications follow from a broad reading of the *Austin* holding. If punishment is considered to be imposed at the moment of seizure, when the claimant is dispossessed of the asset, then warrantless seizures within the discretion allowed under 21 U.S.C. § 881(b)(4) would constitute the summary imposition of punishment solely on the basis of a law enforcement officer's judgment. This is a clear violation of due process with which the *Mendoza-Martinez* Court was concerned.[172]

The *James Daniel Good Real Property* decision supports an argument that this type of deprivation of property, absent prima facie evidence of criminal activity, warrants a pre-seizure hearing on the merits of the government's claim that a seizure is appropriate.[173] The *James Daniel Good Real Property* Court pointed to the immovable nature of the seized assets in response to the government's contention that custody of the assets in question must be maintained to protect the court's jurisdiction over the res.[174] Admittedly, these con-

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[169] 21 U.S.C. § 881(a) (1988 & Supp. V 1993) *See* United States v. Harris, 903 F.2d 770 (10th Cir. 1990) (dealing with 21 U.S.C. § 853).

[170] United States v. United States Currency in the Amount of $228,536, 895 F.2d 908, 916 (2d Cir. 1990).

[171] *See supra* part V.A.

[172] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). *See supra* text accompanying note 159.

[173] *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). *See supra* text accompanying note 129.

[174] *See James Daniel Good Real Property*, 114 S. Ct. at 502. *See supra* text accompanying note 139.

cerns are valid in the case of a seizure of cash or a conveyance. Protective mechanisms borrowed from criminal procedure may supply the necessary protection of the claimant's interest and still allow the warrantless seizure of assets when exigencies exist to protect the court's jurisdiction. Providing both a quick hearing to establish probable cause and a speedy trial at which the burden remains with the state to prove the occurence of criminal activity or criminal intent ensures the claimant's right to avoid the imposition of punishment without the deprivation of due process.

Even if punishment is not considered to be imposed at the time of the warrantless seizure, if the eventual forfeiture of the asset constitutes punishment then the seizure must be seen as akin to the warrantless arrest of a person in a criminal proceeding. Both situations amount to the restriction of liberty based on a suspicion of criminal activity, prior to the possible imposition of punishment at a judicial proceeding. While the criminal suspect must be arraigned within forty-eight hours of arrest at a proceeding where the government shows its basis for probable cause,[175] no analogous requirement of a prompt judicial hearing on the strength of the government's evidence exists in the case of asset seizure.

B. *The* Austin *Holding Viewed Narrowly*

Concededly, the broad reading of *Austin* as outlined in the preceding section may not prevail in the courts. Viewed narrowly, *Austin* at least stands for the proposition that the forfeiture of an asset must not be excessive. The Court declined petitioner's invitation to formulate a test for excessiveness, and remanded the case to the lower courts for that determination.[176] In doing so, the Court may have been signaling its desire that such inquiries be made on an ad hoc basis.

Justice Scalia, concurring in the judgment, offered a test for excessiveness. "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?"[177] However, if punishment is imposed by forfeiture on the basis of alleged criminal activity and probable cause that the asset is connected to that activity, Justice Scalia's test cannot be applied with any assuredness. Neither the criminal activity nor its nexus to the property can be quantified absent evidence of the nature of the offense and its extent. In Mr. Jones' case, if it can be shown that the seized cash was intended for the purchase of narcotics, the nexus is sufficiently established. Nevertheless, the state should not have the benefit of a presumption that the entire amount of cash seized was intended to be used for the drug purchase.[178] The burden must remain with the government to prove the

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[175] *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

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

[177] *Id.* at 2815 (Scalia, J., concurring).

[178] *But see* United States v. Harris, 903 F.2d 770, 777 (10th Cir. 1990) (holding

amount of the cash that was intended for the illegal purpose. If half of the $9000 that Mr. Jones was carrying was legitimately earned and intended for legitimate purposes, seizing the entire amount of cash would impose excessive punishment under the Scalia test.

An argument that the Eighth Amendment requires a fair measure of the extent to which the seized assets are related to the underlying crime necessarily leads to the conclusion that the underlying crime must be shown with at least prima facia evidence. The *Peisch* Court's reasoning, that forfeiture can only be applied where the owner has some means to prevent the loss of his assets, supports this contention.[179] A traveler may prefer to carry cash and incur the risk of its loss to a thief or to his own forgetfulness. However, by indulging in this preference he has no means of preventing its forfeiture because to do so he will have to prove a negative proposition; that he does not intend to engage in drug trafficking.

C. *Forfeiture as Punishment Without a Crime*

In footnote ten of the *Austin* opinion, the Court stated that it "again ha[s] no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner."[180] This comment and the opinion's focus on those cases where criminal activity has either been proven or is made facially evident[181] gives rise to speculation about the constitutionality of imposing punishment where no criminal activity has been shown. Indeed, Justice Kennedy's concurrence admits as much: "At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question."[182]

It is paradoxical that § 881 provides for an innocent owner defense[183] while allowing both seizure based on suspicion and subsequent forfeiture based on a mere showing of probable cause that an offense has been committed. One claimant may raise a defense of innocence regarding the use of his property in the facilitation of a drug trafficking crime to which he stipulates,[184] while another claimant must bear the burden of proof if his "defense" is that no

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that under 21 U.S.C. § 853(a)(2) all of the real property is forfeitable even though only a portion is used for illegal purposes).

[179] *See* Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808). *See supra* text accompanying note 61.

[180] Austin v. United States, 113 S. Ct. 2801, 2809 n.10 (1993).

[181] *See supra* part IV.

[182] *Austin*, 113 S. Ct. at 2816 (Kennedy, J., concurring).

[183] *See supra* note 42 and accompanying text.

[184] *See* United States v. 141st St. Corp., 911 F.2d 870, 878 (2d Cir. 1990) (noting that a claimant who did not consent to the use of his property may avail himself of the defense); United States v. One 1976 Cessna Model 210L Aircraft, 890 F.2d 77, 81 (8th Cir. 1989) (asserting that "any reasonable attempt" to prevent unlawful use of property will satisfy the requirements of the defense).

criminal activity occurred or was intended.

Viewing forfeiture as punishment for an offense while recognizing innocence of the owner as a defense then necessarily requires that the government show criminal activity before forfeiting the assets alleged to be connected to that activity. The government must arrest and indict some party on criminal charges, prove those charges in court beyond a reasonable doubt and show probable cause that the claimant's property is connected to that crime. To do less is tantamount to imposing punishment on the claimant without proof that a crime was committed or attempted by anyone. Under the current regime, punitive forfeiture is imposed for the mere intent to engage in criminal activity. Consequently, the Court should honor the language of *Boyd*[185] excoriating the government's attempt to deny the claimant criminal procedure protections by foregoing the indictment and seeking only the forfeiture of his assets.

VII. CONCLUSION

Asset forfeiture has a long history, and the legal fiction that property can be guilty of an offense is firmly rooted in American jurisprudence. The Supreme Court's historical decisions have assumed at least a prima facie showing of the commission of an offense before a forfeiture is adjudicated. Section 881 expands the realm of forfeiture to assets seized solely on probable cause. Recent Courts of Appeals cases like *$37,780 in U.S. Currency*, the Hernandez case, have approved the forfeiture of assets seized even if there was insufficient probable cause at the time of the seizure, and have affirmed that criminal activity need not be shown in connection with the particular assets seized.

The Supreme Court ruled in *Austin* that forfeiture is punitive, for purposes of the Excessive Fines Clause.[186] The Court continues to reserve the question of the constitutionality of forfeiting the property of a truly innocent owner, and Justice Kennedy has acknowledged the constitutional difficulty implicit in such a measure. The converse question is whether the courts can order a forfeiture when the commission or intent to commit a crime is not shown. The statutory shifting to the claimant of the burden of proving his innocence when the government has shown probable cause for a warrantless seizure, in conjunction with the view of forfeiture as punishment, demonstrates the clear incongruence in the law whereby guilt is presumed and punishment immediately imposed without benefit of a judicial proceeding.

The Supreme Court has opened the door to a determination that it is unconstitutional to seize assets on a reasonable belief of a nexus between the asset and some alleged criminal activity, absent prima facie evidence of a crime. When the appropriate case presents itself, the Court should make that determination and hold that assets cannot be forfeited without a prima facie showing of criminal activity. Law enforcement authorities must not be allowed to take the easy step of seizing assets and instituting forfeiture proceedings and

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[185] *See supra* note 81 and accompanying text.

[186] *Austin*, 113 S. Ct. at 2806.

forgo the harder task of prosecuting a criminal charge. The government's argument that the movable assets may escape seizure cannot be allowed to overcome the procedural requirement that guilt be determined, or at least shown to a degree sufficient to warrant a trial, before punishment is imposed.

The presumption of innocence must be honored in forfeiture cases if forfeiture is truly punishment imposed by a sovereign for some offense, as the *Austin* Court concluded it is.[187] The Court limited its holding to the question presented: whether the Eighth Amendment protection against excessive punishment must be applied. Nevertheless, the rationale for finding that the Eighth Amendment must be observed militates in favor of affording the full panoply of criminal protections to the forfeiture claimant, despite the historical characterization of such proceedings as civil. Alternatively, the civil proceeding's burden of production must remain with the plaintiff government. Regardless of the characterization of the nature of the proceeding, no person should be deprived of his property until the government is prepared to show that a forfeiture is justified.

If the state can bring its full law enforcement and prosecutorial power to bear on an individual for the purpose of taking his property as punishment, the due process protections long afforded criminal defendants must not be denied to the civil forfeiture claimant.

Joseph B. Harrington

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[187] *Id.* at 2810.