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# Notes: Constitutional Limitations of Civil in Rem Forfeiture and the Double Jeopardy Dilemma: Civil in Rem Forfeiture Constitutes Punishment and Is Subject to Excessive Fines Analysis. *Aravanis v. Somerset County*, 339 Md. 644, 664 A.2d 888 (1995), Cert. Denied, 116 S. Ct. 916 (1996)

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CONSTITUTIONAL LIMITATIONS OF CIVIL *IN REM* FORFEITURE AND THE DOUBLE JEOPARDY DILEMMA: CIVIL *IN REM* FORFEITURE CONSTITUTES PUNISHMENT AND IS SUBJECT TO EXCESSIVE FINES ANALYSIS. *Aravanis v. Somerset County*, 339 Md. 644, 664 A.2d 888 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

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## I. INTRODUCTION

The Eighth Amendment to the Constitution of the United States<sup>1</sup> contains three clauses designed to protect citizens from the government's power to prosecute: the prohibition of Excessive Bail, Excessive Fines, and Cruel and Unusual Punishment.<sup>2</sup> The Eighth Amendment, although historically applied to criminal prosecutions and "direct actions initiated by government to inflict punishment,"<sup>3</sup> has recently been held to apply in the civil arena as well. In *Austin v. United States*,<sup>4</sup> the Supreme Court of the United States concluded that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."<sup>5</sup> Accordingly, the Court held that modern statutory forfeiture,<sup>6</sup> pursuant to the commission of drug offenses, constituted punishment and was subject to the limitations of the Excessive Fines Clause of the Eighth Amendment.<sup>7</sup>

The Court of Appeals of Maryland addressed the issue of constitutional limitations on civil *in rem* forfeiture, for the first time, in *Aravanis v. Somerset County*.<sup>8</sup> In *Aravanis*, the court found that

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1. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. *Id.*; see also *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989).

3. *Browning-Ferris*, 492 U.S. at 260.

4. 509 U.S. 602 (1993).

5. *Id.* at 618.

6. The Court in *Austin* was concerned with 21 U.S.C. §§ 881(a)(4) & (a)(7) (1988 & Supp. V 1993) which provide for the forfeiture of:

(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, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution] . . . .

(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 in 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)(4) & (a)(7) (1988 & Supp. V 1993); see also *Austin*, 509 U.S. at 622.

7. See *Austin*, 509 U.S. at 622.

8. 339 Md. 644, 651, 664 A.2d 888, 891 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

Maryland's forfeiture statute<sup>9</sup> was similar to the statute at issue in *Austin*, and therefore, punitive in nature.<sup>10</sup> Accordingly, Maryland's high court concluded that civil *in rem* forfeiture constituted punishment.<sup>11</sup> The court did not, however, reach the issue of the applicability of the Eighth Amendment to the state forfeiture action.<sup>12</sup> Rather, recognizing that Article 25 of the Maryland Declaration of Rights<sup>13</sup> has long been considered *in pari materia* with the Eighth Amendment, it held that the excessive fines provision of article 25 was dispositive of the case *sub judice*.<sup>14</sup> While setting forth broad parameters, the court did not articulate "a precise formula or laundry list of factors" to be considered in determining whether a particular forfeiture violates article 25.<sup>15</sup> Rather, the court felt it prudent to allow trial judges to determine the appropriate factors to be weighed, on a case-by-case basis, and remanded the instant case back to the trial court for a determination of whether the forfeiture was constitutionally excessive.<sup>16</sup>

By not clearly defining a test to determine whether or not a fine is excessive, Maryland will undoubtedly join the myriad of jurisdictions fending for themselves. Such a lack of direction from the high

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9. The statute involved in *Aravanis* was Article 27, Section 297(m) of the Annotated Code of Maryland which provides in relevant part:

(m) Forfeiture of interest in real property. — (1)(i) Except as provided in subsection (l) [innocent owner defense] of this section and paragraph (2) of this subsection [principal family residence owned tenants by the entirety, may not be forfeited unless both parties are convicted], an owner's interest in real property may be forfeited if the real property was used in connection with a violation of § 286, § 286A, § 286B, § 286C, or § 290 of this article in relation to these offenses.

Md. ANN. CODE art. 27, § 297(m) (1996); *see also Aravanis*, 339 Md. at 654, 664 A.2d at 893.

10. *See Aravanis*, 339 Md. at 655, 664 A.2d at 893.

11. *See id.*

12. *See id.* at 655-56, 664 A.2d at 893.

13. Article 25 of the Maryland Declaration of Rights provides "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law." MD. CODE ANN., CONST. art. 25 (1981).

14. *See Aravanis*, 339 Md. at 654-56, 664 A.2d at 893-94. Article 25 was based on the English Bill of Rights of 1689. *See id.* at 656, 664 A.2d at 894 (citing *Walker v. State*, 53 Md. App. 171, 183, 452 A.2d 1234, 1240 (1980) (citing *Phipps v. State*, 39 Md. App. 206, 211, 385 A.2d 90, 93-94 (1978))). Article 25 served as a model for the Eighth Amendment. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 n.5 (1989). Thus, the Excessive Fines Clause of Article 25 of the Maryland Declaration of Rights is textually identical to the Eighth Amendment of the United States Constitution. *See Aravanis*, 339 Md. at 656, 664 A.2d at 893-94. Article 25 is considered to be *in pari materia* with the Eighth Amendment. *See id.* at 894.

15. *Id.* at 665, 664 A.2d at 898.

16. *See id.* at 666, 664 A.2d at 898-99.

courts has resulted in a loss of uniformity among United States circuit courts<sup>17</sup> and courts of the several states.<sup>18</sup> The lack of uniformity has resulted from the failure of the highest courts to articulate definitive methods and factors to be considered in determining "excessiveness."<sup>19</sup>

This note will examine the court of appeals's decision in *Aravanis* by first tracing the historical purpose and modern developments of civil *in rem* forfeiture, with deliberate emphasis on Maryland state law. It will then address the impact of determining civil *in rem* forfeitures to be punitive, especially in light of protections provided by the Double Jeopardy Clause of the Fifth Amendment.<sup>20</sup>

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17. See *infra* notes 92, 94, and accompanying text.

18. See, e.g., *In re* 2120 S. 4th Ave., 870 P.2d 417 (Az. 1994) (holding that Eighth Amendment Excessive Fines Clause does not apply to civil *in rem* drug forfeitures because such forfeitures are remedial in nature and do not constitute punishment); *Thorpe v. State*, 450 S.E.2d 416 (Ga. 1994) (adopting test from *United States v. 6625 Zumirez Dr.*, 845 F. Supp. 725 (C.D. Cal. 1994)); *Evans v. State*, 458 S.E.2d 859 (Ga. App. 1995) (following test promulgated in *Zumirez*, 845 F. Supp. at 725-42); *Cade v. Lot 2 in Block 5 of Vista Village Addition*, 885 P.2d 381 (Idaho 1994) (finding civil *in rem* forfeiture to be punishment and hence subject to the Excessive Fines Clause of the Eighth Amendment; remanding to trial court for determination of excessiveness without formulating a test); *Waller v. 1989 Ford F350 Truck*, 642 N.E.2d 460 (Ill. 1994) (adopting *Zumirez* test); *State v. Hellis*, 536 N.W.2d 587 (Mich. Ct. App. 1995) (holding that protection under Excessive Fines Clause of the Eighth Amendment is only triggered when forfeiture is disproportionate to the offense committed); *State v. \$7000*, 642 A.2d 967 (N.J. 1994) (failing to reach constitutional question of excessiveness; stating only that a direct causal connection must exist between the property and the crime); *State v. Hill*, 635 N.E.2d 1248 (Ohio 1994) (holding Excessive Fines Clause of Eighth Amendment and Ohio constitution apply to civil *in rem* drug forfeiture; failing promulgate a test); *In re King Properties*, 635 A.2d 128 (Pa. 1993) (adopting instrumentality test and expressly rejecting proportionality test and requiring instead that forfeited property be used significantly in the commission of the offense; stating that a significant relationship between the property and the offense is only evidenced by a pattern of similar incidents); *State v. 392 S. 600 E.*, 886 P.2d 534 (Utah 1994) (holding instrumentality is threshold test: state must prove substantial nexus between property and crime and state must establish a pattern of illegal activities occurring at the property; holding further that once instrumentality is established proportionality review may be appropriate; failing, however, to define proportionality).

19. See *supra* note 18 and *infra* notes 92, 94.

20. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offen[s]e to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

## II. HISTORICAL DEVELOPMENT

A. *The History of Civil In Rem Forfeiture*

A forfeiture is a penalty by which one loses rights, title, and interest in property in consequence of a default or an offense.<sup>21</sup> Three types of forfeiture were established in England at the time Maryland's article 25 and the Eighth Amendment were ratified: (1) deodand; (2) statutory forfeiture; and (3) forfeiture following conviction for a felony or treason.<sup>22</sup> Deodands were forfeitures to the Crown following the accidental death of a King's subject, in an amount equal to the value of the inanimate object that directly, or indirectly, was responsible for the loss of life.<sup>23</sup> Statutory forfeiture, provided for the forfeiture of objects used in violation of custom and revenue laws.<sup>24</sup> The third type was commonly known as forfeiture of estate.<sup>25</sup> Following a property owner's conviction of a felony or of treason, all of his real and personal property were forfeited to the Crown.<sup>26</sup> Statutory forfeiture<sup>27</sup> became a part of the American scheme of justice<sup>28</sup> and can be either criminal or civil in nature. Criminal forfeiture is analogous to forfeitures of estate, while civil *in rem* forfeiture has been characterized as a merger of deodand and statutory forfeiture.<sup>29</sup>

Criminal forfeiture statutes were enacted to punish criminal defendants following conviction of a requisite criminal offense.<sup>30</sup>

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due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

21. See BLACK'S LAW DICTIONARY 650 (6th ed. 1990).

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

23. See Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law With a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 273 (1995). For example, a wagon wheel falls off the back of a lorry and strikes a child on the side of the road, causing her death. The owner of the wheel would be required to pay, to the crown, the monetary value of the wheel, which was the instrumentality of the child's death. Cf. *id.* at 273-75.

24. See *Calero-Toledo*, 416 U.S. at 682.

25. See *id.*

26. See *id.*

27. Forfeitures are not favored in the law and must be authorized by a specific statute. See *United States v. One 1976 Ford F-150 Pickup*, 769 F.2d 525, 527 (8th Cir. 1985); see also 37 C.J.S. Forfeitures § 5(a) (1943).

28. See *Calero-Toledo*, 416 U.S. at 682.

29. See *id.*

30. See *Libretti v. United States*, 116 S. Ct. 356, 363 (1995). Criminal forfeiture statutes currently punish criminal conduct in violation of federal racketeering and drug laws. See *id.*; see also *Gozlon-Peretz v. United States*, 498 U.S. 395, 399-403 (1991) (tracing the statutory history of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, which instituted criminal forfeiture for violations of federal law).

Such forfeitures are considered sanctions and are imposed upon criminal defendants as part of their sentences.<sup>31</sup> The proceeding is considered *in personam*, as it is a direct punishment against an individual for criminal conduct.<sup>32</sup> The excessiveness analysis for *in personam* criminal forfeitures centers on the amount of the forfeiture in relation to the severity of the offense.<sup>33</sup>

Conversely, civil *in rem* forfeitures are based on the premise that "the thing is primarily considered the offender."<sup>34</sup> Thus, *in rem* proceedings are brought directly against the offensive property,<sup>35</sup> the focus being on the property's guilt, rather than on the guilt of the property's owner.<sup>36</sup> This often led to harsh results when a property owner, innocent of wrongdoing, lost title to "tainted" property.<sup>37</sup> The harshness of civil *in rem* forfeiture has been abrogated, in modern times, by statutory provisions<sup>38</sup> and constitutional safe-

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31. See *Libretti*, 116 S. Ct. at 363.

32. See *Austin v. United States*, 509 U.S. 602, 624 (1993) (Scalia, J., concurring); see also William J. Hughes & Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613, 618 (1984).

33. See *Austin*, 509 U.S. at 627 (citing *Alexander v. United States*, 509 U.S. 544, 571-74 (1993)). *Alexander* was a criminal forfeiture action decided on the same day as *Austin*. See *Alexander*, 509 U.S. at 559 n.4. In *Alexander*, the defendant contended that the taking of his 31 wholesale and retail businesses and \$9,000,000 in cash was excessive because his conviction was based only on the seizure of seven obscene materials. See *id.* at 547-48, 558. The Court found that the Excessive Fines Clause did apply to the criminal forfeiture. See *id.* at 559. On remand, however, the Supreme Court urged the Eighth Circuit to evaluate the excessiveness of the taking not on the number of materials found, but on the temporal and criminal extent of the defendant's racketeering enterprise. See *id.* The Court's emphasis in criminal (*in personam*) forfeiture, therefore, is clearly on the culpability of the property's owner, and not that of the property.

34. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921).

35. See BLACK'S LAW DICTIONARY 793 (6th ed. 1990).

36. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (permitting forfeiture of a yacht, upon which a single marijuana cigarette was found, despite the innocence of the yacht's owner); *Goldsmith-Grant*, 254 U.S. at 510 (permitting forfeiture of automobile used in liquor tax avoidance scheme, despite the use of the automobile without the permission or knowledge of the owner); *United States v. Harmony*, 43 U.S. 210 (1844) (permitting forfeiture of a cargo vessel used in acts of piracy on the high seas, despite owner's lack of culpability, but permitting the innocent owner of the vessel to retain the cargo contained therein, because the cargo was not guilty of an offense).

37. See *supra* note 36 and *infra* note 38.

38. See, e.g., 21 U.S.C. § 881 (1988 & Supp. V 1993) (requiring government to show that there is (1) probable cause that property was used, or intended to be used, to facilitate illegal drug activity; and (2) owner of property has opportunity to prove, by a preponderance of the evidence, that the owner had

guards.<sup>39</sup> Innocent owners of property that was used to further illegal purposes can now implement an innocent owner defense, as permitted by statute.<sup>40</sup> Moreover, the application of constitutional analysis affords the owner of seized property an additional means of regaining title to "guilty" property<sup>41</sup> if the owner can show that the taking of the owner's property is "excessive." If the taking is deemed excessive, then the forfeiture will be considered unconstitutional and the property will remain titled to the owner.<sup>42</sup>

## 1. The Federal Scheme of Civil *In Rem* Forfeiture

Civil *in rem* forfeiture has been part of the American legal landscape since the American Revolution and was utilized during our country's infancy to remedy crimes such as piracy<sup>43</sup> as well as to enforce protective tariffs on luxury goods<sup>44</sup> and tobacco imports.<sup>45</sup> During the 1920s, it was used to combat bootleggers seeking to circumvent the prohibition of alcohol.<sup>46</sup> Currently, civil *in rem* forfeiture is used to assail illegal gambling,<sup>47</sup> the sexual exploitation of

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no culpability with regards to the drug activity); MD. ANN. CODE art. 27, § 297 (1996) (permitting grant of remission of forfeiture to protect the rights of innocent parties and prohibiting forfeiture of family home, held in tenancy by the entireties, unless both parties have been convicted of offenses expressed in the statute). It must be noted, however, that such protections are not available for property that is the direct proceeds of criminal activity. See 21 U.S.C. 881(a)(6) (1988 & Supp. V 1995). Extending such protections to "fruits" of criminal activity would, in effect, reward the felon for criminal acts and permit illegally gotten gains to be shielded from forfeiture actions. See *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994). The Eighth Circuit succinctly explained, "Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity." *Id.*

39. See *Austin v. United States*, 509 U.S. 602 (1993) (holding Eighth Amendment Excessive Fines Clause applicable to civil *in rem* forfeiture).

40. See *supra* notes 36, 38.

41. For purposes of this discussion, the property at issue will be assumed to have been used, or intended to be used, in the facilitation of a statutorily prohibited activity, as opposed to contraband or property directly traceable as proceeds of illegal activity. See *supra* notes 36, 38.

42. See *United States v. Shelly's Riverside Heights Lot X*, 851 F. Supp. 633 (M.D. Pa. 1994) (finding forfeiture of family farm and residence used to manufacture marijuana for personal consumption excessive in relation to the criminal offense). See *infra* notes 269-72 and accompanying text.

43. See *Harmony v. United States*, 43 U.S. 210 (1844).

44. See *Peisch v. Ware*, 8 U.S. 347 (1808).

45. See *Lilienthal's Tobacco v. United States*, 97 U.S. 237 (1877).

46. See *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921).

47. See 18 U.S.C. § 1955(d) (1994).



children,<sup>48</sup> money laundering,<sup>49</sup> organized crime,<sup>50</sup> and illegal drug trafficking.<sup>51</sup>

An examination of the mechanics of civil *in rem* forfeiture reveals why it has historically been favored by law enforcement. To commence civil *in rem* proceedings, prosecutors need only prove that there is probable cause to believe that the property was used in the commission or facilitation of a crime.<sup>52</sup> The property is then "pun-

48. See 18 U.S.C. § 2254 (1994).

49. See 18 U.S.C. § 981 (1994).

50. See The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1994).

51. See 21 U.S.C. § 881 (1994); see also *supra* note 6.

52. At the federal level, the initial burden of proof in attaching property for trial, in civil forfeiture actions, falls on the government to show probable cause that the property was connected to a drug crime. See *United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995); *United States v. Rural Route 1, Box 137-B*, 24 F.3d 845, 848 (6th Cir. 1994); *United States v. RR # 1, Box 224*, 14 F.3d 864, 869 (3d Cir. 1994); *United States v. Shelly's Riverside Heights Lot X*, 851 F. Supp. 633, 637 (M.D. Pa. 1994). The burden then shifts, in the majority of the circuits, to the claimant to show, by a preponderance of the evidence, that the property is not subject to forfeiture. See *Milbrand*, 58 F.3d at 844. But see *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985 (9th Cir. 1995) (placing the burden on the government to show a substantial connection between the property and the offense, once a claimant asserts that forfeiture violates the Excessive Fines Clause). Although the Maryland courts have not yet reached this specific issue, two recently decided cases indicate that their approach will probably be more analogous to the majority method.

In *1986 Mercedes Benz 560 CE v. State*, 334 Md. 264, 279, 638 A.2d 1164, 1171 (1994), the Court of Appeals of Maryland addressed burdens of proof following the assertion of an innocent owner defense. In its analysis, the court stated that once adequate evidence is presented that property is subject to forfeiture under section 297 a presumption of forfeitability arises. See *1986 Mercedes Benz 560 CE*, 334 Md. at 279, 638 A.2d at 1171. The burden then shifts to the claimant to rebut the presumption by a preponderance of the evidence. See *id.*; see also *State v. One 1984 Toyota Truck*, 311 Md. 171, 183, 533 A.2d 659, 665 (1987) (holding the innocent owner defense provided for within section 297 is an affirmative defense and the burden is on the owner to show "entitlement to exemption").

This approach was applied in *One Ford Motor Vehicle v. State*, 104 Md. App. 744, 657 A.2d 825 (1995). The issue before the Court of Special Appeals of Maryland concerned determining ownership of a motor vehicle seized by the police following a drug arrest. See *id.* at 751-53, 657 A.2d at 828-29. The automobile was not titled to the drug offender, but rather was held in his sister's name. See *id.* at 750, 657 A.2d at 828. The court recognized that there was a presumption that the named title holder was the owner of the property, but that the state had rebutted that presumption. See *id.* The appellate court considered the ownership issue a question of fact properly left for the trier of fact to determine. See *id.* In support of the trial judge's decision, the appellate court noted that the drug offender possessed both sets of the car's keys and exercised complete control over the vehicle. See *id.* at 748, 657 A.2d at 827. Further, the court stated that the "claimant ha[d] the burden of proving the

ished” through seizure, and the secondary punitive effect on the owner of the property is not considered relevant.<sup>53</sup> The civil nature of the proceeding affords prosecutors a lower burden of proof,<sup>54</sup> while it deprives property owners the protections guaranteed to criminal defendants under the Bill of Rights of the United States Constitution.<sup>55</sup>

The owners of “offensive” property, in modern times, have been afforded some protection by the enactment of “innocent owner” defenses.<sup>56</sup> Constitutional protections, such as due process constraints on law enforcement officials,<sup>57</sup> have also strengthened the position of claimants. The Supreme Court’s decision in *Austin*, that the Eighth Amendment protection against excessive fines is available in civil *in rem* proceedings, adds another layer of protection heretofore unavailable.<sup>58</sup>

a. The History of Title 21 U.S.C. Section 881

The forfeiture statute at issue in *Austin* was originally enacted as The Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>59</sup> The Act authorized the federal government to seize cars, equipment, and other instrumentalities used to manufacture or transport illegal drugs.<sup>60</sup> In 1978, the Act was amended to include a

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claimant [was] an ‘innocent owner.’” *Id.* at 753, 674 A.2d at 829 (citing *One Toyota Truck*, 311 Md. at 183-84, 533 A.2d at 664-65). The court stated that “if an innocent owner can satisfy the court that he/she has an interest in the property, it should not be forfeited.” *Id.* at 751, 657 A.2d at 829. Thus, the burden of proof rests on the party asserting ownership of the property to prove that the party is innocent of the underlying offense and are the rightful owner of the property.

The assertion of a constitutionally excessive fine, if successful, provides a remedy to the claimant analogous to the remedy afforded by the innocent owner defense. *See supra* notes 36-38. It is reasonable to assume, therefore, that the procedure for proving this constitutional claim will, likewise, mirror that of the innocent owner defense.

53. *See* Steven V. Miller, *So What Rights Does A HMET Mobile Home Have Anyway? In Austin v. United States, the Supreme Court Applies the Excessive Fines Clause to In Rem Civil Forfeitures*, 23 CAP. U. L. REV. 797 (1994).

54. *See Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (citing *In re Winship*, 397 U.S. 358 (1970)).

55. *See* Miller, *supra* note 53, at 797.

56. *See supra* notes 36-38.

57. *See United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993); *see also United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992) (holding Fourth Amendment’s prohibition of unreasonable search and seizure applies to civil *in rem* forfeiture).

58. *Austin*, 509 U.S. at 622.

59. 21 U.S.C. § 881 (1994).

60. *See id.*

provision that would subject profits earned from illegal drug activity to forfeiture.<sup>61</sup> Congress again broadened the reach of law enforcement with the enactment of The Comprehensive Crime Control Act of 1984<sup>62</sup> allowing the seizure of real property used in the commission or facilitation of drug activity,<sup>63</sup> as well as providing an innocent owner defense provision.<sup>64</sup>

## 2. The Maryland Scheme of Civil *In Rem* Forfeiture

Maryland's drug forfeiture statute predates the federal statute by some twenty years.<sup>65</sup> In its original form,<sup>66</sup> the Maryland statute allowed for forfeiture of conveyances of illegal drugs and also contained an innocent owner provision.<sup>67</sup> The statute in force at this

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61. See 21 U.S.C. 881(a)(6) (1994); see also S. Rep. No. 225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374 (stating that for efforts against drug trafficking to be successful, the economic benefits of the drug trade must be attacked).

62. 21 U.S.C. § 881 (1994).

63. See 21 U.S.C. § 881(a)(7) (1994).

64. See *id.*

65. The Uniform Narcotic Drug Act was enacted by Chapter 59 of the Laws of 1935 by the Maryland State Legislature. In 1951, Senate Bill 406 was unanimously passed by the Maryland State legislature and became Chapter 471 of the Laws of 1951. Senate Bill 406 added a new section, codified at MD. ANN. CODE art. 27, §§ 276-305, to the Uniform Narcotic Drug Act allowing for forfeiture of "tainted" property.

66. The relevant section in the case at bar is MD. ANN. CODE art. 27, § 297 (1996). The predecessor to § 297 was codified at MD. ANN. CODE art. 27, § 301 and stated:

In addition to any other fines or penalties provided for a violation of provisions of this subtitle, any motor vehicle, vessel or aircraft used or employed in the concealment, conveying or transporting of any such narcotic drugs, or used during the course of any violation of this subtitle by any person or persons convicted of the same shall upon the conviction or convictions be declared by the court to be forfeited to the county or to Baltimore City, as the case may be; *provided that no vehicle be forfeited hereunder unless the owner thereof authorized or permitted such use or employment . . . .*"

Art. 27, § 301 (*emphasis added*).

67. See *supra* note 66. The operation of this affirmative defense, however, was negated in 1970 by the repeal of the original statute and enactment of the Maryland Controlled Dangerous Substance Act, which did not provide innocent owners with protection from forfeiture of "tainted" property. On July 1, 1970, Chapter 403 of the Laws of 1970 took effect, repealing sections 276-313D of article 27 and substituting sections 276-302 under the new subheading, "Health-Controlled Dangerous Substances." See *Prince George's County v. One 1969 Opel*, 267 Md. 491, 495, 298 A.2d 168, 170 (1973). Specifically, section 297 was substituted for section 301. See *id.* This change in Maryland's statutory scheme was recognized by the Court of Appeals of Maryland in *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 658-59, 284 A.2d 203, 204-05

writing is essentially the same as the federal statute.<sup>68</sup> It provides for the forfeiture of conveyances and real property used to facilitate drug transactions, as well as providing for the forfeiture of the proceeds of illegal drug activity.<sup>69</sup>

### B. The Prohibition Against Excessive Fines

The recent decisions in *Aravanis v. Somerset County*<sup>70</sup> and *Austin v. United States*<sup>71</sup> establish a protection to property owner's beyond that which is provided by statute — a guarantee that such forfeitures not be unconstitutionally excessive.

#### 1. The Eighth Amendment Prohibition Against Excessive Fines

The Eighth Amendment<sup>72</sup> was adopted to control abuses of the federal government's prosecutorial power.<sup>73</sup> The debate surrounding

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(1971), where the court acknowledged the legal fiction that an inanimate object can be guilty of a crime. It further recognized that the historic treatment of forfeiture followed the ancient law of deodand. *See id.* Additionally, it noted that the statute in force prior to July 1, 1970 "was contrary to the general view." *Id.* at 659, 284 A.2d at 205. Finally, the court held that while the taking of "tainted" property from an innocent owner was harsh, it was not constitutionally barred. *See id.* at 662, 284 A.2d at 206.

In 1972, however, a narrow innocent owner defense was adopted by the legislature. *See State v. One 1983 Chevrolet Van Serial No. 1GCCG15D8D 104615*, 309 Md. 327, 330-31, 524 A.2d 51, 52-53 (1987). This exception dealt primarily with automobiles but did not require return of the property to the lienholder. Rather, they permitted the state to sell the automobile, deduct their expenses from the proceeds, and apply the balance to the lien.

In 1984, the statute was again amended to provide additional protection to lienholders. *See id.* at 331-32, 524 A.2d at 53. A new subsection was enacted which required that: "No conveyance shall be forfeited under the provisions of this section to the extent of the interest of any owner of the conveyance who neither knew or should have known that the conveyance was used or was to be used in violation of this subtitle." Art. 27, § 297(a)(4)(iii). This new subsection was subsequently construed to afford a broad innocent owner defense. *See State v. One 1984 Toyota Truck*, 311 Md. 171, 182-84, 533 A.2d 659, 664-65 (1987). The statute in force at this writing expressly provides protection to innocent owners of tainted property. Subsection (c) states: "Property not subject to forfeiture. — Property or an interest in property described under subsection (b)(4), (9), and (10) of this section may not be forfeited if the owner establishes by a preponderance of the evidence that the violation of this subheading was done without the owner's actual knowledge." § 279(c).

68. *See* MD. ANN. CODE art. 27, §297(m) (1996).

69. *See id.*

70. 339 Md. 644, 664 A.2d 888 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

71. 509 U.S. 602 (1993).

72. *See supra* note 1 for the text of the Eighth Amendment.

73. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989).

the adoption of the amendment was minimal and the Excessive Fines Clause received "even less attention."<sup>74</sup> This lack of attention continued into modern times because the Supreme Court did not address the application of the Excessive Fines Clause until its 1989 decision in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*<sup>75</sup> In holding the Excessive Fines Clause inapplicable to disputes between private parties, the Court stated that the clause "was intended to limit only those fines directly imposed by, and payable to, the government."<sup>76</sup> While the *Browning-Ferris* Court acknowledged that the Eighth Amendment had long been understood to apply exclusively to criminal cases,<sup>77</sup> it declined to hold that the Excessive Fines Clause was solely applicable to the criminal arena.<sup>78</sup>

The Court revisited this issue in *Austin*, and held that the Excessive Fines Clause was a limitation on civil *in rem* forfeiture imposed for the commission of drug offenses.<sup>79</sup> The Court's application of Eighth Amendment protection to the civil arena was based on its determination that civil *in rem* forfeiture had historically been understood to constitute governmentally imposed punishment.<sup>80</sup> In reaching this conclusion, the Court recognized that civil *in rem* forfeiture deprives property owners of their property rights as a deterrent and as punishment for criminal activity.<sup>81</sup> Further, the Court noted that the existence of innocent owner provisions revealed that the true focus of civil *in rem* forfeiture was on the culpability of the owner and that Congress intended only to punish those guilty of criminal activity.<sup>82</sup> Determining that the drug forfeiture statutes at issue<sup>83</sup> constituted punishment, the Court noted that they tied forfeiture to an underlying drug offense<sup>84</sup> and that the legislative history of the statute indicated congressional intent to use forfeiture as a deterrent.<sup>85</sup> The *Austin* Court concluded that in the presence of these factors, forfeiture, under the statutes at issue, "constitute[d] 'payment to a sovereign as punishment for some offense,'"<sup>86</sup> and was,

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74. *Id.* at 264.

75. *See id.*

76. *Id.* at 268.

77. *See id.* at 262.

78. *See id.* at 265.

79. *See Austin v. United States*, 509 U.S. 602, 622 (1993); *see also supra* note 6.

80. *See Austin*, 509 U.S. at 618; *see also supra* notes 21-58 and accompanying text.

81. *See Austin*, 509 U.S. at 618.

82. *See id.* at 619.

83. *See* 21 U.S.C. §§ 881(a)(4) & (a)(7) (1994); *see also supra* note 6.

84. *See Austin*, 509 U.S. at 620.

85. *See id.*

86. *Id.* at 622 (*quoting* *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

therefore, "subject to the limitations of the Eighth Amendment's Excessive Fines Clause."<sup>87</sup>

a. *Tests for Excessiveness*

While holding that the Eighth Amendment applied to civil *in rem* forfeiture, the *Austin* Court declined to fashion a test for determining excessiveness.<sup>88</sup> Justice Scalia, in a lone concurring opinion, articulated a test that has been termed the "instrumentality test."<sup>89</sup> In remanding *Austin* for a determination of excessiveness, the Court did not, however, limit the lower court from considering factors other than Justice Scalia's proposed instrumentality test.<sup>90</sup> Because of the lack of direction given by the majority, federal district and circuit courts have developed their own tests.<sup>91</sup> While these tests are far from uniform, they tend to emphasize either an "instrumentality" or a "proportionality" approach. A minority of federal circuits have fashioned tests based on Justice Scalia's instrumentality proposal which focus on the connection between the property and the underlying drug offense.<sup>92</sup> The majority of federal circuits, however, have given great weight to the *Austin* Court's failure to adopt Justice Scalia's test.<sup>93</sup> These circuits have fashioned tests that require the value of forfeited property to be proportional to the underlying criminal activity.<sup>94</sup>

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87. *Id.*

88. *See id.*

89. *See id.* at 623-28.

90. *See id.* "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 . . . excessiveness." *Id.* at 623 n.15.

91. *See infra* notes 92, 94 and accompanying text.

92. Three circuits have adopted the instrumentality test: the Ninth Circuit, *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995), the Seventh Circuit, *United States v. Plescia*, 48 F.3d 1452 (7th Cir.), *cert. denied*, 116 S. Ct. 114 (1995), and the Fourth Circuit, *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995). *See also infra* notes 139-44 and accompanying text (discussing *6380 Little Canyon Rd.*), notes 99-104 and accompanying text (discussing *Plescia*), notes 108-34 and accompanying text (discussing *Chandler*).

93. *See supra* note 90.

94. Five circuits have followed this approach. *See United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995) (holding factors to be considered include: harshness of forfeiture in comparison to gravity of offense and sentence that could have been imposed; relationship between the property and the offense; and role and degree of culpability of the owner of the property), *cert. denied*, 116 S. Ct.

## i. The Instrumentality Test

The threshold question of the instrumentality test, as announced by Justice Scalia, is whether there is a close enough relationship between the property and the offense "to render the property, under traditional standards, 'guilty' and hence forfeitable."<sup>95</sup> Thus, in determining excessiveness, federal courts are considered to have adopted an instrumentality test if the test's threshold factor focuses on the nexus between the property and the offense.<sup>96</sup>

The extent of the connection required, however, varies from circuit to circuit.<sup>97</sup> Several circuits also require that other factors be considered once a substantial nexus between the offense and the property has been established.<sup>98</sup> The only uniformity between the various instrumentality tests is that the instrumentality requirement is the threshold factor to be considered in determining excessiveness.

The United States Court of Appeals for the Seventh Circuit is the sole jurisdiction, to date, to apply an absolute instrumentality test.<sup>99</sup> In *United States v. Plescia*<sup>100</sup> the government seized a defen-

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1284 (1996); *United States v. Rural Route 1, Box 137-B*, 24 F.3d 845 (6th Cir. 1994) (holding petitioner must prove by a preponderance of the evidence that forfeiture is grossly disproportionate to offense committed); *United States v. Myers*, 21 F.3d 826 (8th Cir. 1994) (adopting proportionality analysis requiring a fact specific evaluation of all the circumstances of defendant's criminal conduct, including the extent of criminal drug activities, in order to determine excessiveness), *cert. denied*, 115 S. Ct. 742 (1995); *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994) (adopting proportionality analysis — measure seriousness of offense by examining whether illegal conduct, associated with the property, was the type Congress intended to punish); *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993) (holding defendant required to make *prima facie* showing that forfeiture is not grossly disproportionate); *United States v. 429 S. Main St.*, 843 F. Supp. 337 (S.D. Ohio 1993) (holding primary factor to consider is gravity of offense, measured by harmful reach of crime and sentence allowable under statute, as compared to the value of the forfeiture; other factors may include extent of property's use and whether family home), *aff'd in part, remanded on other grounds*, 52 F.3d 1416 (6th Cir. 1995); *see also infra* notes 262-68 and accompanying text.

95. *Austin v. United States*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring).

96. *See supra* note 92.

97. *Compare United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985 (9th Cir. 1994) (requiring a substantial connection between the property and the underlying offense) *with United States v. Plescia*, 48 F.3d 1452, 1462 (7th Cir. 1995) (holding forfeiture is appropriate if used in any way to facilitate drug offenses as long as the use is not "incidental or fortuitous") (citing *United States v. 916 Douglas Ave.*, 903 F.2d 490, 493 (7th Cir. 1990), *cert. denied*, 116 S. Ct. 114 (1995)).

98. *See* notes 92-143 and accompanying text.

99. *See United States v. Plescia*, 48 F.3d 1452, 1462 (7th Cir.), *cert. denied*, 116 S. Ct. 114 (1995).

100. *Id.*

dant's home on the basis of one phone call between codefendants, the purpose of which was to set up a large cocaine transaction.<sup>101</sup> The court found that the forfeiture was not excessive because the property was deliberately, as opposed to fortuitously, used to facilitate a drug transaction.<sup>102</sup> Expressly adopting Justice Scalia's instrumentality analysis,<sup>103</sup> the court found that the connection between the property and the offense was close enough to warrant forfeiture regardless of the value of the property.<sup>104</sup>

The Fourth and Ninth Circuits apply a multi-tiered instrumentality approach.<sup>105</sup> The Fourth Circuit analysis expressly rejects the applicability of proportionality analysis,<sup>106</sup> yet allows additional factors to be considered once a nexus between the property and the offense has been established. Conversely, the Ninth Circuit employs a proportionality analysis, but only if a substantial nexus has been established between the property and the underlying criminal activity.<sup>107</sup> Thus, both are considered instrumentality tests because of their nexus requirement, and both employ a multi-tiered approach because they apply other factors to determine excessiveness once the nexus is satisfied.

The instrumentality test was adopted by the United States Court of Appeals for the Fourth Circuit as the "appropriate standard for determining excessiveness" in *United States v. Chandler*.<sup>108</sup> In *Chandler*, evidence was presented at the forfeiture proceeding that a thirty-three acre farm, valued at \$569,000, was the situs of at least 130 drug transactions.<sup>109</sup> There was also testimony that farm employees were paid for their labors in drugs rather than in cash.<sup>110</sup> The trial court found probable cause that the property facilitated the drug activity and was thus subject to forfeiture.<sup>111</sup> The burden of proof then shifted to the claimant to show either that the property was not used as a site for drug transactions, or that the owner was unaware of the illegal activity.<sup>112</sup> The jury found that the property was used to facilitate drug activity, that it was improved by proceeds of the drug exchanges, and that the property owner was aware of the drug

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101. *See id.*

102. *See id.*

103. *See supra* notes 89-90 and accompanying text.

104. *See Plescia*, 48 F.3d at 1462.

105. *See infra* notes 106-44 and accompanying text.

106. *See United States v. Chandler*, 36 F.3d 358, 360 (4th Cir. 1994).

107. *See United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1994); *see also supra* notes 139-44 and accompanying text.

108. 36 F.3d 358, 360 (4th Cir. 1994).

109. *See id.* at 360, 366.

110. *See id.* at 361.

111. *See id.*

112. *See id.*



dealings.<sup>113</sup> The entire farm was ordered forfeited, and the owner appealed on the grounds that the forfeiture was excessive.<sup>114</sup>

On appeal, the Fourth Circuit first established the appropriate standard by which to ascertain whether or not a forfeiture violates the Excessive Fines Clause.<sup>115</sup> In promulgating its test the court recognized the historical premise that *in rem* forfeiture is grounded on the legal fiction that the "property itself was considered the 'offender.'"<sup>116</sup> Further, the court found that the drug forfeiture statute at issue<sup>117</sup> "did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was *tainted* by the offense."<sup>118</sup> Thus, the *Chandler* court held that the central question of excessiveness is the role of the property and the extent of its use in the furtherance of the underlying offense.<sup>119</sup>

The focus of the *Chandler* test is on the property and its role in the offense.<sup>120</sup> The factor given the greatest weight, the nexus between the property and the offense, is determined by considering several specific factors, none of which are dispositive: (1) whether the property's use was deliberate; (2) whether the property's use was important to the success of the crime; (3) the time during which the property was used and the spatial extent of its use; (4) whether the use was an isolated incident or the property has been used more than once; and (5) whether the property was acquired, maintained, or used with the purpose of carrying out the crime.<sup>121</sup>

The court recognized, however, that civil *in rem* forfeiture exacts a punishment on the owner of the property.<sup>122</sup> Acknowledging the punitive aspect of such forfeitures, the court provided that the role of the property owner, while of "minor relevance," should also be considered.<sup>123</sup> "Thus, where the owner's involvement in the offense is only incidental, as opposed to extensive — e.g., where he is simply

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113. *See id.*

114. *See id.* at 361-62.

115. *See id.* at 363.

116. *Id.*

117. *See* 21 U.S.C. § 881 (1988 & Supp. V 1993).

118. *Chandler*, 36 F.3d at 364. Although the *Chandler* court acknowledged that forfeiture exacted punishment on the property owner, it dismissed both the value of the property and the gravity of the underlying offense as factors to be weighed in an excessiveness analysis. *See id.* The value of the property and the gravity of the offense are factors often employed under the proportionality test. *See infra* notes 145-84 and accompanying text.

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

120. *See id.*

121. *See id.* at 365.

122. *See id.* at 364.

123. *See id.*

aware of the offense but not a perpetrator or conspirator — this fact will weigh on the excessiveness side of the scales.”<sup>124</sup> This element operates to mitigate the harshness of forfeiture if the property owner can show that his role in the underlying criminal activity was minimal.

The court was also concerned that only “tainted” property be subject to forfeiture.<sup>125</sup> The *Chandler* court provided that if the property owner could prove that readily separable parcels were not implicated in the underlying offense, they could be saved from forfeiture.<sup>126</sup> The burden of proving separability, however, rested with the property owner.<sup>127</sup>

The Fourth Circuit then applied the above factors to the facts presented at trial.<sup>128</sup> The court found that the secluded nature of the property was important to the success of the illegal activity.<sup>129</sup> Furthermore, the number of transactions that occurred on the property and the extensive use of the property for drug storage increased the culpability of the property.<sup>130</sup> The court also found that the property was partially maintained and improved by payments to farm workers made with drugs.<sup>131</sup> Thus, the requisite nexus between the property and the drug activity was overwhelmingly satisfied.<sup>132</sup> Turning to the remaining two factors, the court was unpersuaded that the property owner’s role was incidental. The court also noted that no evidence was presented that the property was separable.<sup>133</sup> Thus, the court concluded that the entire thirty-three acre farm had been properly forfeited and that the excessive fines clause was not offended.<sup>134</sup>

The *Chandler* test is a two-tiered approach to civil *in rem* forfeiture actions. First, the establishment of the requisite nexus between the property and the offense determines whether a forfeiture can properly be imposed.<sup>135</sup> Second, the extent of the property owner’s involvement and the separability of the offending property are factors that relate directly to the excessiveness of the “fine.”<sup>136</sup> Hence, where property is clearly implicated through its use in criminal activity, its forfeiture may be excessive if the owner can prove that the owner’s role is “incidental, as opposed to extensive” or if

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124. *Id.*

125. *See id.*

126. *See id.*

127. *See id.* at 366.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.* at 364.

136. *See id.*

"nonimplicated" property is not separated, where possible, from offending property.<sup>137</sup> This analysis is less harsh than the *Plescia* test.<sup>138</sup> Its multi-factored approach affords more protection to the property owner as it considers the extent of the property's use and role of the owner in the underlying criminal activity in its determination of excessiveness.

A slightly different two-tiered approach was adopted by the United States Court of Appeals for the Ninth Circuit in *United States v. 6380 Little Canyon Road*.<sup>139</sup> To determine whether the forfeiture is proper, the Ninth Circuit applies the instrumentality test which requires the government to show a substantial connection between the guilty property and the underlying criminal offense.<sup>140</sup> Once the government has satisfied its burden, the court applies a proportionality prong as "a check on the instrumentality approach."<sup>141</sup> Thus, once the instrumentality requirement is satisfied the "worth of the property must be 'proportional' (not excessive) to the culpability of the owner."<sup>142</sup> Under this model, property that is extensively used for criminal purposes may be saved from forfeiture if the court determines that the harshness of the forfeiture<sup>143</sup> exceeds the culpability of the owner.<sup>144</sup>

## ii. The Multi-Factor Proportionality Test

The multi-factor proportionality approach recognizes both the *in personam* and *in rem* characteristics of civil *in rem* forfeiture. This approach stems from analogizing the Supreme Court's treatment

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137. *Id.*

138. *See supra* notes 99-104 and accompanying text.

139. 59 F.3d 974, 982 (9th Cir. 1994).

140. *See id.* at 985. This approach of shifting the burden of proof to the non-claiming party differs from the rest of the circuits which have addressed this issue. *See supra* note 52 and accompanying text.

141. *6380 Little Canyon Rd.*, 59 F.3d at 983. The proportionality prong is applied in recognition of the potential harshness of civil *in rem* forfeiture. *See id.*

142. *Id.* at 982.

143. The Ninth Circuit considered the following factors in determining the harshness of the forfeiture: (1) the fair market value of the property; (2) the subjective value of the property (whether it is the family home, etc.); and (3) the hardship to the claimant, taking into account the effect of the forfeiture on the claimant's family or financial condition. *See id.* at 985.

144. The culpability of the owner is determined by considering the following factors: (1) whether the owner was reckless or negligent in allowing the property to be used for criminal activity; (2) whether the owner was directly involved in the criminal activity and the extent of the involvement; and (3) the harm caused by the illegal activity measured by the amount of drugs involved, the duration of the activity, and the effect of the crime on the community. *See id.* at 986.

of parallel clauses contained in the Eighth Amendment.<sup>145</sup> The approach utilized in determining violations of the Eighth Amendment,<sup>146</sup> in regard to the Excessive Bail and Cruel and Unusual Punishment Clauses,<sup>147</sup> forms the basis for the proportionality test.<sup>148</sup> Recognizing that there are "parallel limitations" imposed "on bail, fines and other punishments,"<sup>149</sup> courts have synthesized and applied the Supreme Court's treatment of the Excessive Bail<sup>150</sup> and Cruel and Unusual Punishment<sup>151</sup> Clauses to the Excessive Fines Clause.<sup>152</sup> While the actual tests adopted by the various courts are far from uniform,<sup>153</sup> the element common to all is the requirement that the moral gravity of the offense be weighed against the harshness of the forfeiture.<sup>154</sup>

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145. See Douglas S. Reinhart, *Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235, 252-53 (1994) (noting that analysis of the Excessive Fines Clause should be similar to that required by the Excessive Bail Clause and the Cruel and Unusual Punishments Clause).

146. U.S. CONST. amend. VIII; see also *supra* note 1 for the text of the Eighth Amendment.

147. See *supra* note 1.

148. See Reinhart, *supra* note 145, at 264.

149. *Solem v. Helm*, 463 U.S. 277, 289 (1983).

150. "[T]he Excessive Fines Clause should be read to employ a proportionality standard as does the Supreme Court's interpretation of the Excessive Bail Clause, in which the Court reads 'excessive' to require proportionality between the amount of bail and the 'interest the Government seeks to protect,' i.e., the risk of flight." *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 983 (9th Cir. 1995) (quoting *United States v. Salerno*, 481 U.S. 739, 754 (1987); *Stack v. Boyle*, 342 U.S. 1, 5 (1951)).

151. "[T]he mode for determining whether a fine is 'excessive' would be similar or virtually identical to that employed to determine whether a punishment was 'cruel [and] unusual.'" *United States v. Sarbello*, 985 F.2d 716, 725 n.16 (3d Cir. 1993).

152. See *United States v. 11869 Westshore Dr.*, 70 F.3d 923, 927-28 (6th Cir. 1995) (tracing the evolution of the proportionality test).

153. See *infra* notes 155, 156, 259, 272 and accompanying text.

154. See *infra* notes 155, 156, 259, 272 and accompanying text. This element can be traced to the Supreme Court's holding in *Solem v. Helm*, 463 U.S. 277, 303 (1983). In *Solem*, the Court defined the limitation of the Eighth Amendment's Cruel and Unusual Punishment Clause. See *id.* The defendant had been convicted of six prior nonviolent felonies when he was convicted of "uttering a 'no account'" check in the amount of \$100. *Id.* at 281. The Court found that the sentence imposed pursuant to a recidivist statute, life in prison without the opportunity of parole, was "grossly disproportionate" and violated the Eighth Amendment. *Id.* at 288, 302. In order to clarify what was meant by grossly disproportionate, the Court established a three factor proportionality analysis: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. See *id.* at 292. It is the first of these factors that has almost uniformly been applied in determination of whether a forfeiture is proportionately excessive. See, e.g., *United States v. 11869 Westshore Dr.*, 70 F.3d 923, 927-28 (6th Cir. 1995).

Additional factors commonly employed quantify the gravity of the underlying criminal involvement<sup>155</sup> and the harshness of the forfeiture<sup>156</sup> as they relate to the property owner<sup>157</sup> and the extent and nature of the property's use.<sup>158</sup>

Representative of the proportionality approach is the test put forth in *United States v. 6625 Zumirez Drive*.<sup>159</sup> In *Zumirez*, the Government sought forfeiture of a single family home, valued in excess of \$600,000, from which \$15,200 of cocaine had been seized.<sup>160</sup> The owner of the property had been acquitted of criminal charges; however, his son, an occupant of the home, had been found guilty of numerous drug offenses.<sup>161</sup> Seeking forfeiture, the Government alleged that the owner permitted his son to use the property for illegal drug activity.<sup>162</sup>

The *Zumirez* court adopted a three factor proportionality test balancing: (1) whether the inherent gravity of the offense outweighed the harshness of the penalty; (2) whether the property was an integral part of the commission of the crime; and (3) whether the criminal activity involving the property was extensive in terms of time and spatial use.<sup>163</sup> The focus of the first factor is on the conduct of the claimant, while the focus of the second and third factors is on the instrumentality of the property.<sup>164</sup>

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155. See, e.g., *United States v. 18755 N. Bay Rd.* 13 F.3d 1493, 1498-99 (11th Cir. 1994) (measuring seriousness of offense by examining whether underlying illegal conduct was type Congress intended to punish); *United States v. Shelly's Riverside Heights Lot X*, 851 F. Supp. 633, 638 (M.D. Pa. 1994) (measuring gravity of the crime by its harmful reach and benefits accrued through illegal activity); *United States v. 429 S. Main St.*, 843 F. Supp. 337, 341-42 (S.D. Ohio 1993) (measuring gravity of the offense by harmful reach of the crime and sentence allowable under the corresponding criminal statute), *aff'd in part, remanded on other grounds*, 52 F.3d 1416 (6th Cir. 1995).

156. See, e.g., *Shelly's Riverside Heights Lot X*, 851 F. Supp. at 638 (measuring harshness by significance of the seized asset to the claimant); *429 S. Main St.*, 843 F. Supp. at 341-42 (requiring harshness to take into account whether property seized is a family home).

157. The emphasis on the owner of the property makes the *in rem* analysis more akin to the analysis undertaken for *in personam* forfeiture. See *supra* notes 32-33 and accompanying text.

158. The extent of the property's use relates directly to its instrumentality. See *United States v. Zumirez*, 845 F. Supp. 725, 732 (C.D. Cal. 1994).

159. 845 F. Supp. at 725-42. The *Zumirez* court expressly rejected the "*Solem* approach," yet expressly incorporated the first element of the *Solem* test. See *id.* at 731-32.

160. See *id.* at 730.

161. See *id.*

162. See *id.*

163. See *id.* at 732.

164. See *id.* at 733-34.

The application of the first factor requires a two step analysis. First, the inherent gravity of the claimant's conduct is evaluated based on whether the claimant was convicted of the criminal act underlying the forfeiture, the claimant was never charged with any crime, or the claimant was charged and acquitted of the underlying criminal offense.<sup>165</sup> When the property owner has not been convicted of the underlying offense, "the court must be careful to focus only on the inherent gravity of the offensive conduct engaged in by the claimant himself, rather than on the inherent gravity of the offense or offenses that the government had probable cause to believe were committed on the property."<sup>166</sup> Second, the harshness of the forfeiture is evaluated by considering the monetary value of the interest held in the property, as well as such intangibles as the type<sup>167</sup> and character<sup>168</sup> of the property.<sup>169</sup>

The second factor is derived from the traditional treatment of civil *in rem* forfeiture.<sup>170</sup> The relevant inquiry is whether the property has a close enough relationship to the underlying offense to render it guilty, and hence, forfeitable.<sup>171</sup> Finally, the application of the third factor involves a determination of the spatial extent of the property's use, and "whether the defendant property played an extensive or pervasive role in the commission of the crime."<sup>172</sup>

The *Zumirez* court applied the above factors to the forfeiture action and held that it was excessive.<sup>173</sup> The court noted that the property owner had been charged and acquitted of the underlying drug offense.<sup>174</sup> Focusing its inquiry on the owner's offensive behavior, the court found that the lack of direct involvement in the drug activity and the familial relationship between the offender and the owner significantly reduced the gravity of the owner's acts.<sup>175</sup> In evaluating the harshness of the forfeiture, the court recognized that

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165. *See id.* at 733.

166. *Id.*

167. The *Zumirez* court noted that society places a higher value on real versus personal property. *See id.* at 734.

168. The *Zumirez* court specifically mentioned the increased value society places on the home as opposed to personal property. *See id.* (citing *United States v. James Daniel Good*, 114 S. Ct. 492, 505 (1993); *Payton v. New York*, 445 U.S. 573, 601 (1980)).

169. *See id.*

170. *See id.*

171. *See id.*; *see also supra* notes 89-90 and accompanying text.

172. *Zumirez*, 845 F. Supp. at 734. The court found that the analysis for this factor should follow that used by the Supreme Court in *Alexander v. United States*, 509 U.S. 544, 559 (1993). *See supra* note 33.

173. *See Zumirez*, 845 F. Supp. at 742.

174. *See id.* at 735.

175. *See id.* at 736.

the loss of a home, owned and maintained for over twenty years, was "unquestionably . . . severe," especially in light of the owner's acquittal.<sup>176</sup> The court concluded that the forfeiture of the home "greatly exceed[ed] that which would be appropriate in light of the offensive behavior involved."<sup>177</sup>

Further, the court found that the property's only link to the criminal activity was its use as a site for drug sales.<sup>178</sup> The location of the home did not facilitate the drug activity, nor did it "provide a cloak of legitimacy to the illegal drug traffickers who frequented the house."<sup>179</sup> Without more of a connection, the court declined to find that the property was integral to the commission of a crime, and the home was deemed not to be an instrument of illegal activity.<sup>180</sup> Thus, forfeiture of the property would not further the goal of ridding society of the instrumentalities of drug activity.

As to the spatial and temporal use of the property, the court found the government's evidence relating to the time frame during which the property was used to be sparse.<sup>181</sup> The extent of the use, however, was substantial as drugs were found in five bedrooms and an exterior shed.<sup>182</sup> The court emphasized that this was the only factor of the proportionality test that was satisfied.<sup>183</sup> Taking all the factors into consideration, the court held that forfeiture of the property would violate the Excessive Fines Clause of the Eighth Amendment.<sup>184</sup>

The proportionality approach differs significantly from the instrumentality approach. The central focus of the proportionality test is on the behavior of the owner of the property with only secondary consideration given to the property's role in the criminal activity.<sup>185</sup> This is in sharp contrast to the instrumentality test which emphasizes the role of the property and only looks to the owner's lack of culpability as a limiting factor.<sup>186</sup>

## 2. Maryland's Prohibition Against Excessive Fines

Prior to *Aravanis v. Somerset County*,<sup>187</sup> Maryland's high court had never applied the Excessive Fines Clause of the Eighth Amend-

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176. *Id.* at 737.

177. *Id.*

178. *See id.* at 738.

179. *Id.* at 737.

180. *See id.* at 738.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. *See supra* notes 145-84 and accompanying text.

186. *See supra* notes 95-144 and accompanying text.

187. 339 Md. 644, 664 A.2d 888 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

ment or article 25 to a civil *in rem* forfeiture. Indeed, the Eighth Amendment Excessive Fines Clause was only peripherally<sup>188</sup> applied by the Court of Appeals of Maryland in *Randall Book Corp. v. State*.<sup>189</sup>

*Randall Book Corp.* involved the imposition of 116 separate fines, totalling \$58,000, arising out of obscenity law infractions.<sup>190</sup> The defendant corporation challenged these fines as a "claim of an illegal sentence."<sup>191</sup> Accordingly, the court analyzed the fines under a framework loosely based on that employed in cruel and unusual punishment challenges.<sup>192</sup> The court recognized, however, that the penalties imposed on the defendant were fines.<sup>193</sup>

In reaching its decision, the court undertook a proportionality analysis comparing the aggregate fine imposed, with the gravity of the offense.<sup>194</sup> Recognizing that the defendant corporation had a history of similar enforcement action and profited from the sales of such materials, and that the fines were below the statutory maximum permitted by the legislature, the court concluded that the fines did not constitute "excessive fine[s] . . . within the meaning of the Eighth Amendment."<sup>195</sup>

### III. THE INSTANT CASE

In 1971, George Joseph Aravanis (Aravanis), appellant, and his wife, took title, as tenants by the entirety, to a Maryland farm.<sup>196</sup> They used this property as their family home until their separation.<sup>197</sup> Aravanis continued to occupy the property, as originally titled, until 1991 when part of the property was sold.<sup>198</sup> Following this sale, Aravanis took sole title to the remaining house and land as his share of the proceeds, receiving \$16,000, a portion of which was used to purchase marijuana for distribution purposes.<sup>199</sup>

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188. See *id.* at 657 n.10, 664 A.2d at 894 n.10 (1995).

189. 316 Md. 315, 332, 558 A.2d 715, 724 (1989).

190. See *id.* at 319, 558 A.2d at 717.

191. *Id.* at 322, 558 A.2d at 719.

192. See *id.* at 331, 558 A.2d at 723. The court expressly referred to *Solem v. Helm*, 463 U.S. 277 (1983), but declined to apply the full test to the facts of the case. *Randall Book Corp.*, 316 Md. at 330, 558 A.2d at 723. For a discussion of the *Solem* test see *supra* note 154.

193. See *Randall Book Corp.*, 316 Md. at 319, 329-32, 559 A.2d at 717, 722-24.

194. See *id.* at 330-31, 559 A.2d at 723.

195. *Id.* at 332, 559 A.2d at 724.

196. *Aravanis v. Somerset County*, 339 Md. 644, 646, 664 A.2d 888, 889 (1995), *cert. denied*, 116 S. Ct. 916 (1996). The farm was located at 5341 Shelltown Road in Westover, Somerset County, Maryland. See *id.*

197. See *id.*

198. See *id.*

199. See *id.* at 646-47, 664 A.2d at 889.



In July of 1991, a search and seizure warrant was executed on Aravanis's property and approximately two pounds of marijuana and several items commonly used in the drug trade were seized.<sup>200</sup> Prior to the search, it was established that Aravanis gave a large quantity of marijuana to a family member, had sold large quantities of marijuana to two individuals on at least three occasions, and had made two controlled sales of marijuana, from the residence, during the weeks just prior to the search.<sup>201</sup> Aravanis pled guilty to one count of possession of a controlled dangerous substance pursuant to Section 286 of Article 27 of the Annotated Code of Maryland.<sup>202</sup> Thereafter, the forfeiture proceeding at issue was filed by the State.<sup>203</sup>

Prosecutors sought forfeiture of Aravanis's farm pursuant to Maryland's drug forfeiture statute.<sup>204</sup> The State argued that because the property was used in connection with his underlying drug offense,<sup>205</sup> it was subject to forfeiture.<sup>206</sup> Aravanis maintained that the forfeiture of his home was excessive for two months of drug dealing.<sup>207</sup> The trial court, however, found that the property had been

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200. See *id.* The paraphernalia seized included sandwich baggies and a set of triple beam scales. See *id.*

201. See *id.* at 647 n.3, 664 A.2d at 889 n.3.

202. See *id.* at 647, 664 A.2d at 889. Section 286 of Article 27 of the Annotated Code of Maryland states, in relevant part:

Unlawful manufacture, distribution, etc.; counterfeiting, etc.; manufacture, possession, etc., of certain equipment for illegal use; keeping common nuisance. (a) Except as authorized by this subheading, it is unlawful for any person: (1) to manufacture, distribute, or dispense, or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to manufacture, distribute, or dispense, a controlled dangerous substance.

MD. ANN. CODE art. 27, § 286 (1996).

203. See *Aravanis*, 339 Md. at 648, 664 A.2d at 890.

204. See *id.* at 649, 664 A.2d at 890 (citing § 297); see also *supra* notes 9, 65-67 and accompanying text.

205. Aravanis "pled guilty to one count of possession of a controlled dangerous substance in sufficient quantity to indicate an intent to manufacture, distribute, or dispense pursuant to Article 27, § 286." *Aravanis*, 339 Md. at 647, 664 A.2d at 889; see also *supra* note 202.

206. See *Aravanis*, 339 Md. at 649, 664 A.2d at 890.

207. See *id.* at 650, 664 A.2d at 891. Aravanis also argued, unsuccessfully, that pursuant to section 297(l) of article 27: (1) the state had failed to establish, by clear and convincing evidence, that the property had been purchased during the time of his illegal activity; and (2) the state had failed to establish that there was no other fiscal source for the acquisition of the property. See *id.* at 648, 664 A.2d at 890. The trial court concurred with the State that the forfeiture was controlled by section 297(m), and that section 297(l) was inapplicable. See *id.* at 649-50, 664 A.2d at 890. The Court of Appeals of Maryland, recognized that section 297(l) is only invoked when there are questions as to the actual owner of the property. See *id.* at 649 n.8, 664 A.2d at 890 n.8. Accordingly, a rebuttable presumption was established that property owned by an individual

used in connection with the distribution of marijuana and, therefore, satisfied the requirements of the forfeiture statute.<sup>208</sup> Finding that no exceptions to the statute were met, the trial court ordered the property forfeited to the State.<sup>209</sup> Aravanis filed an appeal to the Court of Special Appeals of Maryland; however, prior to consideration by that court, the Court of Appeals of Maryland granted certiorari on its own motion.<sup>210</sup>

Aravanis challenged the forfeiture of his home on constitutional grounds, claiming that the taking of his property was excessive — in violation of the Excessive Fines Clause of the Eighth Amendment of the United States Constitution and Article 25 of the Maryland Declaration of Rights.<sup>211</sup> Aravanis based his Eighth Amendment challenge on the Supreme Court's holding in *Austin v. United States*<sup>212</sup> and asserted that the Eighth Amendment is applicable to the states through the Fourteenth Amendment.<sup>213</sup>

#### A. The Application of *Austin*

The *Aravanis* court followed the model set forth in *Austin*<sup>214</sup> by first determining if the drug forfeiture statute at issue, article 27 section 297(m),<sup>215</sup> constituted punishment.<sup>216</sup> These factors include: (1) whether the statute has historically been understood to punish;<sup>217</sup> (2) whether an innocent owner provision is included within the statute;<sup>218</sup> (3) whether the statute at issue tied forfeiture to a statutorily proscribed drug offense;<sup>219</sup> and (4) whether the legislative history of

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who has violated the relevant drug statutes are proceeds of criminal activity. Upon the State's showing, by clear and convincing evidence, that the property was acquired while engaged in illegal drug activity and there was no other likely source for such property, the property is forfeitable. *See id.* at 649 n.6, 664 A.2d at 890 n.6 (citing § 297(l)). Maryland's high court did not dispute the trial court's findings with respect to Aravanis's section 297(l) claim, and turned its attention to Aravanis's constitutional claim. *See id.* at 651, 664 A.2d at 891.

208. *See id.* at 650, 664 A.2d at 891.

209. *See id.*

210. *See id.* at 651, 664 A.2d at 891.

211. *See id.*; *see also supra* notes 1 and 13.

212. 509 U.S. 602 (1993).

213. *See Aravanis*, 339 Md. at 650, 664 A.2d at 891. Stating that article 25 is *in pari materia* with the Eighth Amendment, Aravanis maintained that in the eventuality that Maryland's high court did not find the Eighth Amendment applicable, article 25's prohibition of excessive fines must be applied. *See id.*

214. *See supra* notes 79-87 and accompanying text.

215. *See supra* note 9.

216. *See Aravanis*, 339 Md. at 651-55, 664 A.2d at 891-93.

217. *See Austin* 509 U.S. at 618.

218. *See id.*

219. *See supra* note 6.

the statute indicated legislative intent that forfeiture serve as a deterrent.<sup>220</sup> The presence of these factors in the forfeiture statute at issue would "constitute 'payment to a sovereign as punishment for some offense,'"<sup>221</sup> and would, therefore, be subject to constitutional limitations.<sup>222</sup>

The *Aravanis* court held that although section 297 is a civil action *in rem*, it is the type of statute that has "historically been understood, at least in part, to [punish]."<sup>223</sup> The court also observed that section 297(m), like the forfeiture statutes at issue in *Austin*,<sup>224</sup> contains an innocent owner defense.<sup>225</sup> Moreover, the court found that the third element of tying the forfeiture to a drug offense was satisfied because section 297 expressly refers to various illegal drug activities that trigger the statute.<sup>226</sup> Finally, the *Aravanis* court noted that the state legislature intended the statute to serve as a deterrence to drug activity.<sup>227</sup> Thus, having satisfied the elements set forth in *Austin*, the court held that section 297, and subsection (m) in particular, were punitive in nature.<sup>228</sup>

The *Aravanis* court then set forth broad parameters under which civil *in rem* forfeitures should be evaluated for excessiveness.<sup>229</sup> Maryland's high court adopted a hybrid test for excessiveness<sup>230</sup> incorporating both an "instrumentality test"<sup>231</sup> and a "proportionality test."<sup>232</sup> The court did not, however, propose that its analysis be a "precise formula."<sup>233</sup> Rather, the court deferred to the trial judges to determine "the weighing of factors appropriate to each individual case."<sup>234</sup>

In determining the factors for the instrumentality prong, the court examined the Fourth Circuit's decision in *Chandler*.<sup>235</sup> The *Aravanis* court found the *Chandler* test to be "a forceful and well

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220. See *Austin*, 509 U.S. at 619-20.

221. *Id.* at 622 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

222. See *id.*

223. *Aravanis v. Somerset County*, 339 Md. 644, 652, 664 A.2d 888, 892 (1995) (quoting *Austin*, 509 U.S. at 612), *cert. denied*, 116 S. Ct. 916 (1996).

224. See 21 U.S.C. §§ 881(a)(4) & (a)(7); see also *supra* note 6.

225. See *Aravanis*, 339 Md. at 654, 664 A.2d at 893.

226. See *id.* at 655, 664 A.2d at 893.

227. See *id.*

228. See *id.*

229. See *id.* at 657-65, 664 A.2d at 894-98.

230. See *id.* at 665, 664 A.2d at 898.

231. See *supra* notes 95-144 and accompanying text.

232. See *supra* notes 145-84 and accompanying text.

233. See *Aravanis*, 339 Md. at 665, 664 A.2d at 898.

234. *Id.* at 666, 664 A.2d at 899.

235. 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995); see also *supra* notes 108-38 and accompanying text.

articulated defense of the instrumentality test<sup>236</sup> and determined that the *Chandler* test provides a "sound basis for evaluating the relationship between the property and the illegal activity."<sup>237</sup>

Additionally, the *Aravanis* court mandated that the property owner's culpability, regarding the underlying offense, also be considered in determining excessiveness.<sup>238</sup> The court noted that the plain meaning of "excessive," coupled with the determination that civil forfeiture is punishment for an offense, required that excessiveness analysis focus on the *owner* of the property.<sup>239</sup> The court maintained that failure to inquire into the effect of the forfeiture on the owner conflates the constitutional excessive fines analysis with the statute's nexus requirement and ignores that forfeiture has, as its object, some person.<sup>240</sup> According to the Court of Appeals of Maryland, "[i]t is appropriate, therefore, that the owner's culpability with respect to the underlying criminal activity be considered."<sup>241</sup>

In its proportionality analysis, the court examined, but fell short of adopting, the test set forth in *Zumirez*.<sup>242</sup> Rather, the court identified a "non-exclusive"<sup>243</sup> list of factors to be considered: the enormity of the loss to the owner; the gravity, scope, and duration of the illegal activity; and the culpability of the owner.<sup>244</sup> Additionally, the state may show the profit gleaned from the illegal activity "because that fact bears on the question of how much the owner actually loses by the forfeiture."<sup>245</sup> The court did not intend, however, to limit the lower courts to this list of factors.<sup>246</sup> Rather, the court deliberately reserved the identification and weighing of the relevant factors to the discretion of the trial court.<sup>247</sup>

Thus, the *Aravanis* court laid out a loose framework under which excessive fine analysis is to be applied.<sup>248</sup> Instrumentality is to be determined under the factors of the *Chandler* test.<sup>249</sup> Trial courts

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236. *Aravanis*, 339 Md. at 661, 664 A.2d at 896.

237. *Id.* at 665, 664 A.2d at 898.

238. *See id.* at 664, 664 A.2d at 898.

239. *See id.*

240. *See id.* at 664-65, 664 A.2d at 898 (citing *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994)).

241. *Id.* at 664, 664 A.2d at 898.

242. *See id.* at 662-64, 664 A.2d at 897-98; *see also supra* notes 159-84 and accompanying text.

243. *See Aravanis*, 339 Md. at 666, 664 A.2d at 898.

244. *See id.* at 665, 664 A.2d at 898.

245. *Id.* at 665 n.16, 664 A.2d at 898 n.16. The court stated that such profits may be shown directly, or indirectly. *See id.*

246. *See id.* at 665, 664 A.2d at 898.

247. *See id.* at 665-66, 664 A.2d at 898-99.

248. *See id.*

249. *See id.* at 665, 664 A.2d at 898.

are also required to consider "factors of proportionality that compare the gravity of the offense . . . with the enormity of the loss to the owner occasioned by the forfeiture."<sup>250</sup> The court did not undertake any further analysis. Rather, it remanded the case to the trial court for a determination of whether the forfeiture at bar violated the Excessive Fines Clause of article 25.<sup>251</sup> Therefore, as the Supreme Court had in *Austin*, the Maryland high court held that civil *in rem* forfeiture was subject to the protections of excessiveness analysis, yet refused to apply a test to the instant case or even to definitively promulgate a test.

#### IV. ANALYSIS

The *Aravanis* court established broad guidelines for Maryland lower courts.<sup>252</sup> It did not, however, apply any of the factors it laid out to the facts of the case. The court's failure to endorse, and apply, a specific test may lead to confusion and nonuniformity. Additionally, the court's determination that section 297 is punitive may invoke the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution<sup>253</sup> because convicted felons who are subjected to forfeiture proceedings may assert they are being punished twice for the same offense.<sup>254</sup>

##### A. *Aravanis* Did Not Provide a Clear Test of Excessiveness

The Supreme Court's failure to define a test for excessiveness in *Austin* has engendered much confusion in the lower federal and state courts.<sup>255</sup> This confusion may well be repeated in Maryland. Had the *Aravanis* court dealt directly with the merits of the case, or more definitively supported a set test, such a result could have been avoided.

Maryland's high court endorsed, but failed to clearly define the role of the Fourth Circuit's *Chandler* test.<sup>256</sup> Is it a threshold determination, or is it just one factor to be considered under a totality of the circumstances? Further, confusion may reign as lower courts are forced to grapple with defining, weighing, and applying a host of proportionality factors to civil *in rem* forfeitures.

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250. *Id.*

251. *See id.* at 666, 664 A.2d at 899.

252. *See id.* at 665, 664 A.2d at 898; *see also supra* notes 229-51 and accompanying text.

253. *See supra* note 20 for the text of the Fifth Amendment.

254. *See Allen v. State*, 91 Md. App. 775, 605 A.2d 994 (1992).

255. *See supra* notes 18, 92, 94.

256. *See supra* notes 235-37 and accompanying text.

The court failed to provide guidance to the lower courts as to the meanings of "gravity of the offense," "enormity of the loss," and "degree of the owner's culpability."<sup>257</sup> Indeed, the court's definition of proportionality — "it means simply that there must be a comparison of the extent of the loss to the relevant factors involved, including the gravity and extent of the illegal activity, the nexus between that conduct and the subject property, and the extent of involvement of the owner"<sup>258</sup> — includes nexus and involvement requirements that arguably have been measured under the *Chandler* test.<sup>259</sup> Thus, the high court provided the lower courts with conflicting, ill defined criteria from which a test must be adduced and applied.

### 1. A Test for All Seasons

While much can be learned from the *Austin* decision about the dangers of failing to provide lower courts with an adequate framework, the plethora of tests that have been formulated offer an opportunity to choose a test that provides defined factors that are relatively easily applied. The tests promulgated in *United States v. 429 South Main Street*<sup>260</sup> and *United States v. Shelly's Riverside Heights Lot X*<sup>261</sup> provide elements that are quantifiable, and hence workable.

In *429 South Main Street*, the claimant had sold an increasing amount of marijuana on three separate occasions, once in the alley behind his home and twice on the premises.<sup>262</sup> In upholding the forfeiture of property, valued at \$83,700, the court concentrated on the objective gravity of the owner's conviction for marijuana sales totaling ninety-five dollars.<sup>263</sup> The gravity of the owner's offense was measured by looking at two factors. First, the court found that, because the drug sales were not a one-time occurrence, and the amount sold increased with each transaction, the behavior of the

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257. See *Aravanis*, 339 Md. at 665, 664 A.2d at 898.

258. *Id.*

259. The *Chandler* test "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 readily be separated from the remainder." *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994). The second element is further explained as a determination of the owner's role, i.e., was it incidental or integral to the success of the criminal activity? See *id.* at 364.

260. 843 F. Supp. 337 (S.D. Ohio 1993), *aff'd in part, remanded on other grounds*, 52 F.3d 1416 (6th Cir. 1995).

261. 851 F. Supp. 633 (M.D. Pa. 1994).

262. See *429 S. Main St.*, 843 F. Supp. at 340.

263. See *id.* at 340-41.

claimant was "suggestive of on-going criminal activity."<sup>264</sup> Second, further indicia of the nature of the crime was found by comparing the maximum penalties under the federal drug statute (a sentence of ten years and a \$500,000 fine)<sup>265</sup> with the owner's aggregate sentence and penalties (the assessed criminal penalties of one year and a \$6000 fine plus the value of the property).<sup>266</sup> Because the penalties were well within the sentencing guidelines, the forfeiture was held not to be disproportionate to the seriousness of the offense, and hence, not excessive.<sup>267</sup> On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the trial judge's decision stating that the owner did not raise issues of material fact as to whether the property was not used in the sale of drugs nor that the fine was excessive.<sup>268</sup>

Thus, the 429 *South Main Street* court provided an objective standard with which to evaluate civil *in rem* forfeiture. The first step of the process is to determine whether the criminal activity is a one-time occurrence, or an on-going activity. The final step is to compare the aggregate penalty with the maximum penalty provided by statute. If the total falls within the legislative mandate then the forfeiture is not excessive.

Additional guidance is provided by *Shelly's Riverside Heights Lot X*<sup>269</sup> where the Government sought forfeiture of a log cabin and the ten-acre parcel that surrounded it.<sup>270</sup> The owners were convicted of various drug offenses arising out of the cultivation, on the property, of marijuana for their personal consumption.<sup>271</sup> The trial judge found the forfeiture to be excessive for the following reasons: (1) the harmful reach of the crime was minimal because the illegal conduct did not go beyond the property; (2) the loss was significant to the owners because it was their sole asset; and (3) the government had failed to prove that the owners accrued any benefits from the drug activity outside the ready supply of marijuana they enjoyed.<sup>272</sup>

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264. *Id.* at 342.

265. *See id.*

266. *See id.*

267. *See id.*

268. *See United States v. 429 S. Main St.*, 52 F.3d 1416, 1422 (6th Cir. 1995).

269. 851 F. Supp. 633 (M.D. Pa. 1994).

270. *See id.* at 635.

271. *See id.* at 634.

272. *See id.* at 638. The trial judge relied on a test set forth in *United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993) (holding the factors to be weighed in determining excessiveness include "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[,] . . . the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest in the enterprise itself are tainted by criminal conduct").

Thus, in determining excessiveness, the court looked at the objective harm caused by the criminal activity, the significance of the asset to the property owners, and the benefits accrued by the criminal activity.

While both 429 *South Main Street* and *Shelly's Riverside Heights Lot X* provide identifiable criteria to apply to civil *in rem* forfeiture, an additional element, put forth in *Chandler* and true to the historical meaning of *in rem* forfeiture, should also be applied. The first element of the *Chandler* test, which measures the "involvement of the property in the offense,"<sup>273</sup> must also be a factor in determining excessiveness. The addition of this factor allows trial judges to consider the importance of the property to the underlying offense. Further, it permits forfeiture of property, regardless of its value, that is central to the criminal activity.

Formulating a test relying on the amalgamation of these factors, yields a workable result. When the aggregate penalties, including the value of the forfeiture and the criminal sentence and fines imposed, are within the statutory maximum provided by the legislature, a rebuttable presumption of forfeitability is established. This presumption can be overcome by the property owner showing that the harmful reach of the criminal activity was minimal, that no benefits were accrued by the activity, and that the property is the family home and the owner's sole asset.

Conversely, forfeiture that exceeds the statutory maximum creates a rebuttable presumption of excessiveness. The government can overcome this presumption by showing that the property was so central to the criminal activity that it was, in actuality, an instrumentality of the offense. The factors enunciated in *Chandler* provide an excellent guide to this analysis. That is:

- (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 spatial 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.<sup>274</sup>

The proposed test, therefore, takes the best each of the three decisions have to offer. It provides criteria that are measurable. Most importantly, it is a tool that trial courts can use to determine excessiveness in a uniform and objective manner.

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273. *United States v. Chandler*, 36 F.3d 358, 364 (4th Cir. 1994).

274. *Id.* at 365.



### B. The Double Jeopardy Clause

By their very nature, civil *in rem* forfeiture actions are instituted following the use of property in a criminal activity.<sup>275</sup> As explained above, the Supreme Court in *Austin* determined that such actions constituted governmentally imposed punishment subject to constitutional limitations and protections.<sup>276</sup> Accordingly, the forfeiture could be viewed as a second punishment for the underlying criminal offense.<sup>277</sup> In light of this dilemma, it becomes necessary to determine if civil *in rem* forfeiture, in conjunction with a criminal prosecution, offends the Double Jeopardy Clause of the Fifth Amendment.

#### 1. The Background of the Double Jeopardy Clause

The application of the Double Jeopardy Clause to the civil arena was addressed by the Supreme Court of the United States in *United States v. Halper*.<sup>278</sup> The *Halper* Court held that the Double Jeopardy Clause of the Fifth Amendment protects citizens against three types of governmental abuse: (1) a second prosecution for the same offense after acquittal;<sup>279</sup> (2) a second prosecution for the same offense after conviction;<sup>280</sup> and (3) multiple punishments for the same offense.<sup>281</sup> The third type of abuse, multiple punishment, is called into question when civil *in rem* forfeiture statutes are applied.<sup>282</sup>

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275. See *supra* notes 30-42, 47-51 and accompanying text.

276. See *supra* notes 79-87 and accompanying text.

277. See *United States v. One Parcel Real Property*, 908 F. Supp. 1070, 1075 (D.R.I. 1995); *State v. Leyva*, 909 P.2d 506, 510 (Az. Ct. App. 1995).

278. 490 U.S. 435 (1989). The prohibition against double jeopardy is established, in Maryland, as a basic principle of common law and under the Fifth and Fourteenth Amendments of the United States Constitution. See *Parojinog v. State*, 282 Md. 256, 260, 384 A.2d 86, 88 (1978). "Federal double jeopardy principles are controlling in determining whether a defendant has been placed twice in jeopardy in violation of the federal Constitution." *Johnson v. State*, 95 Md. App. 561, 566, 622 A.2d 199, 202 (1993) (citing *Newton v. State*, 280 Md. 260, 373 A.2d 262 (1977)). While the Court of Appeals of Maryland recently addressed the interplay between civil forfeiture (albeit not *in rem*), criminal prosecution, and the Double Jeopardy Clause, it reached its conclusion by determining what constitutes punishment under the clause, and not with reference to the *Halper* criteria. See *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995); see also *infra* notes 309-17 and accompanying text. The forfeiture action addressed by the Maryland court was *in personam* versus *in rem*. See *supra* notes 21-42 and accompanying text for a discussion of the distinction between *in rem* and *in personam* proceedings.

279. See *United States v. Ball*, 163 U.S. 662, 668-69 (1896).

280. See *Price v. Georgia*, 398 U.S. 323, 331 (1970).

281. See *Halper*, 490 U.S. at 440; see also *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Randall Book Corp. v. State*, 316 Md. 315, 323, 558 A.2d 715, 719 (1989); *Johnson*, 95 Md. App. at 565, 622 A.2d at 202.

282. See *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Perez*, 70 F.3d 345, 349 (1995).

The Supreme Court addressed the issue of whether *in rem* forfeiture violates the Double Jeopardy Clause in *United States v. Ursery*.<sup>283</sup> The Court held that “civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause.”<sup>284</sup> Specifically, the Court applied a two prong test to determine if the forfeiture at issue violated the Double Jeopardy Clause.<sup>285</sup> First, the applicable forfeiture statutes<sup>286</sup> were examined to determine if Congress intended them to be civil or criminal proceedings.<sup>287</sup> Second, the Court considered whether the proceedings themselves were so punitive “in fact as to ‘persuade us that the forfeiture proceeding[s] may not be viewed as civil in nature,’ despite Congress’s intent.”<sup>288</sup>

The Court noted that the procedural mechanisms of the statutes at issue indicated Congress’s intent that the statutes be civil in nature.<sup>289</sup> Turning to the second factor, the Court found “little evidence” that the forfeiture proceedings were so punitive as to contravene Congress’s intent.<sup>290</sup> Thus, the Court held that the nature of civil *in rem* proceedings creates a presumption that such forfeitures are not subject to double jeopardy protection.<sup>291</sup>

This presumption is, however, rebuttable “where the ‘clearest proof’ indicates that an *in rem* civil forfeiture is ‘so punitive either in purpose or effect’ as to be equivalent to a criminal proceeding.”<sup>292</sup> It is instructive, therefore, to examine the applicability of the Double Jeopardy Clause to instances where this presumption may be over-

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283. 116 S. Ct. 2135 (1996).

284. *Id.* at 2147.

285. *See id.*

286. *See* 21 U.S.C. § 881 (1994); 18 U.S.C. § 981 (1994).

287. *See Ursery*, 116 S. Ct. at 2147.

288. *Id.* (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 366 (1984)).

289. *See id.* The Court recognized that they are *in rem* proceedings that are brought directly against property and, hence, are impersonal. *See id.* Specifically, the statutory scheme promulgated by Congress does not require actual notice if the government cannot identify a party with interest in the targeted property. *See id.* (discussing 19 U.S.C. § 1607 (1984)). The burden of proof in such proceedings also indicated to the Court that Congress intended this to be a civil proceeding. *See id.* at 2148; *see also supra* note 53.

290. *See Ursery*, 116 S. Ct. at 2148. Specifically, the Court found that the goals of the drug forfeiture statutes were nonpunitive. *See id.* The Court also examined other traditional indications of punishment. *See id.* at 2149. First, the Court determined that civil *in rem* forfeiture has not historically been regarded as punishment, under the Double Jeopardy Clause. *See id.* Second, the scienter requirement for crimes is not evident in the forfeiture statutes. *See id.* Finally, the Court found that while the statutes serve a deterrent purpose this, in and of itself, does not render them punishment. *See id.*

291. *See id.* at 2148 n.3, 2149.

292. *Id.* at 2148 n.3 (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)).

come.<sup>293</sup> Whether a civil forfeiture action places an individual twice in jeopardy for the same offense depends on three factors:<sup>294</sup> (1) whether the forfeiture constitutes "punishment";<sup>295</sup> (2) whether the forfeiture action and the criminal prosecution constitute "separate proceedings";<sup>296</sup> and (3) whether the criminal conviction and the forfeiture proceeding are for the "same offense."<sup>297</sup> If all three of these factors are satisfied, the forfeiture will be in violation of the Double Jeopardy Clause.<sup>298</sup>

## 2. The Elements of Double Jeopardy

### a. Forfeiture as Punishment

The Double Jeopardy Clause prohibits the government from seeking a second criminal punishment in a separate proceeding for the same conduct.<sup>299</sup> Civil sanctions, while a detriment to the indi-

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293. It is also well held that a State is free as a matter of its own law to impose greater restrictions on law enforcement than those the Supreme Court of the United States holds to be required under federal constitutional standards. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975). This tenet is especially relevant in the case at bar because the Court of Appeals of Maryland rested its decision on state constitutional grounds, i.e. article 25, and not on provisions of the federal constitution. See *id.* at 719-20.

294. The Maryland courts have interpreted the *Halper* Court's application of the Double Jeopardy Clause to civil proceedings very narrowly. See, e.g., *Johnson v. State*, 95 Md. App. 561, 568, 622 A.2d 199, 203 (1993). In Maryland, the "separate proceeding" and "forfeiture as punishment" inquiries have been conflated and resolved by determining if a proceeding is civil or criminal in nature. See, e.g., *id.*; *Allen v. State*, 91 Md. App. 775, 785, 605 A.2d 994, 999 (1992). The determination of whether the "same offense" prohibition is violated follows the *Blockburger* test, which in Maryland is referred to as the "required evidence test." See *State v. Lancaster*, 332 Md. 385, 391, 631 A.2d 453, 456 (1993).

295. See *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994) amended by 56 F.3d 41 (9th Cir. 1995), rev'd sub nom. *United States v. Ursery*, 116 S. Ct. 2135 (1996) (reversing the Ninth Circuit's determination that civil *in rem* forfeiture was *per se* punishment but not reaching the issues of "same offense" and "separate proceeding"); see also *supra* notes 283-92 and accompanying text.

296. See *\$405,089.23 U.S. Currency*, 33 F.3d at 1216.

297. See *United States v. Falkowski*, 900 F. Supp. 1207, 1213 (D. Alaska 1995).

298. See *\$405,089.23 U.S. Currency*, 33 F.3d at 1210 (holding that civil *in rem* forfeiture is *per se* punishment under the Double Jeopardy Clause, and that the proceedings are separate proceedings and thus violate the Double Jeopardy Clause). But see *Falkowski*, 900 F. Supp. at 1214-15 (holding that civil forfeiture is not the same offense as criminal activity and, therefore, the Double Jeopardy Clause is not violated).

299. See, e.g., *One Lot Emerald Cut Stone v. United States*, 409 U.S. 232, 235-36 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

vidual, have traditionally not been subjected to double jeopardy analysis because such sanctions are remedial in nature and are used to ensure that the government is made whole.<sup>300</sup> Nevertheless, in *Halper*, the Court subjected civil forfeiture to the Double Jeopardy Clause for the first time.<sup>301</sup> In *Halper*, the Court restricted the application of the Double Jeopardy Clause to the "rare case . . . where a fixed penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."<sup>302</sup> Accordingly, the Court defined "rare case" as one in which "a defendant who has already been punished in a criminal prosecution [is] subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."<sup>303</sup>

Thus, the *Halper* Court carved out an exception to double jeopardy application in civil actions.<sup>304</sup> Under *Halper*, the Double Jeopardy Clause is implicated in the "rare case" that subjects a small time offender to a sanction *grossly disproportionate* to the harm caused.<sup>305</sup> The measurement of harm caused includes the costs incurred by society for the adjudication, investigation, and incarceration of the offender.<sup>306</sup> Thus, civil sanctions, under *Halper*, are presumed *not* to be punitive, unless they are grossly disproportionate to the damage caused and, hence, qualify as the required "rare case."<sup>307</sup> Therefore, the effect of the sanction will determine whether or not the civil sanction is punitive and whether it invokes the Double Jeopardy Clause.

By contrast, punishment under the Fifth Amendment in Maryland has historically been determined by establishing whether a statute is civil or criminal in nature.<sup>308</sup> Following *Aravanis* and *Austin*, this

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300. See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *United States v. Hess*, 317 U.S. 537, 551-52 (1943).

301. See *United States v. Halper*, 490 U.S. 435, 441 (1989).

302. *Id.* at 449.

303. *Id.* at 448-49.

304. See *id.* at 449-50.

305. See *id.*

306. See *id.*

307. See *supra* note 290 and accompanying text.

308. See *Johnson v. State*, 95 Md. App. 561, 568, 622 A.2d 199, 203 (1993). The character of the proceeding has, since *Halper*, been the bellwether test for determining whether civil penalties, assessed either subsequently, see *Ewachiw v. Director of Fin.*, 70 Md. App. 58, 519 A.2d 1327 (1987), or prior to, see *Allen v. State*, 91 Md. App. 775, 789, 605 A.2d 994, 1001 (1992), criminal prosecution constitute double jeopardy. In classifying such actions the courts give great deference to the legislature and the intent and effect of the statutes that have been implicated. See *Johnson*, 95 Md. App. at 568, 622 A.2d at 203. The primary inquiry is whether the statute was enacted to achieve a

analysis may change. While not directly addressing civil *in rem* forfeiture, the Court of Appeals of Maryland recently indicated that the *Austin* analysis may apply to the Fifth Amendment.<sup>309</sup>

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"legitimate governmental purpose" separate and apart from any incidental punitive effect. *See Allen*, 91 Md. App. at 785-86, 605 A.2d at 999-1000. Thus, if the legislative purpose was to punish an individual for specific acts, the statute was considered penal in nature; however, if it was enacted to curtail or discourage behavior deemed threatening to the future health and welfare of society as a whole, the statute was considered remedial and non-punitive. *See id.*

Additionally, the procedural requirements of the statute are examined to determine if the statute is criminal or civil in nature. *See id.* at 786-87, 605 A.2d at 1000. The factors analyzed include the standard of proof, whether the penalty could be imposed at the discretion of the trial judge, and the type of remedy provided by statute. *See id.* A preponderance of the evidence standard indicated that the proceeding was civil in nature. *See id.* Further, lack of discretion, on behalf of the trial judge, indicated a non-punitive purpose. *See id.* "[S]tatute's mandate must be obeyed for it is not a penalty imposed as part of the criminal punishment that can be invoked at the discretion of the trial judge." *State v. One 1967 Ford Mustang*, 266 Md. 275, 278, 292 A.2d 64, 66 (1972).

Relying on *Halper*, the Maryland court categorized actions that impose restrictions on the trial judge's discretion, as to the imposition and form of the penalty, as strict liability crimes which "are principally directed at social betterment rather than punishment of the culpable individual." *Allen*, 91 Md. App. at 787, 605 A.2d at 1000 (citing *United States v. Halper*, 490 U.S. 435, 447 n.8 (1989)). Statutes, therefore, that satisfy the above requirements are considered civil and non-punitive and do not "run afoul" of the Double Jeopardy Clause. *See id.*

This framework was applied to Maryland's drug forfeiture statute, MD. ANN. CODE art. 27, § 297 (1992), in *Allen v. State*, 91 Md. App. 775, 605 A.2d 994 (1992). In *Allen*, the defendant was convicted of possession of a controlled dangerous substance. *See id.* at 778, 605 A.2d at 995. Prior to his conviction, the defendant's truck was forfeited pursuant to Maryland's drug forfeiture statute. *See id.* at 782, 605 A.2d at 997. Relying on *Halper*, the defendant argued that forfeiture of his truck constituted punishment and, therefore, his subsequent criminal conviction violated the Double Jeopardy Clause of the Fifth Amendment. *See id.* at 782, 605 A.2d at 998.

Following the parameters set forth in *Halper*, the court of special appeals evaluated the forfeiture statute at issue, art. 27, § 297, as to whether it was civil or criminal in nature. *See id.* at 785-88, 605 A.2d at 999-1000. In making its determination, the court relied on the legislative purpose behind the statute, *see id.* at 785-86, 605 A.2d at 999, and its statutory scheme, *see id.* at 787-88, 605 A.2d at 1000. The court determined that the legislative purpose was "to curtail and discourage drug use and trafficking" and did not have, as its primary goal, punishment of drug offenders. *Id.* at 786, 605 A.2d at 999-1000. Further, the statute's required burden of proof (a mere preponderance of the evidence versus beyond a reasonable doubt) indicated to the court that the statute was civil. *See id.* at 786, 605 A.2d at 1000. Additionally, the lack of judicial discretion afforded the trial judge, as to the penalty required by the statute, further indicated that the statute served a remedial as opposed to punitive goal. *See id.* In light of the above analysis the court held that "[s]ection

In *State v. Jones*,<sup>310</sup> the court was faced with a double jeopardy challenge arising out of the suspension of a driver's license followed by a trial and conviction of drunk driving.<sup>311</sup> Jones appealed to the Circuit Court for Montgomery County, where he filed a motion to dismiss based on double jeopardy grounds.<sup>312</sup> The circuit court found that Jones had been subjected to double jeopardy and dismissed the drunk driving conviction.<sup>313</sup> The Court of Appeals of Maryland granted certiorari on its own motion and, finding that the suspension of Jones's license was not punitive but remedial in nature, reversed the circuit court's decision.<sup>314</sup>

The court, in its determination that the statute under which Jones's license was suspended was not punitive, referred directly to *Austin*.<sup>315</sup> Specifically, the court stated that the issue at bar was whether or not the statute in question could be "fairly" characterized as serving a non-punitive purpose.<sup>316</sup> The court set forth a three-part test to make this determination: (1) whether the statute at issue has historically been understood to constitute punishment; (2) whether, after examining the plain language and structure of the statute and to some degree its legislative history, the statute evinces a purpose different from the historic understanding given to analogous statutes; and (3) whether, if the statute serves both punitive and non-punitive purposes, the non-punitive purpose alone can justify the penalty imposed.<sup>317</sup>

These elements, coupled with the recent holding in *Aravanis*, indicate that the Double Jeopardy Clause may now apply in Maryland to civil *in rem* drug forfeiture on a *per se* basis. In *Aravanis*, the court determined that *in rem* forfeiture has historically been understood to punish.<sup>318</sup> Further, it noted that the "purpose of the Maryland forfeiture statute is, at least in part, punitive."<sup>319</sup> The first two

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297 is a civil statute" and "that a forfeiture proceeding is a civil action and when brought prior or subsequent to a criminal proceeding does not involve the Double Jeopardy Clause of the Fifth Amendment nor the Maryland common law double jeopardy prohibition." *Id.* at 788, 605 A.2d at 1000.

309. See *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995), *cert. denied*, 116 S. Ct. 1265 (1996).

310. *Id.*

311. See *id.* at 240, 666 A.2d at 130.

312. See *id.* at 241, 666 A.2d at 131.

313. See *id.*

314. See *id.* at 251, 666 A.2d at 136.

315. See *id.* at 245-51, 666 A.2d at 132-36.

316. See *id.* at 250, 666 A.2d at 135.

317. See *id.*

318. See *Aravanis v. Somerset County*, 339 Md. 644, 653, 664 A.2d 888, 892 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

319. *Id.* at 655, 664 A.2d at 893.

elements of the *Jones* test have, therefore, been satisfied. The lone element of the *Jones* test yet to be determined in the civil *in rem* forfeiture arena is whether the non-punitive purpose of the drug forfeiture statutes can justify the penalties imposed.

From the court's finding that section 297 serves in part to punish,<sup>320</sup> it can be inferred that the Maryland forfeiture statute serves remedial goals as well. Referencing a state senate floor report, the court noted that forfeiture is intended to be a "powerful prosecutorial tool for stopping CDS [controlled dangerous substance] offenders and depriving them of the huge profits reaped from their illegal activity."<sup>321</sup> While the court construed this as a punitive purpose, this statement can also be construed as remedial in nature. As the court's discussion in *Aravanis* equated the purpose of the Maryland statute to the purpose of the Federal Act,<sup>322</sup> it is instructive to examine judicial interpretation of the Federal Act.

The gravity of drug offenses and the harm they cause to society has been well acknowledged. In *Department of Revenue v. Kurth Ranch*,<sup>323</sup> Justice O'Connor, in dissent, noted that drug offenders should be at least partially responsible for the "money spent on drug abuse education, deterrence, and treatment."<sup>324</sup> Additionally, it has been recognized that the moral gravity of drug offenses represents "one of the greatest problems affecting the health and welfare of our population."<sup>325</sup> Thus,

Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture.<sup>326</sup>

It can be concluded, therefore, that congressional and legislative acts that curtail drug activity have a remedial purpose.

While Maryland's high court has stated that section 297 is part-punishment because it strips assets from drug dealers and offenders, there is a remedial aspect to the statute. In depriving drug offenders

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320. *See id.* at 653, 664 A.2d at 892.

321. *Id.* at 655, 664 A.2d at 893 (S.B. 419, Floor Report, at 4 (Md. 1989)).

322. *See id.* at 655, 664 A.2d at 893.

323. 511 U.S. 767 (1994) (O'Connor, J., dissenting).

324. *Id.* at 794 (O'Connor, J. dissenting).

325. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

326. *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in judgment).

of "tainted" property, they are less able to regain entry into the drug market. This is illustrated by Aravanis's entry into the drug market. He acquired the funds to start his drug operation through the sale of a portion of his land.<sup>327</sup> Absent those assets, he may have never amassed the funds necessary to participate in the distribution of marijuana. Additionally, the curtailment of drug activity may decrease related crimes and, thereby, reduce the extensive social costs of illegal drug activity.

It may be argued, therefore, that the non-punitive purpose of the drug forfeiture statute justifies the penalties it imposes. If this reasoning is rejected, and it is determined that the drug forfeiture statute is indeed punishment, further double jeopardy analysis is required. That is, the remaining elements of a double jeopardy violation must be satisfied. It must be shown that the forfeiture action is a separate proceeding for the same offense.<sup>328</sup>

*b. Separate Proceeding*

The Double Jeopardy Clause does not prohibit the government from seeking both the full range of statutorily authorized civil and criminal penalties.<sup>329</sup> It does, however, require that two actions that seek to punish for the same offense be brought in the same proceeding.<sup>330</sup> This constraint is intended to prevent the government from seeking "a second punishment [because] it is dissatisfied with the punishment levied in the first action"<sup>331</sup> or making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity."<sup>332</sup>

Civil actions and criminal prosecutions are inherently distinct in nature.<sup>333</sup> The federal circuit courts are, however, split as to whether

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327. See *Aravanis*, 339 Md. at 646-47, 664 A.2d at 889.

328. See *supra* notes 292-96 and accompanying text.

329. See *United States v. Halper*, 490 U.S. 435, 450 (1989); accord *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) (noting that the Clause does not prohibit the prosecution of multiple offenses within a single prosecution).

330. See *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1216 (9th Cir. 1994), amended by, 56 F.3d 41 (9th Cir. 1995), rev'd *sub nom.* *United States v. Ursery*, 116 S. Ct. 2135 (1996).

331. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied *sub nom.* *Bottone v. United States*, 510 U.S. 1092 (1994).

332. *Green v. United States*, 355 U.S. 184, 187 (1957).

333. Civil and criminal proceedings are governed by different constitutional tenets, require different procedural rules, and are evaluated under different burdens of proof. See Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 54, 67 (Fall 1993).



civil *in rem* forfeiture and the related criminal conviction are but separate prongs of a single, coordinated proceeding.<sup>334</sup> The Second Circuit, in *United States v. Millan*, promulgated a three-part test to determine if civil and criminal action constitute a single, coordinated proceeding: (1) whether both actions were filed nearly contemporaneously; (2) whether the two actions involved the same criminal conduct; and (3) whether the two actions were part of a "coordinated effort to put an end to extensive" criminal activity.<sup>335</sup> This approach was soundly rejected by the Ninth Circuit in *United States v. \$405,089.23*.<sup>336</sup> Rather, in *\$405,089.23*, the court, focusing on the procedural differences between criminal and civil actions,<sup>337</sup> held that a "forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time."<sup>338</sup>

The question as to whether civil *in rem* forfeiture and criminal prosecution for the underlying offense are considered separate proceedings has not been reached by the Maryland courts. Prior to *Aravanis*, this determination was based solely on the nature of the proceeding. If this analysis survives *Aravanis*, or if the approach promulgated by the Ninth Circuit<sup>339</sup> is adopted, civil *in rem* drug forfeitures will be considered separate proceedings and may violate the Double Jeopardy Clause.<sup>340</sup> Conversely, if the Maryland courts adopt the *Millan* analysis,<sup>341</sup> double jeopardy implications will be avoided if: (1) the actions are filed nearly contemporaneously; (2) the two actions involve the same conduct; and (3) the two actions are part of a coordinated effort to end extensive criminal activity.<sup>342</sup>

The prohibition against separate proceedings is intended to prevent the government from bringing a second action when it was dissatisfied with the result in the first action<sup>343</sup> and to protect an

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334. See, e.g., *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493, 1499 (11th Cir. 1994); *Millan*, 2 F.3d at 20; *United States v. Smith*, 874 F. Supp. 347, 350 (N.D. Alaska 1995), *aff'd*, 92 F.3d 1200 (11th Cir. 1996). But see *\$405,089.23 U.S. Currency*, 33 F.3d at 1216; *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994).

335. See *Millan*, 2 F.3d at 20.

336. 33 F.3d at 1216-22.

337. The court noted that the two actions are tried at different times, before different fact finders and judges, and result in separate judgments. See *id.* at 1216-17.

338. *Id.*

339. See *supra* notes 335-37 and accompanying text.

340. See *supra* notes 335-37 and accompanying text.

341. See *supra* notes 294-98 and accompanying text.

342. See *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied sub nom. Bottone v. United States*, 510 U.S. 1092 (1994).

343. See *id.*

individual from the expense and anxiety associated with repeated prosecutions.<sup>344</sup> Requiring adherence to the *Millan* factors<sup>345</sup> minimizes these dangers. The contemporaneous filing requirement gives notice to the defendant that both actions will be litigated, and therefore, the anxiety of wondering if further prosecution will follow is eliminated. Likewise, because the actions are filed at the same time, it cannot be claimed that the government instituted a second prosecution because it was dissatisfied with an earlier result, as neither case will have reached a final judgment.

The *Millan* approach offers a pragmatic solution to the separate proceedings dilemma. It protects defendants and their property, while avoiding the dangers of prosecutorial harassment. The rejection of *Millan*, however, and a finding that the forfeiture action is indeed a separate proceeding does not necessarily implicate the Double Jeopardy Clause. The "same offense" prong must also be satisfied for the Double Jeopardy Clause to be violated.<sup>346</sup>

### c. Same Offense

In order for a defendant to prove a violation of the Double Jeopardy Clause, the defendant must also show that he is being punished twice for the same offense.<sup>347</sup> The sole test for determining when two offenses are properly considered the same offense is known as the "same elements" or "*Blockburger* test."<sup>348</sup> This test requires

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344. See *Green v. United States*, 355 U.S. 184, 187-88 (1957).

345. See *Millan*, 2 F.3d at 20.

346. See *supra* notes 292-96 and accompanying text.

347. See *supra* notes 292-96 and accompanying text.

348. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see also, e.g., *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Randall Book Corp. v. State*, 316 Md. 315, 323, 558 A.2d 715, 719 (1989). The *Blockburger* test, or as it is labeled in Maryland the "required evidence test," is also applied in Maryland to determine if a second prosecution is barred by double jeopardy. See *Snowden v. State*, 321 Md. 612, 616-17, 583 A.2d 1056, 1058-59 (1991). The "required evidence test" was applied to civil *in rem* forfeiture in *Allen v. State*, 91 Md. App. 775, 788-89, 605 A.2d 994, 1000-01 (1992). The *Allen* court determined that civil forfeiture, pursuant to Section 297 of Article 27 of the Annotated Code of Maryland, was not a lesser included offense of possession of controlled dangerous substances. See *id.* at 789, 605 A.2d at 1001. The forfeiture statute holds the owner of the property strictly liable for the property's illegal use and, therefore, intent need not be proved by the state. See *id.* (discussing § 297). Conversely, conviction of possession of a controlled dangerous substance (CDS) requires that the state prove intent. See *id.* (discussing §297). "Thus, neither civil forfeiture nor criminal CDS charges require the establishment of an essential element of the other." *Id.* Furthermore, the court recognized that in civil forfeiture the *property* is the defendant, as opposed to an individual defendant in criminal CDS cases. See *id.* The court held, therefore, that under

a court to focus on the statutes involved, and determine what the prosecuting party is required to prove in order to successfully demonstrate a *prima facie* case.<sup>349</sup> If each statute requires proof of an element the other does not, then the two offenses are deemed separate offenses under the Double Jeopardy Clause.<sup>350</sup> The handful of district courts that have reached this issue have found civil *in rem* forfeiture and the related criminal offense each to contain an element the other does not<sup>351</sup> and, therefore, have determined that the Double Jeopardy Clause was not implicated.<sup>352</sup>

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the "required evidence test" civil forfeiture subsequent or prior to criminal proceedings does not offend the Double Jeopardy Clause. *See id.*

The decision in *Aravanis v. Somerset County*, 339 Md. 644, 655, 664 A.2d 888, 893 (1995), *cert. denied*, 116 S. Ct. 916 (1996), that civil *in rem* drug forfeiture is punishment is a marked departure from the determination in *Allen* that section 297 is a civil statute. *See Allen*, 91 Md. App. at 738-88, 605 A.2d at 998-1000. The ramifications of this new characterization on double jeopardy application to the civil arena will depend upon the Maryland court's determination of: (1) whether the forfeiture action and the criminal prosecution constitute "separate proceedings"; (2) whether the criminal conviction and the forfeiture proceeding are for the "same offense"; and (3) whether the forfeiture constitutes "punishment." If it is determined that a forfeiture satisfies all three of the above factors, it violates the Double Jeopardy Clause.

349. *See Dixon*, 509 U.S. at 696-97; *United States v. White*, 1 F.3d 13, 16 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994).

350. *See Dixon*, 509 U.S. at 696.

351. *See, e.g., United States v. Chick*, 61 F.3d 682, 687 (9th Cir. 1995) (holding that civil *in rem* forfeiture and criminal offenses each required proof of an element that the other did not); *United States v. Falkowski*, 900 F. Supp. 1207, 1214-15 (D. Alaska 1995) (holding civil forfeiture and drug charges each contain element other does not, and thus Double Jeopardy Clause not violated); *United States v. Thibault*, 897 F. Supp. 495, 498 (D. Colo. 1995) (holding forfeiture was punishment for double jeopardy purposes and that actions for forfeiture and criminal conviction separate proceedings but that forfeiture and drug charges not same offense so Double Jeopardy Clause not violated); *United States v. Amaya*, 877 F. Supp. 528, 530 (D. Or. 1995) (holding forfeiture of firearms and criminal conviction of distribution of cocaine not same offense based on same elements test), *aff'd*, 67 F.3d 309 (9th Cir. 1995); *United States v. \$7,137.02*, 1995 WL 505481, \*5-6 (N.D. Ill. Aug. 18, 1995) (holding that civil forfeiture action seeking "illegal money" not barred by money laundering criminal conviction based on "same elements" test); *United States v. Leaniz*, 1995 WL 143127, \*5 (S.D. Ohio March 31, 1995) (holding that elements of federal drug forfeiture statute are not the same as those of a conviction of possession with intent to distribute, and therefore, it is not the same offense even though based on the same conduct).

352. An alternative analysis, based on a careful reading of *Dixon*, suggests that the substantive criminal offense constitutes a "lesser included offense" and, therefore, offends the Double Jeopardy Clause. *See Brown v. Ohio*, 432 U.S. 161, 168-69 (1977) (holding double jeopardy prohibits government from prosecuting a defendant, once convicted, for a crime that contains all of the elements of the offense for which they were previously convicted).

An examination of the required elements of civil *in rem* forfeiture and the related substantive criminal offense reveal that each contain an element the other does not.<sup>353</sup> Specifically, the element required by *in rem* forfeiture, but not required by the related drug offenses, is proof that the property is "guilty."<sup>354</sup> In an *in rem* action, the government is not required to prove that the owner of the property had any involvement in the criminal drug offense that gives rise to civil *in rem* forfeiture.<sup>355</sup> *In rem* forfeiture provisions generally only require that the government prove an *actus reus* element<sup>356</sup> — that the property was used in connection with a drug offense.<sup>357</sup> "In contrast, none of the criminal statutes require the use of any specific property to prove guilt."<sup>358</sup> Likewise, the criminal offenses require proof of an element not contained in the civil forfeiture statute — *mens rea*.<sup>359</sup> Unlike *in rem* forfeiture actions where the government need only prove an *actus reus* element, in the criminal prosecution the government must prove both an *actus reus* and *mens rea*.<sup>360</sup> Thus, *in rem* forfeiture and drug offenses each contain an element the other does not and, therefore, the Double Jeopardy Clause is not violated.

Applying this analysis to the instant case yields much the same result. Aravanis was convicted of "one count of possession of a controlled dangerous substance in sufficient amount to indicate an intent to manufacture, distribute, or dispense pursuant to article 27, section 286."<sup>361</sup> The statute expressly requires the proof of both *mens rea* (intent) and *actus reus* (manufacture, distribution, or dispensing).<sup>362</sup> Aravanis's property was seized pursuant to article 27, section 297(m) because it was used in connection with a violation of section 286.<sup>363</sup> The statute did not require that Aravanis use the property for illegal drug activities; it only required that the property be used for such activities. The statute, thus, did not require *mens rea* or intent

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353. See *Falkowski*, 900 F. Supp. at 1213.

354. See *United States v. Chandler*, 36 F.3d 358, 362 (4th Cir. 1994).

355. See *id.* at 362; see also Joy Chatman, Note, *Losing the Battle, but Not the War: The Future Use of Civil Forfeiture By Law Enforcement Agencies After Austin v. United States*, 38 ST. LOUIS L. J. 739, 744 (1994).

356. *Actus reus* is a wrongful deed. See BLACK'S LAW DICTIONARY 36 (6th ed. 1990).

357. See *United States v. Thibault*, 897 F. Supp. 495, 498 (D. Colo. 1995).

358. *United States v. Falkowski*, 900 F. Supp. 1207, 1214 (D. Alaska 1995).

359. See *id.* *Mens rea* is "an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent." BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

360. See *Falkowski*, 900 F. Supp. at 1213-14.

361. *Aravanis v. Somerset County*, 339 Md. 644, 647, 664 A.2d 888, 889 (1995), *cert. denied*, 116 S. Ct. 916 (1996).

362. See MD. ANN. CODE art. 27, § 286 (1996).

363. See *Aravanis*, 339 Md. at 649 n.7, 664 A.2d at 890 n.7.

be proven.<sup>364</sup> Following this model of analysis the "required evidence test" is satisfied and the Double Jeopardy Clause is not violated.<sup>365</sup>

## V. CONCLUSION

Civil *in rem* forfeiture historically focused on the "guilt" of an inanimate object. Finding this premise to be legal fiction, the Supreme Court, in *Austin*, recognized that such forfeitures focus on the culpability of the owner of the "thing" and afforded constitutional protection to them. The Court of Appeals of Maryland followed suit in *Aravanis*. This fundamental change in the scheme of *in rem* forfeiture characterizes such actions as governmentally imposed punishment. While the constitutional protections offer owners of seized, or threatened, property a check on sometimes overzealous law enforcement, the ramifications of this determination may preclude its use in the future.

The court's determination that civil *in rem* forfeiture is a punitive statute will necessarily be utilized by felons and drug offenders to mount attacks on their convictions or asset forfeitures on double jeopardy grounds. It is unclear if the required elements for their success — separate proceedings that seek to punish for the same offense — will be satisfied. The Maryland court's decision in *Jones* has further clouded this issue. While the Constitution should not be

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364. See MD. ANN. CODE art. 27, § 297 (1996).

365. Alternatively, a second, broader approach, which has not been adopted by any court at this writing, would yield a contrary result. In *Dixon*, the Court found a subsequent prosecution for a drug offense was barred by a previous contempt sanction. See *United States v. Dixon*, 509 U.S. 688, 700 (1993). The defendants were found in criminal contempt of court for "violating court orders that prohibited them from engaging in conduct that was later the subject of a criminal prosecution." *Id.* at 691. The Court held that the crime of violating the contempt order could not be abstracted from the substantive criminal drug offense, as the drug offense was, in effect, a lesser included offense. See *id.* at 698. Under this analysis, the Double Jeopardy Clause was violated. See *id.* at 700. Applying this analysis to *Aravanis* may lead to a bar against civil *in rem* forfeiture following a criminal conviction. Section 297 of the forfeiture statute specifically requires section 286 to have been violated. Following *Dixon*, the incorporated criminal code (section 286) becomes a "'species of lesser-included offense[s].'" *Dixon*, 509 U.S. at 698 (quoting *Illinois v. Vitale*, 447 U.S. 410, 420 (1980)). This approach may be defeated, however, because *Dixon* was an *in personam* proceeding requiring the defendants, and no others, to violate the contempt order. In contrast, the forfeiture statutes do not require the government to prove that *Aravanis* was guilty of violating section 286. They need only show that activity violative of section 286 occurred on the property.

a casualty of the war on drugs,<sup>366</sup> the analysis put forth in this discussion affords courts an avenue that maintains the integrity of the Constitution, and does not remove a well intentioned and needed law enforcement tool.

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366. *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied sub nom. Bottone v. United States*, 510 U.S. 1092 (1994); *United States v. Lasanta*, 978 F.2d 1300, 1305, (2d Cir. 1992); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218 (9th Cir. 1988) (quoting Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987)); *United States v. Levine*, 905 F. Supp. 1025, 1032 (M.D. Fla. 1995).

