ASSET FORFEITURE & INSTRUMENTALITIES: THE CONSTITUTIONAL OUTER LIMITS

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INTRODUCTION

Asset forfeiture is a large, increasingly bright star in the constellation of law-enforcement tools. State and federal law enforcement annually seizes billions of dollars in crime-tainted assets through administrative, civil, and criminal proceedings, typically facing relatively relaxed legal standards that can make asset forfeiture much more straightforward than criminal prosecution. These assets are deposited differently in different jurisdictions, but typically large portions are directed back to law enforcement agencies' budgets. The perverse incentives this feedback loop arguably creates have recently sparked substantial controversies. These controversies are particularly acute when it comes to the forfeiture of "instrumentalities": property that has some connection to illegal activity but possession of which is, on its own, legal. In certain circumstances, state

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and federal governments can lawfully seize real property, motor vehicles, currency, and a variety of other property after proving that it has been used to facilitate crime.

Although forfeiture in its various forms is increasingly prominent, the outer limits of government agencies' ability to seize and retain property remain somewhat unclear, particularly regarding the procedural protections to which property owners are entitled and the substantive limits on the amount of property relating to a particular crime that agencies can seize. This paper focuses on the constitutional dimensions of these issues. First, I review the state of forfeiture in practice, noting important differences across administrative, civil, and criminal categories. I also review equitable sharing and differences between state and federal forfeitures. Second, I explore the underdeveloped law circumscribing the limits of governments' forfeiture powers under Fifth and Fourteenth Amendment due process. And third, I analyze the recent law applying the Eighth Amendment's Excessive Fines Clause to "punitive" forfeitures related to crimes.

I. FORFEITURE: PROCEDURAL BACKGROUND & RECENT CONTROVERSIES

I make two distinctions to emphasize the significance of constitutional limits on asset forfeiture: first, forfeiture can take place administratively, with property seized by law enforcement without judicial involvement if law enforcement has probable cause. Forfeiture can also occur judicially, with civil, in rem forfeiture technically proceeding against the property itself, producing cases with names like People v. One 1998 GMC, and criminal in personam forfeiture composing part of a criminal prosecution, where property associat-
ed with a defendant's crimes can be forfeitable after conviction. These categories, while important formally and perhaps constitutionally, as discussed below, can be difficult to navigate in practice. The federal level is particularly difficult, as the absence of a uniform "criminal code" leads to different types of property being treated differently. The second important distinction is between federal and state forfeiture, particularly regarding oversight of forfeited assets and the incentives law enforcement agencies face to pursue forfeiture in a particular jurisdiction.

The quantity of assets forfeited annually is difficult to estimate, but it is quite substantial and has grown rapidly in recent years. According to information collected by the Bureau of Justice Statistics, the total value of federal asset forfeiture handled by U.S. Attorneys alone reached nearly $1.8 billion in 2010 after growing at an average annual rate of 19.4% between 1989 and 2010.

State asset forfeiture is also quite substantial, but inconsistent data-collection practices make it difficult to estimate exactly how much property is forfeited. As of 2003, only 29 states clearly required their law-enforcement agencies to report asset-forfeiture data, and of those only 19 responded to recent freedom-of-information requests. This limited oversight becomes particularly troubling in

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2 See Stefan D. Cassella, Forfeiture is Reasonable, and it Works, 1 CRIM. L. PROC. NEWS (The Federalist Society) 2, at 2-3 (noting that under 28 U.S.C. § 2461(a), for instance, objects including firearms, gambling proceeds, vehicles used to smuggle illegal aliens, and counterfeiting paraphernalia can only be forfeited civilly, not criminally).
3 Kathleen Maguire, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2009).
4 Marian R. Williams et al., Policing for Profit: The Abuse of Civil Asset Forfeiture, INST. FOR JUST. 13 (2010).
5 Having spent time in a large urban county prosecutor's office in one of the states that does impose asset forfeiture reporting requirements on its local law enforcement agencies, I suspect that even this reporting may not provide a completely accurate picture or guarantee effective oversight: in Michigan, the relevant statute simply
light of the fact that most states—26 of them—send fully 100% of state forfeiture proceeds directly to law-enforcement agencies’ budgets. This funding has become so significant that some Texas sheriffs have come to rely on forfeiture-related funding for one third of their budgets.6

The various state legal standards are relevant to how easily law-enforcement agencies can wield asset forfeiture. In most states, civil asset forfeiture is substantially simpler than a criminal prosecution, and standards of proof are relatively low. Ten states require the state to prove a connection to criminality only by probable cause or a prima facie allegation, although most states set the bar higher, at preponderance. Additionally, where the property owner asserts innocence (e.g., for lack of knowledge that the property was being used criminally), 38 states and the federal government place the burden on the owner to prove an “innocent owner defense.”7

Over time, the federal “innocent owner” defense has become a single, uniform defense that now clearly establishes what claimants must prove when they assert they were not involved in the crime underlying the forfeiture. In the federal system, before a substantial Congressional reform in 2000, the uncertainty over the defense had produced a circuit split over what exactly “innocence” meant in this context.8 For instance, some of the pre-2000 federal drug forfeiture

requires reporting of forfeiture data to a state “office of drug agencies” and includes weak provisions for oversight or auditing. Mich. Comp. Laws § 333.7524a (2012). Curiously, the responsibility for compiling this data and producing an annual report seems to have shifted, since the statute was enacted, from the now-defunct Office of Drug Agencies to the Michigan State Police. See Michigan State Police, 2011 Asset Forfeiture Report (Covers 2010) (2011).

6 Williams, supra note 4, at 17.

7 Williams, supra note 4, at 22-23.

8 See Stefan D. Cassella, The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner
statutes required innocent owners to establish that the illegal use of their property took place without their "knowledge or consent." A circuit split quickly arose as to whether this requirement was disjunctive or conjunctive. The Ninth Circuit, in United States v. Lot 111-B, held that the requirement was conjunctive—e.g., a wife who knew her husband was using her property to commit a crime could not defeat the forfeiture even if she could show she had not consented and had even tried to stop her husband—while the Second and Third Circuits held that the requirement was disjunctive, so lack of consent to criminal activity despite knowledge that it was occurring was sufficient for an innocent owner to defeat a forfeiture. The Supreme Court, upholding a Michigan decision that declined to provide an innocent owner defense, failed to resolve this split in Bennis v. Michigan, holding simply that the Constitution does not entitle property owners to any form of innocent owner defense because governments are constitutionally entitled to confiscate property that facilitated crime.

At the federal level, at least, this issue was legislatively resolved: the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, ap-
plies to all federal forfeiture and provides for a uniform innocent-owner defense. Cafra essentially sides with the Second and Third Circuits: under 18 U.S.C. § 983(d)(2)(A)(ii), a person can be an “innocent owner” despite knowledge of the illegal use of her property as long as she did not consent to that illegal use and took reasonable steps to stop it.16

One final legal wrinkle, important for understanding the persuasiveness of forfeiture and the way it functions as a law enforcement tool, is a process called “equitable sharing.” Through this process, the proceeds of federal asset forfeiture can be shared with state and local law enforcement agencies; in total, the Department of Justice has shared over $4.5 billion with more than 8,000 state and local entities.17 Some journalists and academics have expressed a concern that equitable sharing enables state and local actors to circumvent more stringent state requirements and defy the efforts of state legislatures.18 There is a parallel to criticisms of the dual-sovereignty exception to the Double Jeopardy protection, which enables defendants to be tried in both state and federal court: law enforcement

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16 See also Barclay Thomas Johnson, Restoring Civility-the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards A More Civilized Civil Forfeiture System [hereinafter Restoring Civility], 35 IND. L. REV. 1045, 1082-83 (2002) (arguing that Cafra improved but did not perfect the legal landscape for innocent owners, particularly claimants such as heirs, spouses, and minor children).
17 Guide to Equitable Sharing, supra note 1, at Foreword.
18 See, e.g., Steven Greenhut, Why Asset Forfeiture Abuse is on the Rise, Reason, Aug. 10, 2012, www.reason.com/archives/2012/08/10/why-asset-forfeiture-abuse-is-on-the-ris (describing law enforcement opposition to proposed California legislation that would require a court order before forfeiture could be transferred from a state or local entity to federal law enforcement); Williams, supra note 4, at 7 (noting that stricter state forfeiture laws and equitable sharing seem to be positively correlated, with states that presume owners are innocent, states that have stricter standards of proof, and states that direct fewer forfeited assets directly to law enforcement tending to receive significantly more in equitable sharing).
officials stymied at the state level can shift their attention to the federal level and try again at the “courthouse across the street.” In both of these scenarios, there are good reasons to be concerned about perverse incentives for law enforcement and the circumvention of state law.

Recent news stories support the argument that forfeiture can create perverse incentives and that oversight is sorely lacking. High-profile prosecutions in Texas revealed potentially gigantic embezzlement by a District Attorney, including over $4.2 million in salary supplements for the DA and three employees along with trips to casinos; the DA claimed that the state’s budgeting requirement for forfeiture funds was “confusing” and that the law and other state officials effectively allowed the DA to independently determine what qualified as an “official purpose.” In Romulus, a suburb of Detroit, the former chief of police and several senior officers have been charged in a more serious case alleging embezzlement of forfeited assets, including $40,000 allegedly spent on prostitutes, marijuana, and alcohol, and $75,000 allegedly used by the chief to buy a tanning salon for his wife. At the federal level, the New York Times recently reported evidence of haphazard sales by the Marshals Service of potentially millions in forfeited assets.

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19 This phrasing is taken from Justice Brennan’s dissent in *Bartkus v. Illinois*, 359 U.S. 121, 169 (1959) (objecting to a “transparent attempt . . . to have two tries at convicting” the defendant for a single crime, thus arguably evading double jeopardy protections).


These and many other examples of controversies across the country, propelled both by asset forfeiture's increasing popularity among law enforcement and by the relatively permissive standards in most jurisdictions, suggest that asset forfeiture needs legislative attention. Without significant substantive or procedural legislative reforms, however, courts have slowly begun identifying constitutional limitations on governments' abilities to forfeit. Thankfully, despite the different state and federal processes, constitutional analysis tends to focus on the substance of the forfeiture itself. This constitutional analysis—starting with due process before addressing the Excessive Fines Clause of the Eighth Amendment—is the subject of the following two sections of this paper.

II. FORFEITURE AND DUE PROCESS

In light of the troubling reach and growing scale of asset forfeiture described in detail above, the Due Process Clauses of the Fifth and Fourteenth Amendments seem to be intuitively appealing sources of protections for the owners of property that law enforcement agencies seek to seize. However, Supreme Court cases addressing asset forfeiture have generally held, applying multi-factor tests, that seizure of a property interest without an opportunity for a prior hearing is constitutionally permissible under certain circumstances, even while occasionally seeming to express the sentiment that the Constitution should provide some due process protections to some property owners.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court considered the seizure and forfeiture under Puerto Rican law of a leased yacht on which police had found some marijuana, which had apparently been brought on board by a lessee unbeknownst to the lessor. "The vessel was seized without prior notice to [its owner] or either lessee," and the owner "first learned of the seizure and forfeiture when attempting to repossess the yacht from the lessees, because of their apparent failure to pay rent." The ignorant yacht owner's position is sympathetic, but the Court ultimately held that the Constitution does not require pre-seizure notice and hearing under its procedural due process jurisprudence. The Court relied on the three-part test it had established two years earlier in *Fuentes v. Shevin*. In *Fuentes*, a case directly involving a Florida state writ of replevin but articulating a standard for deprivation of property generally, the Court had held that immediate seizure of a property interest *without* prior notice or an opportunity for a hearing is constitutionally permissible when, first,

the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

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24 *Id.* at 667-68.
25 *Id.* at 678-80.
27 *Id.* at 91.
Immediately preceding that passage, the Fuentes Court had written that the justifications for postponing notice and opportunity for a hearing would only be met in “extraordinary” situations that were “truly unusual,”28 but the Calero-Toledo Court’s reading of the three-part Fuentes test effectively extends it to cover virtually all forfeitures. The Calero-Toledo Court held that, first, forfeiture fosters “the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions”; second, advance notice and hearing might enable property owners to move, destroy, or conceal their property; and third, government officials—albeit not judges—are the ones determining whether seizure is appropriate.29 Interestingly, Justice Brennan did, in dicta, leave open the possibility of constitutional protections for innocent owners who are more ignorant and take more positive steps than the lesser in the case before him, writing that “it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.”30 In deciding Bennis v. Michigan, however, the Court declined to follow that sentiment and held that the Due Process Clause does not protect owners from forfeiture when their property was used to commit a crime, even where the property owner had no knowledge of, and did not consent to, the illegal use that justifies the forfeiture.31

Given the Calero-Toledo Court’s expansive reading of the Fuentes test and the Bennis Court’s similar reasoning, are any constitutional

28 Id. at 90.
30 Id. at 689.
31 Note that this constitutional jurisprudence simply establishes that an innocent owner defense is not constitutionally compelled; CAFRA and analogous state statutes create one legislatively.
procedural due process protections available at all? Probably some prompt post-seizure process is constitutionally required to comply with due process and avoid an illegal seizure under the Fourth Amendment, but the Supreme Court has been reluctant to hold that more is required or to specify what form notice and hearing must take.

One factor relevant to the Due Process Clause—a factor that a handful of lower courts have seized upon, as discussed below—is the type of property to be seized. In United States v. James Daniel Good Real Property, the Court considered the seizure of a house without pre-seizure notice or hearing; it sharply distinguished that circumstance from the seizure of the much more mobile yacht at issue in Calero-Toledo, holding that, absent exigent circumstances, real property cannot be seized without "notice and a meaningful opportunity to be heard. . . ."[33] CAFRA, discussed above, codified this requirement and provided for specific procedures, including a notice provision and a definition of exigent circumstances.[34] Interestingly, in James Daniel Good, the Court did not reapply the three-part Fuentes analysis upon which it had relied in Calero-Toledo, utilizing instead the three-part inquiry described in Mathews v. Eldridge.[35] That test is slightly different:

The Mathews analysis requires us to consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the

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[33] Id. at 63.
[34] 18 U.S.C. § 985 (2000); see Restoring Civility, supra note 17, at 1071.
Government's interest, including the administrative burden that additional procedural requirements would impose.\textsuperscript{36}

The Court emphasized the particular, special significance of the seizure of a home, even one whose owner is simply renting it out to tenants, and it specifically held that the governmental interest in the Mathews inquiry is not a general governmental interest in seizing property but the governmental interest in seizing it immediately, before a forfeiture hearing is held.\textsuperscript{37} Since deciding James Daniel Good, the Supreme Court has not decided a case that significantly clarifies the application of due process to asset forfeitures—and it remains unclear whether the Supreme Court would be receptive to due process challenges to inadequate or delayed post-seizure notice and hearing.

More recently, however, two circuit courts—the Second and Seventh—have pushed the due process envelope. These courts have meticulously analyzed state forfeiture to determine what opportunities to be heard are currently afforded to owners and ultimately have found that due process sometimes entitles owners to prompt post-seizure hearings. Although the specific contours of those hearings are still unclear, it is clear under these courts' reasoning that the Constitution can delay final forfeiture.

A. THE SECOND CIRCUIT

The Second Circuit's imposition of constitutionally mandated post-seizure process arose in the mundane context of NYPD vehicle seizures. At the time, the New York City Code included a broad catchall provision that allowed for administrative forfeiture of any

\textsuperscript{36} James Daniel Good, 510 U.S. at 53.
\textsuperscript{37} Id. at 54-57.
property connected to a crime. This provision applied to all crimes and allowed New York City officials to seize the vehicles of several plaintiffs after some had been arrested for DWI and another had lent her van to her estranged husband, who was then arrested for drug and weapon possession. The plaintiffs filed their lawsuit under 42 U.S.C. § 1983 after waiting in a sort of protracted procedural limbo: as their criminal proceedings moved forward, each one concluding without resulting “in a conviction of a crime that would serve as a predicate for forfeiture,” the forfeitures of their vehicles stalled, leaving those vehicles in the City’s custody for months, even as their owners continued to make monthly payments on them. The district court, granting the City’s motion to dismiss, applied the Mathews balancing test discussed above and concluded that “plaintiffs’ due process right to a meaningful hearing at a meaningful time does not require the additional safeguard of a probable cause hearing”—that is, the court reasoned that the probable cause for the underlying arrest and the eventual forfeiture hearing were sufficient on their own.

The Second Circuit, in an opinion by then-Judge Sotomayor, reversed, looking back to James Daniel Good, Fuentes, and most importantly Mathews. The court began from the premise that “even a brief and provisional deprivation of property pending judgment is of constitutional importance.” Given that the City did not then let owners challenge the seizure before a full forfeiture hearing, the court was disturbed by “the temporal gap that typically exists between seizure of the vehicle and the forfeiture proceeding, the ina-

40 Id. at 46-47.
42 Krimstock, 306 F.3d at 51.
bility of innocent owners to challenge promptly the City’s retention of their vehicles pendente lige, and the inadequacy of other suggested remedies for providing prompt post-seizure review. . . .” 43 The court then applied the three-part Mathews inquiry: it held, first, that the private interest at stake is extremely important, particularly given the unique importance of automobiles to many people’s everyday lives, the absence of “hardship relief” under New York City law, and the months-long length of the deprivation plaintiffs faced; second, that the risk of erroneous deprivation weighed slightly in the City’s favor, although the court suggested that that risk might vary, with a low risk where the crime is cut-and-dried and easy to detect, such as DWI, and a higher risk where the property is allegedly an instrumentality of a more complex crime; and third, that the government’s interest was relatively weak, particularly because the plaintiffs’ vehicles, unlike the yacht in Calero-Toledo, had already been seized and were unlikely to abscond. 44 In its unfortunately cursory summary of balancing the Mathews factors, the court held:

[W]e find that the Fourteenth Amendment guarantee that deprivations of property be accomplished only with due process of law requires that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer to determine whether the City is likely to succeed on the merits of the forfeiture action and whether means short of retention of the vehicle can satisfy the City’s need to preserve it from destruction or sale during the pendency of proceedings. 45

43 Id. at 53.
44 Id. at 60-67.
45 Id. at 67.
Although the court laid out general guidelines about this hearing, it left the final design to lower courts and administrators. Eventually, because of additional litigation in the Southern District of New York and the Second Circuit, Krimstock produced what are now known as Krimstock hearings, which, when vehicles are seized as instrumentalities, require the NYPD to give claimants written notice that they have a right to a hearing before a judge at the New York City Office of Administrative Trials and Hearings.

The procedural details of these Krimstock hearings are interesting but are beyond the scope of this paper; suffice it to say that the Second Circuit seems to have succeeded, for now, in carving out a brand-new procedural due process right to challenge the government’s continuing possession of property—at least when the property is a vehicle. Despite the constitutional significance of this holding and its potential implications for procedures across the country, it seems to have made few waves in other courts. One of the courts it has convinced is the Seventh Circuit, which fully embraced the Krimstock post-seizure due process approach before its judgment was vacated by the Supreme Court and its underlying logic rejected by the Illinois Supreme Court.

46 "At a minimum, the hearing must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable cause for the initial warrantless seizure." Id. at 69.

B. THE SEVENTH CIRCUIT

The Seventh Circuit faced a Krimstock-like set of facts in Smith v. City of Chicago.48 Smith involved a § 1983 action against Chicago that had been dismissed by the district court below: the plaintiffs were owners whose property had been seized for extended periods of time by the Chicago Police Department under a broad state statute, the Illinois Drug Asset Forfeiture Procedure Act.49 The opinion includes a detailed description of the timeline of a DAFPA forfeiture, noting that, “[f]or property worth less than $20,000, [the time between the seizure of the property and the filing of judicial forfeiture proceedings] could be a maximum of 187 days – though we note that the claimant, by acting swiftly to file a claim, can reduce that time to 142 days.”50 After reviewing earlier cases such as Calero-Toledo, for the proposition that pre-seizure hearings remain constitutionally un-compelled except for real property, and James Daniel Good, the opinion wholly adopts the Krimstock decision.51 Like the Second Circuit in Krimstock, the Seventh Circuit left the form of post-seizure hearings to lower courts and agencies:

The hearing should be prompt but need not be formal. We leave it to the district court to determine the notice requirement and what a claimant must do to activate the process. We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived of property and, in the case of

48 Smith v City of Chicago 524 F.3d 834 (7th Cir. 2008), vacated as moot sub nom. Alvarez v Smith, 558 U.S. 87 (2009).
49 Id. at 835; see 725 Ill. Comp. Stat. 150/1 et seq.
50 Id. at 836.
51 Id. at 837-38.
an automobile or personal property other than cash, to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending.\textsuperscript{52}

As noted above, however, the Smith decision did not last long. In Alvarez v. Smith,\textsuperscript{53} the Supreme Court found that the controversy had become moot on appeal and vacated the Seventh Circuit's judgment.\textsuperscript{54} The Supreme Court of Illinois hammered the final nail in Smith's coffin in People v. One 1998 GMC,\textsuperscript{55} which reviewed three separate cases of claimants who argued that they were constitutionally entitled to contest forfeiture of their cars in post-seizure probable-cause hearings. The opinion carefully but sharply criticizes the reasoning of Krimstock and Smith, relying primarily on an earlier Supreme Court case that Krimstock had only briefly mentioned: United States v. Von Neumann.\textsuperscript{56} The Second Circuit had distinguished Von Neumann because it dealt with seizure by U.S. Customs agents and applied a standard other than probable cause (and considered “remission or mitigation” of fines, penalties, or forfeitures, not continued possession of property per se).\textsuperscript{57} The Illinois Supreme Court, however, argued that the reasoning applied to forfeiture generally and ultimately held that the constitutionally required “meaningful hearing at a meaningful time” was provided by the forfeiture proceeding itself, so no additional Krimstock hearing was necessary.\textsuperscript{58} These decisions bring DAFPA and similar forfeiture laws in the Seventh Circuit back to pre-Smith square one, operating

\begin{footnotes}
\footnote{52} Id. at 838-39.
\footnote{53} 558 U.S. 87 (2009).
\footnote{54} Id. at 88.
\footnote{57} Krimstock, 306 F.3d at 52 n.12.
\footnote{58} One 1998 GMC, 355 Ill. Dec. at 913-14.
\end{footnotes}
the way they operated before the Seventh Circuit intervened. Probably this issue will again reach the Seventh Circuit, which might very well reinstate *Smith*, particularly considering how firmly established *Krimstock* is in the Second Circuit.

C. THE FUTURE OF DUE PROCESS

After the demise of *Smith*, the Second Circuit is once again the only jurisdiction that reads the Constitution as requiring additional process in forfeiture beyond the forfeiture hearing itself. The weeks and months during which claimants across the country must wait for a ruling on forfeited property impose enormous costs. Those claimants’ ability to argue against such deprivation ought to be vigorously debated. Of course, whether *Krimstock* hearings have measurably improved claimants’ lives is an important and difficult question. Some sources suggest that they can be quite difficult to navigate, particularly without counsel.59

Of course the government has valid reasons to want to maintain possession of property connected to crimes. These concerns have been given weight in the cases discussed above. In *Calero-Toledo* and in *Krimstock*, for instance, the Supreme Court and the Second Circuit grappled with government arguments that personal property, unlike the real property in *James Daniel Good*, can “abscend.” At least as significant is the concern that unseized property will simply continue to be used in crime. Nevertheless, due process concerns are substantial and have been under-addressed. Courts have tentatively acknowledged that even temporary seizures can wreak havoc on

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people's lives. Given these competing concerns, how should courts balance these interests? Might the Supreme Court provide more guidance on the three Malheus factors, especially regarding the relative weights of each? Will Krimstock remain limited to the Second Circuit? Regardless, does its logic extend to property beyond automobiles? Hopefully more courts will take up this challenging topic, especially if forfeiture continues to expand across the country.

III. FORFEITURE AND EIGHTH AMENDMENT "EXCESSIVENESS"

Turning away from the Due Process Clauses, forfeiture has another important constitutional influence: the Eighth Amendment's rarely invoked Excessive Fines Clause. In 1993 the Supreme Court took up this clause—for only the second time in its entire history61—in Austin v. United States,62 which involved the kind of facts that forfeiture opponents use to argue that the forfeiture of instrumentalities can be unjust. Austin introduced a debate over proportionality, a concept central to the Cruel and Unusual Punishments Clause, to forfeiture and Excessive Fines Clause jurisprudence.

60 See, e.g., Smith v. City of Chicago, 524 F.3d, 834, 838 (7th Cir. 2008), vacated as moot sub nom. Alvarez v. Smith, 558 U.S. 87 (2009) ("The private interest involved, particularly in the seizure of an automobile, is great. . . . The hardship posed by the loss of one's means of transportation . . . is hard to calculate. It can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment.").

61 This is quite remarkable, particularly in light of the fact that the first application of the Excessive Fines Clause took place only four years earlier and effectively entailed a finding that the clause did not apply to that earlier case. Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (holding that the Excessive Fines Clause does not limit punitive damages awarded to a private party in a civil suit in which the government is not at all involved).

The petitioner in *Austin*, Richard Lyle Austin, had been indicted on four counts of violating South Dakota drug laws. He pleaded guilty to one count of possessing cocaine with intent to distribute.\(^6^3\) After Austin’s guilty plea and sentencing, the United States targeted Austin’s mobile home and his auto body shop for *in rem* forfeiture. Austin had allegedly sold cocaine at his body shop and stored it at his mobile home, and searches of the two properties revealed small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and roughly $4,700 in cash.\(^6^4\) Austin argued that the Eighth Amendment applied to this *in rem* action, but the Eighth Circuit, citing the Ninth, held that the Constitution never requires excessiveness review of *in rem* forfeitures.\(^6^5\) On appeal in *Austin*, the government made a similar argument, contending that the Eighth Amendment, including the Excessive Fines Clause, applies only to criminal punishments and is thus simply inapplicable to *in rem* forfeitures.\(^6^6\)

For the first time, the Supreme Court concluded that the Eighth Amendment is not concerned with only criminal proceedings, but rather with government punishments generally.\(^6^7\) That produced a thorny question: *in rem* forfeiture is an action against "guilty" property that does not turn on the guilt of its owner. Is that punishment? The Court reached back into its history to note that forfeiture "serves 'punitive and deterrent purposes,’"\(^6^8\) and concluded that

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\(^6^3\) Id. at 604.
\(^6^4\) Id. at 604-05.
\(^6^5\) United States v. One Parcel of Property, 964 F.2d 814, 817 (8th Cir. 1992); see United States v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988).
\(^6^7\) Id. at 609-10.
\(^6^8\) Id. at 618 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 (1974)).
forfeiture generally does qualify as a punitive "fine." But how is the Eighth Amendment to be applied?

Unfortunately, the Court's majority opinion leaves aside how exactly the Excessive Fines Clause is to be applied in practice: "Prudence dictates that we allow the lower courts to consider that question in the first instance." ⁶⁶ Notably, however, Justice Scalia's concurrence is substantially more straightforward, both in its review of the history of forfeiture and the Court's own cases, and in its proposed application of the Eighth Amendment to future forfeitures. Scalia suggests what has since been referred to as an instrumentality approach that focuses not on the value of the property to be seized but rather inquires almost exclusively in to the directness of its relationship to the crime. In other words, the question is: how "guilty" was the property?⁷⁰ Scalia suggests, by way of illustrating the practical implications of this approach, that "[s]cales used to measure out unlawful drug sales . . . are confiscable whether made of the purest gold or the basest metal."⁷¹ His concurrence cites as an example of this approach, among other cases, *Harmony v. United States*,⁷² in which the Court held that a ship used for piracy could be forfeited but its cargo could not be, presumably because the cargo was less directly related to the piracy itself.⁷³

Although it appears admirably simple, Scalia's "pure instrumentality" approach has an obvious shortcoming, suggested by the gold scales. An exclusive focus on instrumentality would make the Eighth Amendment blind to the forfeiture of any property as long as it is directly connected to any crime—that is, as long as the property

⁶⁶ Id. at 622-23.
⁶⁷ Id. at 623-28 (Scalia, J., concurring).
⁶⁸ Id. at 627.
⁶⁹ 43 U.S. 210 (1844).
⁷⁰ Id.
is “guilty.” This leaves at least two important questions on the table. First, is this approach truly limitless? Is a direct connection to crime sufficient regardless of the actual value of the instrument, even if that value far exceeds the “value” of the crime? Second, can or must property be divided such that only the most directly connected components are forfeit? For instance, in the case of real property partly used for drug dealing, does the Eighth Amendment contemplate dividing the property and allowing only the parts actually used in the crime to be forfeited? What would happen to the rest?

Soon after *Austin*, lower courts dealing with constitutional challenges to forfeiture developed a plethora of multi-factor approaches to the Excessive Fines Clause, mixing elements of Justice Scalia’s instrumentality principle and “the traditional Eighth Amendment proportionality principle articulated in *Solem v. Helm*.”74 In *Solem*, the Court held that the Cruel and Unusual Punishments Clause “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”75 This “proportionality analysis” looks to three factors: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”76

At least two circuit courts partly or fully embraced Justice Scalia’s instrumentality approach, giving free rein to law enforcement. In *Chandler*, the Fourth Circuit reviewed the forfeiture of a 33 acre farm where drug-related transactions had happened, including distributing, packaging, selling, purchasing and using narcotics, and

75 *Solem*, 463 U.S. at 284.
76 Id. at 292.
even paying a farmhand in cocaine. Applying the Excessive Fines Clause, the Fourth Circuit created an instrumentality approach using a new three-factor test, requiring courts to consider “(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.” Applying this test, the court upheld the forfeiture of the entire 33 acres. The court brushed aside a request to separate the buildings on the farm, where the transactions had occurred, from the rest of the land, holding that Mr. Chandler had “provided no evidence that this area is on a separately platted property that could be readily separated.” Thus without some proportionality as a limiting principle, pure instrumentality can support expansive forfeitures. This became even clearer the following year in the Seventh Circuit.

_United States v. Plescia_ involved property that was much less involved in crime: whereas the _Chandler_ court dealt with farm buildings headquartering a drug-dealing operation, the _Plescia_ court dealt with a criminal connection that comprised a single phone call. At some point in 1989, Norman Demma received at home that phone call from Victor Plescia, the head of a cocaine-distribution conspiracy, during which the men discussed a drug deal worth about $50,000. Applying Justice Scalia’s instrumentality approach, the Seventh Circuit rejected Demma’s Excessive Fines Clause argument that the forfeiture of his house was unconstitutional and found that Demma’s entire house could indeed be forfeited after

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77 Chandler, 36 F.3d at 360-61.
78 Id. at 365.
79 Id. at 366.
80 Id.
81 48 F.3d 1452 (7th Cir. 1995).
82 Id. at 1460.
that single phone call: "There is no doubt that Demma used the privacy of his house to conduct drug-related business over the telephone . . . . The connection [between the forfeited property and the underlying offense] is not incidental and fortuitous, but a fitting situation for forfeiture." 83 The court also noted that it was untroubled by the magnitude of the forfeiture compared to the magnitude of the crime: "[E]ven if we consider how much the property was worth, Demma's claim fails. . . . [T]he government replies that Demma's equity in his one-half interest in the house was worth around $30,000, while the drug deal arranged in the phone call concerned $50,000 worth of cocaine." 84 That dictum is nonetheless an interesting early effort to review proportionality, although the court does not explain what might make that particular comparison constitutionally relevant. Should courts compare the value of the forfeited property to the profit realized from the crime? Surely Mr. Demma did not receive all of the $50,000 from the deal. But what other proportionality benchmarks might be more appropriate?

Five years after Austin, the Supreme Court once again took up the Excessive Fines Clause and forfeitures and resolved much of the uncertainty that Austin had created in the circuits. In United States v. Bajakajian, the Court explicitly applied proportionality to punitive forfeitures, roughly aligning the Excessive Fines Clause with the Cruel and Unusual Punishments Clause and the Solem approach. 85

Hosep Bajakajian was caught by currency-sniffing dogs at Los Angeles International Airport with $357,144 in unreported currency. Federal law requires reporting when more than $10,000 in currency leaves the country, although all parties agreed that Bajakajian

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83 Id. at 1462.
84 Id.
possessed and intended to use the money legally. 86 Unlike the in
rem civil forfeiture challenged in Austin, here law enforcement had
sought in personam criminal forfeiture of the entire $357,144 against
Bajakajian himself. 87 The district court found that the entire amount
was indeed forfeitable, as all of it was “involved in” the offense, but
the court ordered forfeiture of only $15,000, finding that forfeiture
of the entire amount would be “extraordinarily harsh” and “grossly
disproportionate.” 88 As for why the district court selected $15,000,
the judge explained that the smaller forfeiture would simply “make
up for what [he thought] a reasonable fine should be.” 89 The Ninth
Circuit affirmed, applying the post-Austin standard it had de-
developed in United States v. Real Property Located in El Dorado County, 90
which required both instrumentality and proportionality; it held,
somewhat surprisingly, that the cash was not an instrumentality,
because the crime “is the withholding of information,” “not the
possession or the transportation of the money.” 91

The Supreme Court affirmed, for the first time articulating a
standard for whether a punitive forfeiture is constitutionally exces-
sive: “We now hold that a punitive forfeiture violates the Excessive
Fines Clause if it is grossly disproportional to the gravity of a de-
fendant’s offense.” 92 Justice Thomas’s opinion emphasizes the lack
of historical guidance regarding just how disproportional a fine has
to be for it to be unconstitutionally “excessive.” 93 Ultimately, the
opinion settles on a grossly disproportional standard, after citing

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86 Id. at 324-26.
87 Id. at 325-26.
88 Id. at 326.
89 Id.
90 59 F.3d 974 (9th Cir. 1995).
91 Bajakajian, 524 U.S. at 326 (quotation omitted).
92 Id. at 334.
93 Id. at 335-36.
cases interpreting the Cruel and Unusual Punishments Clause to underscore two concerns that weigh in favor of judicial restraint: first, judgments about appropriate punishments “belong in the first instance to the legislature,” and second, “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”

Having arrived at a constitutional standard, the Court straightforwardly applied it to Bajakajian’s case and held that forfeiture of the entire $357,144 would be grossly disproportional, agreeing that Bajakajian should give up only $15,000 but, like the district court, failing to explain why that amount was appropriate. The Court considered all the circumstances surrounding Bajakajian’s crime. It noted that his violation was unrelated to any other crimes and that the harm was minimal: there was no “fraud” and no loss to the public fisc, and the only “harm” to the United States was Bajakajian’s willful withholding of the information that a large quantity of currency was leaving the country.

Unfortunately, the opinion preserves some murkiness surrounding the concept of “punitive” forfeitures. It is unclear how courts are to determine whether a given in rem forfeiture is punitive. The Court does, however, seem to hold that an in personam forfeiture is always punitive: “In this case . . . the Government has sought to punish [Bajakajian] by proceeding against him criminally, in personam, rather than proceeding in rem against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of

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94 Id. at 336-37.
95 Id. at 337-38.
96 Id.
a punitive forfeiture involves solely a proportionality determination.”

Several important developments have followed Bajakajian. First, on the statutory side, CAFRA only two years after Bajakajian codified the gross disproportionality analysis for federal in rem and in personam forfeitures. Justice Scalia’s instrumentality approach may not be dead, however: some courts, including the Second Circuit in von Hofe v. United States, discussed below, have held that the closeness of the connection between the property and the crime remains an important constitutional factor, at least in in rem forfeitures.

Second, on the judicial side, there have been interesting developments in the circuit courts since Bajakajian as they have sought to create law that sensibly applies the Eighth Amendment to forfeitures—whether in rem, in personam, involving criminal owners, or involving innocent owners. The discussion and analysis of these cases is separated below into a review of circuit courts’ attempts to answer two basic questions about Bajakajian’s gross disproportionality standard: disproportional to what, and disproportional to whom?

A. DISPROPORTIONAL TO WHAT?

This first question gets at the heart of the gross disproportionality standard: how is “disproportionality” to be measured? What can courts use as a yardstick, and what is compared to what? First, Bajakajian itself suggested that the forfeiture amount can be measured against other available punishments: the Court noted that forfeiture of the full $357,144 would be many times larger than the maximum

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97 Id. at 333-34.
99 492 F.3d 175 (2d Cir. 2007).
Sentencing Guidelines fine of $5,000 for the reporting offense at issue. The small Guidelines fine “confirm[s] a minimal level of culpability.” This comparison seems expeditious for courts: simply calculate the Guidelines fine and compare it to the value of the property to be forfeited. But how large a disparity is “gross” disproportionality?

Courts following Bajakajian have refined this analysis. Some courts have expanded the analysis to include comparisons of the value of forfeited property with the gravity of other types of available punishments. In United States v. Cheeseman, for example, the Third Circuit upheld the forfeiture of approximately $500,000 in firearms and ammunition after the defendant-owner pled guilty to illegal weapons possession. The court considered many factors, focusing on the extent to which the defendant “squarely fits within the class of persons whose behavior the statute aims to criminalize”; the relationship between the value of the property being forfeited and the $7,500–$75,000 Sentencing Guidelines fine range; and the relationship between the value of the property and the statutory maximum fine, $250,000. This analysis, considering Guidelines, statutory maximum fines, and guilt, likely will only rarely find a particular forfeiture unconstitutionally excessive.

Indeed, the Bajakajian result appears to be the exception rather than the rule, driven by the extreme value of the forfeiture and the nearly harmless crime. But this analysis is easiest where Guidelines-like fines apply to the owner. What about “innocent owners”? This prompts the following question:

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100 Bajakajian, 524 U.S. at 338-39.
101 600 F.3d 270 (3d Cir. 2010).
102 Id. at 284-85.
B. DISPROPORTIONAL TO WHOM?

The “innocent owner,” discussed in the first section of this paper, is arguably “punished” through forfeiture despite non-involvement in the underlying crime. Two circuits have addressed this issue directly by holding that the disproportionality analysis must apply to the owner, and it must consider the owner’s guilt—or innocence.

In von Hofe,103 mentioned above, the Second Circuit took on an unusual “innocent part-owner” scenario. The von Hofes, a married couple, jointly owned a house in Branford, Connecticut, in which, apparently unbeknownst to Mrs. von Hofe, Mr. von Hofe was growing marijuana. Mr. von Hofe ultimately pleaded guilty to state manufacturing and distribution charges, while Mrs. von Hofe pleaded guilty only to possession.104 The federal government sought forfeiture of the von Hofes’ house, valued at $248,000.105 Despite the von Hofes’ joint ownership of the house, the court took pains to evaluate each of them as a separate claimant, and because of the two spouses’ different culpabilities, the court ultimately split the baby: it held that, while forfeiture of Mr. von Hofe’s interest in his house was not unconstitutionally excessive, the forfeiture of Mrs. von Hofe’s interest was.106 The court noted that Mr. von Hofe had mostly independently decided to grow marijuana, whereas the wife had simply turned a blind eye.107 The court noted that technically Mrs. von Hofe was not an “innocent owner,” as she both knew about her husband’s marijuana plants and failed to act to stop his cultivation of them. It further noted that the statutory maximum

103 Von Hofe v. United States, 492 F.3d 175 (2d Cir. 2007).
104 Id. at 179.
105 Id. at 179-80.
106 Id. at 188-90.
107 Id. at 186-91.
The utility of the available penalties tends to . . . diminish where, as here, a claimant does not have knowledge of the full extent of criminal activity occurring on the property. Given the dearth of evidence indicating the extent of any profit or gain earned from the marijuana plants, and Mrs. von Hobe's lack of knowledge that her husband sold or bartered marijuana with his friends, neither the statutory maximum nor the Guidelines maximum prove decisive in gauging the excessiveness of the forfeiture in relation to Mrs. von Hobe's culpability. 108

The Second Circuit remanded the curious question of how to divide the house between Mrs. von Hobe and the government. 109, 110

The other court that has addressed the thorny question of Eighth Amendment excessiveness with respect to a quasi-innocent owner is the Ninth Circuit, in the recent case of United States v. Ferro. 111 Ferro is an unusual case that arose from remarkable facts. Rob--

108 Id. at 189.
109 Id. at 191-92.
110 Although the district court's partition of the property on remand appears to be unpublished, the Second Circuit held that the forfeiture extinguished the von Hofes' joint tenancy and created a tenancy in common between the government and Mrs. von Hobe. Id. at 191. The von Hofes' attorney suggested in the wake of the Second Circuit's decision that Mrs. von Hobe might have to obtain a mortgage for the government's half-interest in her home. Halfway house has new meaning for Conn. wife, ASSOCIATED PRESS (June 28, 2007, 2:31 PM), available at, www.msnbc.msn.com /id/114851488/ns/us_news-weird_news/t/halfway-house-has-new-meaning-conn- wife/.
111 681 F.3d 1105 (9th Cir. 2012).
ert Ferro and Maria Ferro lived together in California, and over the course of less than a decade during their marriage, Mr. Ferro collected an enormous quantity of firearms, 1,679 in all, many of them rare and extremely valuable, including 35 machineguns, a rocket launcher, and some rare or gold-plated pieces valued at over $10,000 each.112 ATF agents discovered hundreds of weapons "hidden in the walls and floors of the Ferros’ home," as well as in "hidden rooms" and "an underground bunker that housed a shooting range," yet Mrs. Ferro was ignorant of almost all of them.113 The seizure of these weapons came after Mr. Ferro’s felony conviction for possession of explosives. Although he had transferred all of his property, including his guns, to Mrs. Ferro before conviction, the federal government seized and sought civil in rem forfeiture of all 1,679 of them—valued at $2.55 million—under the federal felon-in-possession statute.114 The district court ordered the government to return 10% of the value to Mrs. Ferro on Eighth Amendment grounds, and both parties appealed.115

Like the Second Circuit in von Hofe, the Ninth Circuit began by finding that Mrs. Ferro was not an “innocent owner,” because despite her ignorance of the quantity of guns, she knew the facts for felon-in-possession: the fact of Mr. Ferro’s conviction and the fact of his ownership of at least some firearms.116 The Ninth Circuit found, however, that the district court had misapplied Eighth Amendment excessiveness review by failing to consider Mrs. Ferro’s culpability. It held that where “the person who committed the sole crime charged which gave rise to forfeitability is not the property's owner,

112 Id. at 1108-09.
113 Id. at 1109.
114 Id. at 1107-08.
115 Id. at 1107.
116 Id. at 1113.
the culpability of the owner must be considered in the analysis.” It
remanded to the district court to re-determine the refund to Mrs.
Ferro. This case is apparently still pending.

The analysis in the Second and Ninth Circuits—that the owner
is the one paying and thus the one being “punished” for the pur-
poses of Eighth Amendment excessiveness—is sensible, and it adds
a buffer zone around the statutory “innocent owner” defense. Even
a Mrs. Ferro or a Mrs. von Hofe who is somehow complicit in or
knowledgeable of a crime cannot be subjected to a forfeiture that
deprives her of property completely disproportionate to the “value”
of her involvement in the underlying crime.

CONCLUSION

This paper has sought to explore the rapidly changing land-
scape of criminal and civil forfeiture and to describe the evolving
constitutional boundaries circumscribing that landscape. As forfei-
ture continues to grow more common, legislatures must improve
transparency and oversight of forfeited funds, especially at the state
level. Courts will have more and more opportunities to refine con-
stitutional boundaries and extend them across more categories of
cases. I now offer some specific Due Process and Excessive Fines
prescriptions.

On the due process side, Smith and Krimstock vividly illustrate
the hardships forfeiture processes can impose. Lengthy pre-hearing
deprivations are more than merely inconvenient: consider owners
who make car payments for months while struggling to find alter-
native transportation. The One 1998 GMC court’s position that the
forfeiture proceeding itself provides sufficient process might be

117 Id. at 1115 (emphasis added).
118 Id. at 1117.
more compelling if that hearing were not subject to substantial delays under Illinois’s DAFPA timeline. Given that full forfeiture proceedings are long and often not prompt, claimants should have a prompt post-seizure opportunity to make their cases and perhaps regain possession of their property, possibly after posting a bond. The Supreme Court should clarify when the three-part Mathews analysis is appropriate and, more importantly, how those three factors are to be weighed against one another. The Supreme Court in James Daniel Good and the Second Circuit in Krimstock glossed over this important component of the Mathews balancing, but a more explicit weighing would improve the transparency of this analysis not just for forfeiture claims but for due process claims more generally. How the Mathews factors should be weighed is a challenging question, but I would expect the private interest to generally be more important than the government interest, for at least two reasons: first, pre-hearing deprivation of property is simply more burdensome for the owner than it is beneficial to the government; and second, the risk that the property might abscond can be significantly mitigated by requiring the owner to post bond or imposing other penalties for failure to appear.

The applicability of the Eighth Amendment to forfeiture must also be further refined. Although I approve of the Eighth Amendment’s imposition of a limit on forfeitures that goes beyond Justice Scalia’s instrumentality test, the analysis courts have applied so far is uncomfortably vague. A clearer, more predictable analysis might focus more tightly on a comparison between the value of the forfeiture and the upper end of the Guidelines fine. This simple comparison has the virtues of being easy to predict and easy to apply, particularly if courts applied a presumption of gross disproportionality to forfeitures beyond a certain multiple—perhaps two or three times the size of the upper-end fine. The Guidelines comparison has the further advantage of allowing courts to avoid entirely the attempt to determine exactly how “instrumental” the property was to the crime at hand—the lower courts’ opinions in Bajakajian nicely
illustrate the hazards this unpredictable determination entails, with
the Ninth Circuit reversing the district court and counterintuitively
concluding that currency is not an instrumentality of failure to re-
port removal of currency.

Although focusing solely on a Guidelines comparison might be
generally effective and would certainly be more predictable than
the approaches I have encountered in the cases, it does not solve the
"innocent owner" problem that arose in Ferro and von Hofe. At the
mostly-innocent end of the spectrum, the von Hofe court's solution is
sensible: a truly or nearly innocent owner's interest in property
should simply not be confiscable, or, if a von Hofe-like division of
the property is impracticable, the owner should be compensated.
Ferro presents a more difficult case involving a less innocent owner,
but there again more strict Eighth Amendment analysis respecting
the owner's reduced culpability is necessary to prevent an exces-
sively punitive forfeiture, especially where there is no criminal con-
duct of the owner on which to base a Guidelines fine comparison. I
am unsure what an ideal reduction in forfeiture would be in Ferro,
but a confiscation of $2.55 million in Mrs. Ferro's property despite
her relative lack of culpability is self-evidently excessive. Courts
like the Ferro court should use Bajakajian to more aggressively trim
overzealous forfeitures and enable claimants to receive at least par-
tial compensation.

Forfeiture is growing rapidly. State and federal courts will inev-
itably have more and more opportunities to refine its constitutional
boundaries. Perhaps, in the not-too-distant future, Justice Soto-
tomayor and her colleagues will have a chance to revisit the logic of
her Krimstock opinion. The Court should take that opportunity to
clarify that the Fifth, Eighth, and Fourteenth Amendments limit the
untimeliness and excessiveness of modern forfeitures.