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CIVIL FORFEITURE AND THE EIGHTH AMENDMENT:
THE CONSTITUTIONAL MANDATE OF
PROPORTIONALITY IN PUNISHMENT IN THE
WAKE OF *AUSTIN v. UNITED STATES*

STEVEN F. POE*

“Excessive bail shall not be required, *nor excessive fines imposed, nor cruel and unusual punishments inflicted.*”¹

INTRODUCTION

Donald Coulter had no idea what the federal government could do to him.² He was growing a small amount of marijuana in his back yard when one day a sheriff’s deputy and federal marshals came to his home and arrested him.³ The state of Ohio found Donald Coulter guilty of a criminal offense, his punishment being a \$1,000 fine and 100 hours of community service.⁴ The federal government, on the other hand, sought mere civil sanctions. The feds wanted Donald Coulter’s \$50,000 home.⁵

Kenneth Jafee of Jackson County, Oregon, was also arrested for growing marijuana in his back yard.⁶ The small marijuana plants had a value of less than \$1,000.⁷ However, through the power of civil forfeiture, the federal government was able to step in and seize Mr. Jafee’s home and property worth almost \$100,000.⁸

Rosemarie Santora was charged with possession of less than three grams of a controlled substance with intent to distribute.⁹ In addition to imposing criminal punishment upon Mrs. Santora, the federal gov-

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1. U.S. CONST. amend. VIII (emphasis added).

2. Stephanie Saul, *A House Could Be the Price of a Joint Under Federal Asset-Seizure Law*, L.A. TIMES, May 6, 1990, (Bulldog Edition), at A2.

3. *Id.*

4. *Id.*

5. *Id.*

6. *United States v. 300 Cove Rd.*, 861 F.2d 232, 233 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989).

7. *Id.*

8. *Id.*

9. *United States v. 26,075 Acres*, 687 F. Supp. 1005, 1008-09 (E.D.N.C. 1988), *modified sub nom. United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989).

ernment took her family home and property valued at over \$100,000.¹⁰

The situations described above reflect the often excessive nature of government civil seizures prior to the summer of 1993. Before this time, such seizures—often labeled civil forfeitures or statutory *in rem* forfeitures—were not thought to be “fines” within the meaning of the Eighth Amendment.¹¹ However, the United States Supreme Court came to the opposite conclusion in *Austin v. United States*.¹² In *Austin*, the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment serves to limit civil forfeitures that are punitive in any respect.¹³ Thus, if a civil forfeiture statute serves in part to punish the owner of seized property, all government seizures under that law are considered to be “fines” within the meaning of the Eighth Amendment.¹⁴ Accordingly, the Constitution dictates that these property seizures must not be excessive. The Supreme Court did not, however, outline a standard to be used or list factors to be considered by the lower courts that must decide whether these government seizures are indeed unconstitutionally excessive.¹⁵

This Note supports the use of the principle of proportionality for determining whether civil seizures of property are unconstitutionally excessive.¹⁶ Part I of this Note outlines the Supreme Court’s opinion in *Austin*.¹⁷ Part II examines the relationship between the *Austin* Court’s reasoning and the reasoning found in past Eighth Amendment jurisprudence and argues that it is this relationship that provides the

10. *Id.*

11. *See, e.g.*, *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992), *rev’d sub nom.* *Austin v. United States*, 113 S. Ct. 2801 (1993); *United States v. Plat 20 Lot 17, Great Harbor Neck*, 960 F.2d 200, 206-07 (1st Cir. 1992); *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991).

12. 113 S. Ct. 2801 (1993).

13. *Id.* at 2812.

14. *Id.*

15. *Id.*

16. *See also* Ron Champoux, Note, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247 (1992) (pre-*Austin* Note supporting proportionality review of seizures pursuant to 21 U.S.C. § 881(a)(7)); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165 (1990) (suggesting that Eighth Amendment protections should apply to government seizures without regard to whether the seizures are classified as criminal or civil). *Cf.* Sandra Guerra, *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805 (1994) (advocating that Congress and the judiciary factor in the punitive nature of civil forfeitures when making criminal sentencing decisions); Stacy J. Pollock, Note, *Proportionality in Civil Forfeiture: Toward a Remedial Solution*, 62 GEO. WASH. L. REV. 456 (1994) (advocating Congressional enactment of a blanket proportionality statute that would limit civil forfeitures).

17. *See infra* notes 27-76 and accompanying text.

general test for determining whether a given civil forfeiture is excessive and therefore unconstitutional—whether the value of the property seized is “grossly disproportionate” to the property owner’s culpable conduct.¹⁸ This test should apply to all civil forfeitures, under both state and federal law, that serve at least in part to punish the owner of the seized property. Part III addresses the Supreme Court’s decision in *Harmelin v. Michigan*,¹⁹ and concludes that the decision, while modifying the mechanics of the proportionality test, does not remove the test from an Eighth Amendment analysis.²⁰ Part IV of this Note explains why a proportionality test should be used rather than the “close enough relationship” analysis²¹ that Justice Scalia advocates.²² Under the latter, a civil seizure of property would be unconstitutionally excessive only if the seized property does not have a close enough relationship to the committed offense.²³

Finally, Part V illustrates how the proportionality principle works²⁴ by applying it to the forfeiture statutes that were at issue in *Austin*.²⁵ This part outlines how the federal judiciary can use objective criteria, specifically the *Federal Sentencing Guidelines*,²⁶ to place an approximate “value” on the property owner’s culpable conduct. Judges can compare this “value” to the dollar value of the seized property, and then determine whether the seizure is grossly disproportionate under the Excessive Fines Clause.

18. See *infra* notes 77-110 and accompanying text.

19. 501 U.S. 957 (1991).

20. See *infra* notes 111-37 and accompanying text.

21. See *infra* notes 138-55 and accompanying text.

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

23. *Id.*

24. See *infra* notes 156-205 and accompanying text.

25. The statutes examined by the *Austin* Court were 21 U.S.C. § 881(a)(4) and § 881(a)(7). *Austin*, 113 S. Ct. at 2803. Section 881(a)(4) provides for government seizure of “[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances and paraphernalia].” 21 U.S.C. § 881(a)(4) (1988). Section 881(a)(7) provides for government seizure of

[a]ll real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of [listed drug offenses].

21 U.S.C. § 881(a)(7) (1988).

26. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1993) [hereinafter SENTENCING GUIDELINES]. Congress granted the United States Sentencing Commission authority to issue the *Sentencing Guidelines* pursuant to the Sentencing Reform Act of 1984. 28 U.S.C. § 994(a) (1988).

I. *AUSTIN V. UNITED STATES*

In *Austin*, the Supreme Court held that government seizures of property that serve at least in part to punish the owner of the seized property are considered "fines" within the meaning of the Eighth Amendment.²⁷ Accordingly, the Court held that these seizures must not be excessive or they will be unconstitutional.²⁸ The Court remanded the case to the lower court to determine whether the civil seizure in *Austin* was excessive.²⁹ The Court cited "prudence" in deciding not to outline a test to be used by the judiciary for determining whether a civil seizure of property is excessive.³⁰

In *Austin*, Keith Engebretson, a government informant, agreed to purchase cocaine from Richard Lyle Austin at Austin's auto body shop in June of 1990.³¹ Austin went to his mobile home, then returned and sold Engebretson the illegal drugs.³² Austin's mobile home and body shop were searched the next day by state law-enforcement officers.³³ The officers recovered a revolver, some marijuana, \$3,300 in cash, and some drug paraphernalia from the body shop.³⁴ In addition, the officers recovered a scale, a small bag of cocaine, some marijuana, and \$660 in cash from the mobile home.³⁵ After Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute, the federal government attempted to seize Austin's mobile home and body shop through the power of civil forfeiture.³⁶ The government brought this statutory *in rem* action in the United States District Court under 21 U.S.C. § 881(a)(4) and (a)(7).³⁷

The District Court granted the government's motion for summary judgment.³⁸ Austin appealed the ruling, arguing that the forfeiture violated the Eighth Amendment, specifically the Excessive Fines Clause.³⁹ The United States Court of Appeals for the Eighth Circuit

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

28. *Id.*

29. *Id.*

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

31. *United States v. 508 Depot St.*, 964 F.2d 814, 815 (8th Cir. 1992), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

32. *Id.*

33. *Id.*

34. *Id.* at 815-16.

35. *Id.* at 816.

36. *Id.*

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

38. *Id.*

39. *Id.*

affirmed the District Court's ruling.⁴⁰ However, the court also stated that it "reluctantly agree[d] with the government" in this case.⁴¹ The court explained that the principle of proportionality in punishment was a "deeply rooted concept in the common law" and, in respect to fairness, "should be applied in civil actions that result in harsh penalties."⁴² Nonetheless, the Eighth Circuit deferred to the judgment of the Ninth Circuit,⁴³ which had held that the Constitution does not require courts to conduct a proportionality analysis to determine whether a civil seizure of property is excessive.⁴⁴

The United States Supreme Court reversed the Court of Appeals' decision.⁴⁵ The Court held that forfeitures under § 881(a)(4) and (a)(7) are subject to the limitations of the Excessive Fines Clause of the Eighth Amendment.⁴⁶ In arriving at this conclusion, the Court first noted that the purpose of the Excessive Fines Clause is to put a limit on the government's power to punish people.⁴⁷ The Court stated that this power to punish can manifest itself in civil proceedings as well as in criminal proceedings.⁴⁸ Emphasizing that government sanctions often serve multiple purposes, the Court noted that it merely had to determine whether the instant forfeiture statutes served at least in part to punish the owner of property.⁴⁹

Writing for the Court,⁵⁰ Justice Blackmun examined the history of forfeiture and determined that civil forfeitures traditionally have

40. *508 Depot St.*, 964 F.2d at 815.

41. *Id.* at 817.

42. *Id.*

43. *Id.* at 817-18. The court cited *United States v. 300 Cove Rd.*, 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989), as support for its holding. *See supra* notes 6-8 and accompanying text. The *300 Cove Rd.* court relied on the traditional distinction between *in rem* and *in personam* forfeitures in holding that the Eighth Amendment does not require a proportionality analysis for *in rem* forfeitures. *300 Cove Rd.*, 861 F.2d at 234-35; *see also infra* part IV.

44. *300 Cove Rd.*, 861 F.2d at 234-35.

45. *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993).

46. *Id.* at 2805.

47. *Id.* at 2805. Prior to *Austin* in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), the Court noted that, fines being one version of punishment in the United States, the "Excessive Fines Clause was intended to limit . . . those fines directly imposed by, and payable to, the government." *Id.* at 2916.

48. *Austin*, 113 S. Ct. at 2805-06 ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.' . . . 'It is commonly understood that civil proceedings may advance punitive and remedial goals . . .'" (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989))).

49. *Id.* at 2806. *See also Halper*, 490 U.S. at 448 ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.").

50. Justice Blackmun delivered the opinion of the Court in which Justices White, Stevens, O'Connor, and Souter joined. *Austin*, 113 S. Ct. at 2802. Justice Scalia filed a separate opinion, concurring in part and concurring in the judgment. *Id.* In addition, Justice Kennedy filed an

been used by the government, at least in part, to punish the owner of the property.⁵¹ More specifically, the Court examined § 881(a)(4) and (a)(7) to determine whether these two civil forfeiture provisions serve to punish the property owner.⁵² Citing the innocent owner provisions of § 881(a)(4) and (a)(7),⁵³ the statutory requirement of a connection between the forfeitable property and the commission of a drug offense,⁵⁴ and the legislative histories of the two subsections,⁵⁵ the Court concluded that both subsections serve, in part at least, to punish the owner of the seized property.⁵⁶ Accordingly, the Court concluded that forfeitures pursuant to § 881(a)(4) and (a)(7) are "subject to the limitations of the Eighth Amendment's Excessive Fines Clause."⁵⁷ However, the Court chose not to outline the exact limitations imposed by the Clause.⁵⁸ The Court remanded the case, effectively leaving it to the lower courts to develop the standards for determining whether a given government seizure is unconstitutionally excessive.⁵⁹

In light of the Court's opinion, a statute that serves purely remedial purposes does not levy a "fine," and thus is not subject to the Excessive Fines Clause.⁶⁰ A statute which is not punitive in any re-

opinion concurring in part and concurring in the judgment, in which Chief Justice Rehnquist and Justice Thomas joined. *Id.*

51. *Id.* at 2810. See also Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 246-49 (1994) (summarizing the history of civil forfeiture); Tamara R. Prety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 927-42 (1991) (providing a more detailed review of the history of civil forfeiture).

52. *Austin*, 113 S. Ct. at 2810-11.

53. Sections 881(a)(4) and (a)(7) both contain innocent owner provisions. For example, § 881(a)(4)(C) provides that "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(C) (1988). In addition, § 881(a)(7) provides that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7) (1988).

54. See 21 U.S.C. § 881(a)(4) and (a)(7).

55. In 1984 Congress added subsection (a)(7) to § 881. In doing so Congress acknowledged "that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983).

56. *Austin*, 113 S. Ct. at 2811-12.

57. *Id.* at 2812.

58. *Id.*

59. The Court cited "prudence" in deciding to allow the lower courts to formulate this test. *Id.* (construing *Yee v. City of Escondido*, 112 S. Ct. 1522, 1534 (1992)). But see *id.* at 2814-15 (Scalia, J., concurring in part and concurring in the judgment) (setting forth a standard for determining when civil forfeitures are unconstitutionally excessive).

60. *Id.* at 2811-12. The Court noted that "it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures under § 881(a)(4) and (a)(7) or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposi-

spect, but serves only to remove instruments of illegal activity from society or to compensate the government for the costs of law enforcement⁶¹ could be classified as purely remedial. For two reasons, the Court found that § 881(a)(4) and (a)(7) do not fit into either one of these remedial categories. First, the Court refused to characterize personal property such as automobiles and mobile homes as “‘instruments’ of the drug trade.”⁶² Second, the Court noted that the value of § 881(a)(4) and (a)(7) forfeitures can vary dramatically.⁶³ Because the value of the property forfeited may have no correlation to the cost of law enforcement, the statutes do not compensate the government for this cost.⁶⁴ Forfeitures under these statutes, therefore, are partly punitive and are subject to the purview of the Excessive Fines Clause.

The lower federal courts and the state courts are now left with the tasks of determining (1) whether a particular civil forfeiture statute serves, in any manner, to punish the owner of the seized property (which would make a seizure pursuant to that statute a government imposed fine) and if so, (2) whether a government seizure under such a statute is unconstitutionally excessive. The Supreme Court has already resolved the first issue with respect to § 881(a)(4) and (a)(7), clearly holding that both subsections partly serve to punish.⁶⁵ In addition, even though the Court has not resolved the first issue for other forfeiture statutes, it has provided the lower courts with guidance. Specifically, the *Austin* Court concluded that “forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, partly at least, as punishment.”⁶⁶ Moreover, the Court examined § 881(a)(4) and (a)(7) and listed the characteristics that led to their classification as partly punitive in nature.⁶⁷ However,

tion of ‘excessive’ fines, and a fine that serves purely remedial purposes cannot be considered ‘excessive’ in any event.” *Id.* at 2812 n.14 (quoting U.S. CONST. amend. VIII).

61. *Id.* at 2811, 2812 n.14 (quoting U.S. CONST. amend. VIII). In fact, § 881(a)(1) provides that the federal government may seize “[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.” 21 U.S.C. § 881(a)(1) (1988). This subsection of the statute could logically be classified as this first type of purely remedial forfeiture provision. *See also* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (recognizing that the forfeiture of contraband may be considered remedial because it removes dangerous instruments of illegal activity from society); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (recognizing that the forfeiture of goods involved in customs violations may be considered a form of “liquidated damages”).

62. *Austin*, 113 S. Ct. at 2811. *See also* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) (“There is nothing even remotely criminal in possessing an automobile.”).

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

64. *Id.*

65. *See id.* at 2810-11.

66. *Id.* at 2810.

67. *See supra* notes 53-55 and accompanying text.

the Court refused to give any guidance for the second issue, whether a given forfeiture is unconstitutionally excessive.⁶⁸

In his concurring opinion, however, Justice Scalia addressed the second issue by advancing what he considered to be the standard for determining when a seizure is excessive.⁶⁹ Citing the common law distinction between *in rem* forfeitures and standard monetary fines, Justice Scalia stated that the standards for determining whether they are excessive should also be different.⁷⁰ Justice Scalia acknowledged that for standard monetary fines, and possibly for *in personam* (or criminal) forfeitures, the value of the forfeiture should be proportionate to the committed offense.⁷¹ However, with *in rem* forfeitures the test should be whether the forfeited property has “a close enough relationship to the offense.”⁷²

Justice Scalia’s conclusion rests on the traditional *in rem* notion that the property has committed the offense and accordingly is tainted, or guilty, because of its unlawful use.⁷³ The court in *United States v. Sandini*⁷⁴ touched on the basis for Justice Scalia’s conclusion as it described what it perceived to be the differences between civil and criminal forfeiture. The *Sandini* court stated:

Civil forfeiture is an *in rem* proceeding. The property is the defendant in the case, and the burden of proof rests on the party alleging ownership. The innocence of the owner is irrelevant—it is enough that the property was involved in a violation to which forfeiture attaches. . . . In contrast, criminal or *in personam* forfeiture differs because its prime objective is punishment of the owner. The owner or possessor of the property is the defendant, and the burden of proof falls on the government.⁷⁵

68. See *supra* note 30 and accompanying text.

69. *Austin*, 113 S. Ct. at 2814-15 (Scalia, J., concurring in part and concurring in the judgment). The majority, however, neither endorsed nor rejected Justice Scalia’s proposed standard:

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

Id. at 2812 n.15.

70. *Id.* at 2814 (Scalia, J., concurring in part and concurring in the judgment) (“Well-established common-law distinctions should not be swept away . . .”).

71. *Id.* at 2814-15.

72. *Id.* at 2815.

73. *Id.* (“[S]tatutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been ‘tainted’ by unlawful use . . . Was . . . the property, under traditional standards, ‘guilty’ and hence forfeitable?”).

74. *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987).

75. *Id.* at 873.

As this Note explains, this traditional distinction between *in rem* (civil) and *in personam* (criminal) forfeiture is at odds with the Court's reasoning in *Austin*. Thus, this distinction should not provide the foundation for building a test to determine whether a given civil seizure is unconstitutionally excessive. Rather, the test should be based on the constitutional principle that the offender's punishment should never be grossly disproportionate to the offender's culpable conduct.⁷⁶

II. THE CONSTITUTIONAL PRINCIPLE OF PROPORTIONALITY IN PUNISHMENT

The principle of proportionality should dictate whether a civil forfeiture is excessive within the meaning of the Eighth Amendment. Under the principle of proportionality, a seizure of property pursuant to a punitive civil forfeiture statute would be unconstitutional if the value of the property seized is grossly disproportionate to the culpable conduct of the property owner.

The basis for the principle of proportionality in this context is found in the relationship between the *Austin* opinion and prior Eighth Amendment jurisprudence. The *Austin* Court concluded that § 881(a)(4) and (a)(7) forfeitures were fines within the meaning of the Eighth Amendment because seizures under these provisions constituted "payment to a sovereign as *punishment* for some offense."⁷⁷ The presence of deterrent and retributive qualities in these federal forfeiture statutes was central to the Court's reasoning.⁷⁸ Indeed, if the statutes were purely remedial in nature, seizures pursuant to the statutes would not be subject to the Eighth Amendment.⁷⁹ Thus, it is the *punitive* nature of civil forfeiture statutes that brings the Excessive Fines Clause into play. Furthermore, a review of past Eighth Amendment jurisprudence, including *Solem v. Helm*⁸⁰ and *Harmelin v. Michigan*,⁸¹ reveals that the Amendment mandates that the government may not impose criminal *punishment* upon an individual when the punishment is "grossly disproportionate" to the individual's proscribed conduct. Because punishment is common to both criminal

76. See *Solem v. Helm*, 463 U.S. 277, 284 (1983). But see *infra* note 115 and accompanying text.

77. *Austin*, 113 S. Ct. at 2812 (emphasis added).

78. See *id.* at 2811.

79. See *id.* at 2812 n.14.

80. 463 U.S. 277 (1983).

81. 501 U.S. 957 (1991).

sentencing and, generally, civil forfeiture, the principle of proportionality should apply to both.

In *Solem v. Helm* the Supreme Court outlined why the proportionality principle should apply to criminal sentencing. The Court reviewed the sentence of a South Dakota man, Helm, who had been sentenced to life in prison without possibility of parole after he had been convicted of writing a bad check for \$100.⁸² The ordinary punishment for this offense was increased in Helm's case because he had previously been convicted of six felonies—three convictions for burglary and separate convictions for obtaining money under false pretenses, grand larceny, and his third offense for driving while intoxicated.⁸³ The Court held that this sentence violated the Eighth Amendment's Cruel and Unusual Punishment Clause.⁸⁴

In arriving at this decision the Court noted that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."⁸⁵ In addition, the Court noted that when the Framers wrote the Eighth Amendment, they adopted the language of the English Bill of Rights and thus adopted the English principle of proportionality.⁸⁶ Finally, the Court concluded that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century."⁸⁷ Thus, the Court held "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."⁸⁸ This holding reinforced the Court's position that "no penalty is *per se* constitutional."⁸⁹

Interestingly, the *Solem* Court indicated that the principle of proportionality may be even more appropriately understood as part of the Excessive Fines Clause than it is as part of the Cruel and Unusual Punishment Clause. The Court seemed to accept, without need for

82. *Solem*, 463 U.S. at 281-83.

83. *Id.* at 280-82. Helm was subjected to a South Dakota recidivist statute that read as follows: "When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981).

84. *Solem*, 493 U.S. at 303.

85. *Id.* at 284.

86. *Id.* at 285-86. "The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: 'excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'" *Id.* at 285 (quoting 1 W. & M., ch.2 (1689)).

87. *Id.* at 286. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982); *Robinson v. California*, 370 U.S. 660 (1962); *Weems v. United States*, 217 U.S. 349 (1910).

88. *Solem*, 493 U.S. at 290.

89. *Id.*

further elaboration, that the limitations of the Excessive Fines Clause require a proportionality analysis:

We have recognized that the Eighth Amendment imposes “parallel limitations” on bail, fines, and other punishments, . . . and *the text is explicit that . . . fines may not be excessive*. It would be anomalous indeed if the lesser punishment of a *fine* and the greater punishment of death were both *subject to proportionality analysis*, but the intermediate punishment of imprisonment were not.⁹⁰

The *Austin* Court’s holding is based on the notion that civil forfeitures are generally penalties that serve to punish, even though they are labeled “civil” as opposed to “criminal.” The *Austin* Court reasoned that, because the forfeiture statutes at issue in that case were of a “punitive nature,” the Excessive Fines Clause applied.⁹¹ The Court noted additionally that “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.”⁹² Consequently, because a punitive civil seizure is considered to be punishment—just as a criminal sentence is considered to be punishment—the contours of the Excessive Fines Clause should also incorporate the *Solem* principle of proportionality.

A few federal appellate courts have already applied the *Solem* proportionality test to both criminal and civil forfeitures. The Court of Appeals for the Ninth Circuit has held that the *Solem* proportionality principle applies to *in personam* forfeitures in the RICO (Racketeer Influenced and Corrupt Organizations) area.⁹³ The court held that the property interest forfeited must not be so “grossly disproportionate” to the offense committed as to violate the Eighth Amendment’s Excessive Fines Clause.⁹⁴ The Third Circuit has also recognized that *in personam* forfeitures under RICO may not be grossly disproportionate to the crime in question.⁹⁵

90. *Id.* at 289 (emphasis added).

91. *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993). The Court considered government seizures pursuant to either one of the subsections to be “payment[s] to a sovereign as punishment for some offense.” *Id.* (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

92. *Id.* at 2805.

93. *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). In *Busher*, the court remanded the case to the District Court for a determination as to whether the forfeiture of defendant’s interest in two businesses and certain real estate violated the Eighth Amendment’s guarantee against grossly disproportional punishment. *Id.* at 1414-16.

94. *Id.* at 1415.

95. *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993). In *Sarbello*, the defendant was convicted of multiple RICO violations. *Id.* at 718-19. In addition, the trial court found that the defendant must forfeit his entire interest in a manufacturing company. *Id.* at 719. The Court of Appeals, however, remanded the case so that the District Court could determine whether the forfeiture was constitutional under the Eighth Amendment. *Id.* at 728.

More on point, the Second Circuit cited *Solem* and held that even civil forfeitures may violate the Eighth Amendment, stating that the Amendment "prevents the imposition of a punishment which is 'grossly disproportionate' to the crime committed."⁹⁶ However, giving great weight to the seriousness of the multiple drug offenses in its case at bar, the court did not find that the forfeiture was an example of an Eighth Amendment violation.⁹⁷

In its original form, the *Solem* proportionality test included an examination of three relatively objective criteria.⁹⁸ First, the Supreme Court held that a reviewing court should compare the gravity of the offense to the harshness of the penalty.⁹⁹ Second, the court should compare the penalty imposed in its case to the penalties imposed on other offenders in the same jurisdiction.¹⁰⁰ Third, the court should compare the penalty imposed in its case to the penalties imposed for the same or similar conduct in other jurisdictions.¹⁰¹ The *Solem* Court reasoned that these criteria, used together, could prevent Eighth Amendment violations, while also preventing the judiciary from making ad hoc, subjective judgments about how long criminal sentences should be.¹⁰²

The first criterion in the original *Solem* proportionality review is a comparison of the gravity of the offense to the harshness of the penalty.¹⁰³ In determining the gravity of the offense, a court should examine "the harm caused or threatened to the victim or society, and the culpability of the offender."¹⁰⁴ The harm caused or threatened to the victim or society can be measured by various factors: the absolute magnitude of the offense (e.g., ten grams of cocaine as opposed to five grams), the violent or non-violent nature of the offense, and the general seriousness of the offense (e.g., attempted crimes versus com-

96. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992). In *38 Whalers Cove Drive*, the defendant pleaded guilty to attempted criminal sale of a controlled substance. *Id.* at 32. The federal government seized the defendant's condominium pursuant to § 881(a)(7). *Id.* The court held that, despite the civil nature of the forfeiture, the forfeiture was so "overwhelmingly disproportionate compared to the value of the relevant drug transactions" that there was a "rebuttable presumption" that the forfeiture was punitive. *Id.* at 37. However, the court held that, even though the forfeiture was punitive, it was not violative of the Eighth Amendment. *Id.* at 39.

97. *Id.* at 39.

98. *Solem v. Helm*, 463 U.S. 277, 290-92 (1983).

99. *Id.* at 290-91.

100. *Id.* at 291.

101. *Id.* at 291-92.

102. *See id.* at 290 n.17.

103. *Id.* at 292.

104. *Id.*

pleted crimes).¹⁰⁵ The culpability of the offender can be measured by the level of intent with which the offender is charged (e.g., purposeful conduct versus reckless conduct) and the offender's motive.¹⁰⁶

The second criterion is a comparison of the penalty imposed on the individual before the court to the penalties imposed on other offenders in the same jurisdiction.¹⁰⁷ For example, if the penalty imposed on the individual before the court is much greater than penalties consistently imposed on other offenders in the same jurisdiction for more serious offenses, the court may consider the possibility that the instant penalty is unconstitutionally excessive.

The third criterion is a comparison of the penalty imposed on the individual before the court to the penalties imposed in other jurisdictions for the commission of the same or similar offense.¹⁰⁸ For example, if the penalty imposed on the individual before the court was much greater than the penalties imposed in other jurisdictions for very similar offenses, the court may have more evidence that the instant penalty is unconstitutionally excessive. The *Solem* Court noted that no single criterion was determinative.¹⁰⁹ Accordingly, each of the three should be considered when performing such constitutional review.

After *Solem*, however, the Court issued a fragmented, plurality decision in *Harmelin v. Michigan*¹¹⁰ that reshaped the contours of the *Solem* proportionality analysis. Thus, before applying the principle of proportionality to civil forfeitures, this Note will next outline the state of the *Solem* proportionality test after *Harmelin*.

III. THE MODIFICATION OF THE PRINCIPLE OF PROPORTIONALITY

A. *Harmelin v. Michigan*

In *Harmelin*, the petitioner was convicted in the state of Michigan for cocaine possession and was sentenced to a mandatory term of life in prison without possibility of parole.¹¹¹ After exhausting the Michi-

105. *Id.* at 292-93.

106. *Id.* at 293.

107. *Id.* at 291.

108. *Id.* at 291-92.

109. *Id.* at 290 n.17 ("[N]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.").

110. 501 U.S. 957 (1991).

111. *Id.* at 961. The defendant was convicted of possessing 672 grams of cocaine. *Id.* At the time of his conviction, Michigan law provided that the punishment for possessing more than 650 grams of cocaine was a mandatory life sentence. *Id.*; see MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (Supp. 1990-91).

gan appeals process, the petitioner went before the United States Supreme Court and asserted that his criminal punishment was "cruel and unusual," and thus unconstitutional, because it was "significantly disproportionate" to his crime.¹¹² For differing reasons, a 5-4 majority held that the petitioner's sentence was not cruel and unusual under the Eighth Amendment.¹¹³

No majority opinion was issued in *Harmelin*. In fact, the Court published five separate opinions, including three dissenting opinions.¹¹⁴ Justice Scalia, joined by Chief Justice Rehnquist, wrote that the Eighth Amendment contains no guarantee of proportional punishment.¹¹⁵ Rather, the Amendment prohibits only cruel and unusual "modes" of punishment, for example, disemboweling or burning alive.¹¹⁶ In arriving at this conclusion, Justice Scalia stated that *Solem* was incorrectly decided and should be overruled.¹¹⁷

Justice Kennedy issued a concurring opinion, in which Justices Souter and O'Connor joined.¹¹⁸ These justices agreed with the ultimate decision of Justice Scalia that the punishment imposed on Harmelin did not violate the Eighth Amendment. However, these justices disagreed with Justice Scalia's reasoning. Justice Kennedy stated that the Eighth Amendment *does* prohibit sentences that are grossly disproportionate to the crime committed.¹¹⁹ Thus, *Solem* should not be overruled. Instead, the *Solem* test should be modified so that it mandates only the use of the first of its three prongs.¹²⁰ The latter two prongs are only analytical tools that should be used "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."¹²¹ Justice Kennedy applied this first *Solem* prong and concluded that Harmelin's sentence was not grossly disproportionate and thus not cruel and unusual.¹²²

112. *Harmelin*, 501 U.S. at 961.

113. *Id.* at 996.

114. *Id.* at 960.

115. *Id.* at 965.

116. *Id.* at 976.

117. *Id.* at 986-90.

118. *Id.* at 996 (Kennedy, J., concurring in part and concurring in the judgment).

119. *Id.* at 997.

120. *Id.* at 1004-05.

121. *Id.* at 1005.

122. *Id.* at 1006-09.

Each of the four dissenting justices agreed with Justice White's dissenting opinion.¹²³ Justice White argued that the full *Solem* test, with each of its three prongs, should be applied in this case.¹²⁴ In Justice White's view, the application of this test resulted in the conclusion that the petitioner's sentence was grossly disproportionate to the crime he had committed.¹²⁵

B. *The McGruder Interpretation of Harmelin*

Since *Harmelin* provided no clear guidance, the lower courts were left with the task of determining whether a proportionality principle still exists under the Eighth Amendment, and if it does, whether the principle still exists in the form of the *Solem* three-prong test. The most widely adopted interpretation of the *Harmelin* opinion among the Circuit Courts of Appeals is the Fifth Circuit's interpretation found in *McGruder v. Puckett*.¹²⁶ This interpretation, which recognizes the continued existence of the proportionality principle, is based on a "head-count analysis" of *Harmelin*.¹²⁷

By applying a head-count analysis, we find that seven members of the Court supported a continued Eighth Amendment guaranty against disproportional sentences. Only four justices, however, supported the continued application of all three factors in *Solem*, and five justices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not. Only Justice Kennedy's opinion reflects that view. It is to his opinion, therefore, that we turn for direction.¹²⁸

A proportionality analysis under the Eighth Amendment accordingly would first involve "a threshold comparison" of the gravity of the offense to the severity of the punishment.¹²⁹ A court should only con-

123. *Id.* at 1009 (White, J., dissenting) and 1027 (Marshall, J., dissenting). Justices Blackmun and Stevens joined in Justice White's dissenting opinion. *Id.* at 1009. Justice Stevens, however, wrote separately in order to provide an additional comment. *Id.* at 1028. He stated that, since the punishment in this case was life imprisonment, extra scrutiny of the punishment is required. *Id.* For such a penalty to stand, the criminal conduct must be "so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation." *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)). Justice Marshall agreed with Justice White's opinion, but wrote his own opinion in order to express his view that the death penalty violates the Eighth Amendment in all circumstances. *Id.* at 1027.

124. *Id.* at 1016-21.

125. *Id.* at 1021 ("Application of the *Solem* factors to the statutorily mandated punishment at issue here reveals that the punishment fails muster under *Solem* and, consequently, under the Eighth Amendment to the Constitution.")

126. 954 F.2d 313 (5th Cir. 1992). See also *United States v. Morse*, 983 F.2d 851 (8th Cir. 1993); *United States v. Sturmoski*, 971 F.2d 452 (10th Cir. 1992); *McCullough v. Singletary*, 967 F.2d 530 (11th Cir. 1992); *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991).

127. *McGruder*, 954 F.2d at 316.

128. *Id.*

129. *Id.*

sider the second and third prongs of *Solem* when the threshold comparison leads the court to infer that the punishment is grossly disproportionate to the offense.¹³⁰ In light of the wide acceptance of the *McGruder* interpretation—and more importantly, five Justices' rejection of the continued initial application of all three of the *Solem* prongs—courts should use this modified version of the *Solem* proportionality test when determining whether a civil seizure of property is an excessive fine.¹³¹

C. *The Application of the Principle to Civil Forfeitures*

Of course the modified *Solem* proportionality test will have to be tailored to fit the specific contours of civil forfeiture. As announced in *Solem* and modified in *Harmelin*, the proportionality test applies to prison sentence lengths, not property seizure values. However, this difference should not be an insurmountable hurdle. The fundamental purpose of the test, maintaining proportionality in punishment, applies directly to the civil forfeiture context.¹³²

The modified *Solem* test requires a judicial determination of the gravity of the offense. The test also requires a comparison of the gravity of the offense to the harshness of the penalty. The Ninth Circuit has already performed these two tasks in their review of an *in personam* forfeiture in the RICO area.¹³³ The court noted that, when determining the gravity of the offense, the court can examine the same considerations in a civil forfeiture proceeding that it does in a criminal sentencing proceeding.¹³⁴ The court should look at the harm suffered by the victim or society and the culpability of the offender.¹³⁵ For example, with an illegal drug sale, the courts can consider the dollar value of the drugs sold, the amount of harm caused to society through dissemination of the drugs, and whether the property owner was the

130. *Id.*

131. Interestingly, even if Justice Scalia's opinion in *Harmelin* had been a majority opinion, the complete (although hypothetical) overruling of *Solem* would arguably not eviscerate *Solem*'s usefulness in the civil forfeiture area. *Harmelin* would have only overruled *Solem*'s proportionality prongs as to their use in a Cruel and Unusual Punishments analysis. See *Harmelin v. Michigan*, 501 U.S. 957 (1991). The Court has already indicated that the Excessive Fines Clause may require a proportionality analysis simply because of the nature of the word "excessive." See *supra* note 90 and accompanying text.

132. See *supra* notes 77-79 and accompanying text.

133. *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); see also *United States v. 429 S. Main St.*, 843 F. Supp. 337, 341-42 (S.D. Ohio 1993) (post-*Austin* decision finding that § 881(a)(7) civil seizure of property valued at just over \$83,000 was not grossly disproportionate when balanced against conduct which involved repeated illegal drug sales).

134. *Busher*, 817 F.2d at 1415.

135. *Id.*

purposeful seller of the drugs or merely an owner of property who had knowledge of drug sales being performed on the property.¹³⁶

The comparison of the gravity of the offense to the harshness of the penalty should also not pose new problems for the judiciary. The penalty has merely changed forms. Rather than comparing the culpability of the offender to a sentence length, with civil forfeitures the courts will be comparing the culpability of the offender to the value of seized property. Courts should use this comparison to draw a line between legal and excessive seizures. "This is, admittedly, not an easy line to draw; the eighth amendment does not provide a bright line separating punishment that is permissible from that which is not. But a court may not turn its back on a constitutional constraint simply because it is difficult to apply."¹³⁷ As recognized by the *Busher* court, Eighth Amendment line drawing is difficult. However, these lines should prove to be no more difficult to draw in the context of civil forfeiture than they already are in the context of criminal sentencing.

IV. JUSTICE SCALIA'S "CLOSE ENOUGH RELATIONSHIP" TEST

In his concurrence in *Austin*, however, Justice Scalia rejected the use of the proportionality principle in the area of civil forfeitures. Because the common law distinguishes between *in rem* forfeitures and standard monetary fines, Justice Scalia supports the use of a "close enough relationship" test for *in rem* forfeitures, rather than a proportionality test. He explains that

[u]nlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant. . . . The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.¹³⁸

A simple hypothetical illustrates the difference between Justice Scalia's approach and the proportionality approach. John Doe has been arrested for illegal possession of marijuana. Prior to the arrest, law enforcement personnel locate a few small marijuana plants on Doe's land and a small baggie of marijuana in his automobile. The land is determined to be worth over \$350,000, while the automobile is

136. *See id.*

137. *Id.* at 1416.

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

worth \$10,000. The federal government has seized both the land and the automobile pursuant to § 881(a)(4) and (a)(7).

During the forfeiture proceeding, evidence is brought forth showing that the marijuana plants were located in the middle of the property. In addition, the evidence suggests that Doe had been growing the drug for only a few months. Surrounding the plants is a dense forest that has arguably served to hide the marijuana plants from view. The evidence also shows that the automobile was intended to be used for only one isolated transaction, a gift of a few marijuana cigarettes to one of Doe's friends. Growing the drug merely for his own use, Doe has never attempted to give or sell marijuana to anyone else before this date.

Under Justice Scalia's "close enough relationship" test, the court could find that Doe's land is forfeitable but that his automobile is not. The trees on the land may have hidden the marijuana plants from view and permitted Doe to continue to grow and use the illegal drug. As a result, the court could reasonably conclude that the land has a "close enough relationship" to the offense of marijuana possession. However, the automobile was used for only one isolated incident and contained only a small amount of marijuana. Therefore, the court could reasonably conclude that the automobile did not have such a close relationship.¹³⁹

On the other hand, under the proportionality test, the court would probably conclude that the automobile is forfeitable but that the land is not. Under the first *Solem* prong, the court could reasonably find that the value of the automobile, \$10,000, is not grossly disproportionate to the "value" of this drug offense. However, the court would probably find that the value of the land, \$350,000, is grossly disproportionate to the "value" of this relatively minor drug offense.

In order to illustrate the "close enough relationship" test and differentiate it from the proportionality principle, Justice Scalia set forth his "gold scales" hypothetical in his *Austin* concurrence: "Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal."¹⁴⁰ According to Justice Scalia, the gold scales are forfeitable because they have such

139. The Court explained that

an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine.

Id. (emphasis added).

140. *Id.*

a close relationship to the offense of drug selling.¹⁴¹ The scales are “guilty” property,¹⁴² and thus seizure of the scales would not violate the Eighth Amendment. Justice Scalia notes that the value of the scales—a determinative factor in a proportionality analysis—is an irrelevant factor in his analysis.¹⁴³ However, in light of the majority’s requirement that a forfeiture statute must be punitive in at least some respect for the Excessive Fines Clause to even apply, Justice Scalia’s gold scales may be completely forfeitable under both the proportionality approach and the “close enough relationship” test. If the gold scales were forfeited in a federal proceeding, most likely they would have been seized pursuant to 21 U.S.C. § 881(a)(2) which permits seizure of “[a]ll . . . equipment of any kind which [is] used . . . in . . . processing, delivering, importing, or exporting any controlled substance.”¹⁴⁴ This portion of § 881 seems to be purely remedial in that it serves to “remove the ‘instruments’ of the drug trade,” and as such, the Excessive Fines Clause would not even apply.¹⁴⁵ Thus, the gold scales would be forfeitable whether the proportionality approach or the “close enough relationship” test is used.

There is no doubt that there are benefits to Justice Scalia’s “close enough relationship” approach. First, the judiciary would not be concerned with valuing seized property. In addition, the courts would not have to become involved with the more difficult task of placing a “value” on the property owner’s culpable conduct. Moreover, under Justice Scalia’s approach, modern civil forfeiture law would comport logically with the common law, traditional notion of “guilty” property.¹⁴⁶ Under the common law, *in rem* actions are pursued against the property itself, not the owner of the property.¹⁴⁷ As such, the “close enough relationship” test is quite logical. If the seized property is closely related to the offense, then the property is “guilty” and for-

141. *Id.*

142. *Id.*

143. *Id.*

144. 21 U.S.C. § 881(a)(2) (1988).

145. *Austin*, 113 S. Ct. at 2811. See also *United States v. \$45,140.00 Currency*, 839 F. Supp. 556, 558 (N.D. Ill. 1993) (post-*Austin* decision finding that § 881(a)(6) forfeiture of cash proceeds from illegal drug sale was purely remedial and did not implicate the Eighth Amendment); *United States v. Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 391 n.10 (S.D. Fla. 1993) (finding that forfeiture of illegally imported lobster tails was purely a remedial measure because the lobster tails were contraband); *State v. Meister*, 866 S.W.2d 485, 490 (Mo. Ct. App. 1993) (post-*Austin* decision finding that forfeiture of cash proceeds from drug sale was purely remedial).

146. *Austin*, 113 S. Ct. at 2815 (“The relevant inquiry for an excessive forfeiture under § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, ‘guilty’ and hence forfeitable?”).

147. *United States v. Sandini*, 816 F.2d 869, 872-73 (3d Cir. 1987).

feitable, regardless of the property's value.¹⁴⁸ If the seized property is unrelated to the offense, then the property is in no way "guilty."¹⁴⁹

Relying on the common law notion of "guilty" property, however, would merely be mechanical compliance with a traditional legal fiction.¹⁵⁰ This fiction was created to expand the jurisdiction of the courts, not to establish the basis for the limitations of the Eighth Amendment.¹⁵¹ More importantly, this fiction is based on the traditional distinction between *in rem* and *in personam* forfeiture, a distinction which is at odds with the *Austin* majority's reasoning.

In *Austin*, the Court accepted that modern civil forfeiture laws tend to impose punishment on the property owner, and that § 881(a)(4) and (a)(7) definitely do impose such punishment. In the majority opinion, the Court concluded that "statutory *in rem* forfeitures in particular historically have been understood, at least in part, as punishment."¹⁵² In arriving at this conclusion the Court noted that, since the creation of statutory *in rem* forfeiture, civil seizures have been based on the property owner's culpable state of mind, not on the idea that the property has actually done something wrong.¹⁵³ The *Austin* Court explained that "the Court has understood this fiction [of 'guilty' property] to rest on the notion that the owner who allows his property to become involved in an offense has been negligent."¹⁵⁴ Since the *Austin* majority looked beyond the traditional legal fiction of "guilty" property in deciding that the Excessive Fines Clause applies to punitive civil forfeitures, the lower courts should also look beyond it when developing the test for determining when civil forfeitures are excessive.¹⁵⁵

148. *Austin*, 113 S. Ct. at 2815. See also *Dobbin's Distillery v. United States*, 96 U.S. 395, 400 (1877) ("[T]he offence is attached primarily to the thing It is not an uncommon course . . . to treat the [property] . . . as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner").

149. *Austin*, 113 S. Ct. at 2815.

150. See *id.* at 2808-09 n.9 ("The Government relies heavily on this fiction. . . . We do not understand the Government to rely separately on the technical distinction between proceedings *in rem* and proceedings *in personam*, but we note that any such reliance would be misplaced.").

151. *Id.* (citing *Republic Nat'l Bank v. United States*, 113 S. Ct. 554, 559 (1992)). See also *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23 (1960) ("A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached. . . .").

152. *Austin*, 113 S. Ct. at 2810.

153. *Id.* at 2808-10.

154. *Id.* at 2809.

155. See *United States v. 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994) (expressing dissatisfaction with Justice Scalia's proposed standard for excessiveness). But see *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421 (N.D. Ala. 1994) (predicting that the 11th Circuit Court of Appeals will adopt Justice Scalia's test for excessiveness); *In re King Properties*, 635 A.2d 128 (Pa. 1993) (holding that, under the Excessive Fines provision of the Pennsylvania Constitution,

V. APPLICATION OF THE *FEDERAL SENTENCING GUIDELINES* TO FEDERAL CIVIL FORFEITURE

In addition to supporting the use of the principle of proportionality in judicial reviews of civil forfeitures, this Note outlines how the *Federal Sentencing Guidelines*¹⁵⁶ can be used by the federal judiciary as an objective tool in evaluating any of the *Solem* prongs. After a brief introduction to the *Sentencing Guidelines*, Part V examines why and how federal judges can use the *Sentencing Guidelines* to review civil seizures pursuant to § 881(a)(4) and (a)(7), even though the *Sentencing Guidelines* were originally designed for use in the criminal law.¹⁵⁷

A. *The Federal Sentencing Guidelines*

Before November 1987 the Federal Government used a system of indeterminate sentencing and parole to set and monitor the punishment of federal criminals.¹⁵⁸ Under this system, judges and parole officers had broad discretion in deciding how long an offender would remain in custody,¹⁵⁹ which often produced wide disparities in sentences.¹⁶⁰ In response to this and other concerns,¹⁶¹ Congress created the United States Sentencing Commission and directed it to create sentencing guidelines that would be binding (except in rare instances) on federal courts.¹⁶²

the excessiveness test is whether the seized property has a close enough relationship to the committed offense). In *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 732 (C.D. Cal. 1994), the court accepted the United States Supreme Court's invitation to develop an Eighth Amendment test for excessiveness and held that *both* a proportionality analysis and a relationship test should be applied.

156. See *SENTENCING GUIDELINES*, *supra* note 26.

157. See *SENTENCING GUIDELINES*, *supra* note 26, at 1 (“[The Commission’s] principal purpose is to establish sentencing policies and practices for the federal *criminal* justice system . . .”).

158. *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Under the old system of indeterminate sentencing and parole, statutes specified the punishment for convicted criminals, but judges had wide discretion to determine whether an individual would be incarcerated and, if so, for how long. *Id.* In addition, a system of parole was used to guide and direct offenders back into society. *Id.*

159. *Id.*

160. *Id.* at 365.

161. Under the prior indeterminate sentencing system, a major goal was to promote rehabilitation. *Id.* at 363. Rehabilitation later became questioned, however, as a “sound penological theory.” *Id.* at 365; see also NORVALL MORRIS, *THE FUTURE OF IMPRISONMENT* 28-43 (1974). Congress reacted by rejecting rehabilitation as a goal of imprisonment. 28 U.S.C. § 994(k) (Supp. 1993). Instead, Congress endorsed retribution, education, deterrence, and incapacitation as the goals of imprisonment. 18 U.S.C. § 3553(a)(2) (1988).

162. *Mistretta*, 488 U.S. at 365-67.

The underlying purpose and basic mechanics of the *Sentencing Guidelines* are effectively summarized by the United States Sentencing Commission in a Special Report to Congress.¹⁶³

Starting with the premise that treating similar offenses and similar offenders alike forms the basis of a just and rational sentencing policy, the Sentencing Commission created guidelines that take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender's role in the offense and prior record. Using this information, the guidelines prescribe proportional individual sentences that, for example, punish the recidivist criminal substantially more than the first offender, and the organizer of a criminal enterprise substantially more than his minions.¹⁶⁴

The *Sentencing Guidelines* utilize what is basically a seven-step process. First, the *Sentencing Guidelines* assign a generic base offense level to each of the 2,000 separate criminal offenses in the federal criminal law.¹⁶⁵ These generic offense levels number from four to forty-three according to the proportionate severity of the crime.¹⁶⁶ After a federal court determines the base offense level, the second task is to identify any characteristics specific to the offense that may change the offense level.¹⁶⁷ For example, the *Sentencing Guidelines* specific to robbery mandate a three-level increase if the offender possessed a firearm during the robbery.¹⁶⁸ Third, the court will determine if there are any generic adjustments that apply to the offender.¹⁶⁹ For example, these adjustments require that the offense level be increased three levels if the victim was a law enforcement officer, regardless of the specific offense at issue.¹⁷⁰ Fourth, the *Sentencing Guidelines* acknowledge that multiple counts of an offense may be relevant to a sentence.¹⁷¹ When multiple counts against the offender do not necessarily represent multiple harms—for example, when the prosecutor elects to charge several counts of drug distribution rather than charge one large conspiracy—the *Sentencing Guidelines* require adjustments

163. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20-21 (1991) [hereinafter SPECIAL REPORT]. The *Sentencing Guidelines* are much too intricate for a comprehensive description in this Note. The manual itself is well over 400 pages in length. SENTENCING GUIDELINES, *supra* note 26.

164. SPECIAL REPORT, *supra* note 163, at 20-21.

165. *Id.* at 21.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 22.

170. *Id.*

171. *Id.*

to the offense level so that only the amount of harm caused by the offender is reflected in the punishment. The sheer number of counts that the prosecutor chooses to charge does not become the ultimate factor.¹⁷² The fifth step in the process is for the court to assess the offender's acceptance of responsibility.¹⁷³ For example, the judge may reduce the offense level by two "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense."¹⁷⁴ These five steps complete the calculation of the offense level, which is shown as a vertical axis on the *Sentencing Guidelines* matrix.¹⁷⁵

Next the court examines the criminal history of the offender.¹⁷⁶ Criminal history points are assigned to account for the offender's prior criminal activity.¹⁷⁷ Logically, more points are awarded if the prior criminal activity included serious offenses requiring incarceration than if it included minor offenses requiring mere probation.¹⁷⁸ This section also awards more points for special patterns of criminal conduct—for example, multiple felony convictions involving violence and controlled substances.¹⁷⁹ After the criminal history points are totalled, the offender is assigned a criminal history category from I to VI.

Finally, the federal judge uses the *Sentencing Guidelines* matrix to determine the sentencing range for the offender. The criminal history categories are listed on the horizontal axis of the matrix to coincide with the offense levels on the vertical axis.¹⁸⁰ The judge simply matches the offense level and the criminal history category on the grid and arrives at the applicable sentencing range.¹⁸¹

B. *Why the Sentencing Guidelines Should Be Applied in the Context of Federal Civil Forfeiture*

Even though the *Sentencing Guidelines* were designed and originally implemented for use in the federal *criminal* justice system,¹⁸² they should also be applied in proportionality review of federal *civil* forfeitures. The *Sentencing Guidelines* should be considered in these civil cases because the *Sentencing Guidelines* were developed with

172. *Id.* at 22-23.

173. *Id.* at 23.

174. SENTENCING GUIDELINES, *supra* note 26, § 3E1.1(a).

175. *See id.* at Sentencing Table (back inside cover).

176. SPECIAL REPORT, *supra* note 163, at 24.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* SENTENCING GUIDELINES, *supra* note 26, Sentencing Table (back inside cover).

181. SPECIAL REPORT, *supra* note 163, at 25.

182. *See supra* note 157.

proportionality in mind. Furthermore, application of the *Sentencing Guidelines* can add to the relative objectivity of judicial proportionality review.

The Sentencing Reform Act of 1984, which provided for the establishment of the *Sentencing Guidelines*, was enacted to satisfy certain objectives.¹⁸³ One important objective was to achieve "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."¹⁸⁴ Thus, the *Sentencing Guidelines* meticulously list proportionate sentences for all federal offenses.¹⁸⁵ Of course, included in this list are the various examples of federal drug offenses.¹⁸⁶ Because the first *Solem* factor requires that courts compare the gravity of the underlying offense to the harshness of the imposed penalty, federal courts reviewing civil seizures pursuant to § 881(a)(4) or (a)(7) must somehow calculate the gravity of the underlying drug offense. Courts should be able to approximate the gravity of the offense in part by looking to the proportional listings in the *Sentencing Guidelines*.

Moreover, the *Sentencing Guidelines* can be used in proportionality review of federal civil forfeitures in order to address the arguably legitimate concern of subjectivity in judicial review. Some judges have expressed concern that proportionality review in criminal proceedings requires judges to perform subjective tasks that are better left to the legislature.¹⁸⁷ Indeed, Justice Kennedy recognized in *Harmelin* that proportionality review by federal courts should utilize "objective factors to the maximum possible extent."¹⁸⁸ Because proportionality review in *civil* proceedings would seem to require the use of a similar element of subjectivity, objective tools should be applied as much as possible. The *Sentencing Guidelines* are such a tool. The *Sentencing Guidelines* are not a product of the judiciary, but rather are ultimately

183. SENTENCING GUIDELINES, *supra* note 26, at 2.

184. *Id.* (emphasis added). Congress' other objectives were to achieve honesty and reasonable uniformity in sentencing. *Id.*

185. *Id.* at 9.

186. *Id.* §§ 2D1.1 - 2D3.2.

187. For example, in *Solem*, Chief Justice Burger dissented and commented that, "[this] conclusion by five Justices that they are able to say that one offense has less 'gravity' than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature." *Solem v. Helm*, 463 U.S. 277, 314 (1983). See also *Harmelin v. Michigan*, 501 U.S. 957, 988 (1991) ("The difficulty of assessing gravity [of the offense] is demonstrated in the very context of [the *Harmelin* case].").

188. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)).

a product of the legislature.¹⁸⁹ Thus, the *Sentencing Guidelines* can serve as an objective guide—the collective judgment of the members of the United States Sentencing Commission—to follow when attempting to approximate the gravity of the offense.

C. *How the Sentencing Guidelines Can Be Applied in the Context of Federal Civil Forfeiture*

Both subsections, § 881(a)(4) and (a)(7), target violators of federal drug laws who also own property. Section 881(a)(4) allows the federal government to seize all aircraft, vehicles, or vessels which are used in the illegal drug trade.¹⁹⁰ Additionally, § 881(a)(7) allows the federal government to seize all real property used in the commission of drug crimes.¹⁹¹ Because both subsections are expressly tied to the commission of drug offenses, the drug offense section of the *Sentencing Guidelines* should prove helpful in analyzing the first prong of the *Solem* proportionality analysis—whether the harshness of the seizure outweighs the gravity of the property owner's culpable conduct.¹⁹² A federal court reviewing a seizure under either subsection should be able to use the base offense levels listed in the *Sentencing Guidelines*¹⁹³ when trying to determine the gravity or "value" of the property owner's culpable conduct. For example, a court can determine if the sale of ten grams of hashish oil by the owner of seized property is a relatively minor or major drug offense.¹⁹⁴

The court can also look to the adjustments included in the *Sentencing Guidelines*.¹⁹⁵ The court could account for particular vulnerability on the part of the victim, an organizational or leadership role that the offender played in the commission of the offense, the offender's obstruction of justice, the existence of multiple offense counts, or even acceptance of responsibility on the part of the offender.¹⁹⁶ In addition, the court can examine the *Sentencing Guide-*

189. Congress provided for the development of the *Sentencing Guidelines* in the Sentencing Reform Act of 1984. 18 U.S.C. § 994(a) (1988). In addition, Congress reviewed the *Sentencing Guidelines* proposed by the United States Sentencing Commission and continues to review all newly proposed amendments. SENTENCING GUIDELINES, *supra* note 26, at 1-2.

190. 21 U.S.C. § 881(a)(4) (1988).

191. 21 U.S.C. § 881(a)(7) (1988).

192. *Solem v. Helm*, 463 U.S. 277, 290-91 (1983).

193. See *supra* text accompanying note 165.

194. See SENTENCING GUIDELINES, *supra* note 26, § 2D1.1.

195. SPECIAL REPORT, *supra* note 163, at 22 ("[A]djustments act to further individualize the sentence. . . . [A]djustments require the court to consider the defendant's role in the offense.")

196. SENTENCING GUIDELINES, *supra* note 26, §§ 3A1.1 - 3E1.1. See also *United States v. Myers*, 21 F.3d 826, 830 (8th Cir. 1994) ("[A] proportionality analysis requires a fact-specific evaluation of all of the circumstances of the defendant's criminal conduct, including the extent of

lines to determine the effect of the offender's criminal history (or lack of criminal history) on the gravity of the underlying conduct.¹⁹⁷ Each of these aspects of the *Sentencing Guidelines* can be used to determine if there is an inference of gross disproportionality.¹⁹⁸

The *Sentencing Guidelines* can also help federal courts in analyzing the second and third *Solem* factors, if needed. Under the second *Solem* factor, a court may need to compare the sentence imposed on the defendant before the court to the sentences imposed on other defendants in the same jurisdiction.¹⁹⁹ This factor can easily be modified to apply to the civil forfeiture context. With forfeiture, the court would compare the value of the property seized from the civil defendant before the court to the value of the property seized from other forfeiture defendants in the same jurisdiction. The *Sentencing Guidelines* can assist the court with this *Solem* factor just as they assisted with the first factor.

For example, a court may decide that the seizure of \$700,000 worth of property for the commission of a Level 6 drug offense (i.e., the sale of less than 250 grams of marijuana)²⁰⁰ is excessive when compared to another court's ruling, in the same jurisdiction, that the seizure of \$600,000 worth of property for the commission of a Level 8 drug offense (i.e., the sale of 300 grams of marijuana)²⁰¹ was unconstitutionally excessive. On the other hand, other factors may lead the court to find the seizure of the \$700,000 property not to be excessive: factors such as a significant criminal history or obstruction of justice.

A court may also use the *Sentencing Guidelines* to analyze the third *Solem* factor. Under the third factor, a court may compare the sentence imposed on the defendant before the court to the sentences imposed on defendants for the same or similar conduct in other jurisdictions.²⁰² In the civil forfeiture context, this would mean that a court would compare the value of the property seized in the case

a defendant's criminal drug activities and the amount of time that the defendant conducted those activities, in order to determine whether the forfeiture was unconstitutionally 'excessive.')

(citing *Alexander v. United States*, 113 S. Ct. 2766, 2775-76 (1993)).

197. SENTENCING GUIDELINES, *supra* note 26, §§ 4A1.1 - 4B1.4. See also SPECIAL REPORT, *supra* note 163, at 24 ("Because a defendant's prior record is relevant to such important sentencing goals as general deterrence . . . [and] just punishment, . . . the guidelines evaluate criminal history with some care and complexity.").

198. See *supra* text accompanying notes 127-31.

199. See *supra* text accompanying note 107.

200. See SENTENCING GUIDELINES, *supra* note 26, § 2D1.1.

201. *Id.*

202. See *supra* text accompanying note 108.

before the court to the value of the property seized in other jurisdictions for the same or similar conduct.

For example, the federal government seizure of a \$5,000 car for the commission of a Level 6 federal drug offense could be compared to a state government seizure of a \$10,000 car for the commission of the same general offense, the sale of less than 250 grams of marijuana. If the state judiciary had found that the \$10,000 seizure was not excessive, the federal court could consider this decision when ruling on the constitutionality of the \$5,000 seizure.

In *United States v. 38 Whalers Cove Drive*,²⁰³ the Second Circuit used the *Sentencing Guidelines* in its review of the third *Solem* prong in a civil forfeiture case.

Further, the punishments meted out by the federal government and other jurisdictions for similar crimes indicate that the forfeiture of [the offender's] condominium is not aberrational. Federal law authorizes a sentence of twenty years and a fine of \$1,000,000 for the distribution of cocaine in an amount less than 500 grams. . . . The *Sentencing Guidelines* assign a Base Offense Level of 12 to transactions involving less than 25 grams of cocaine. Depending upon criminal history, a defendant who had distributed the same amount of cocaine as [the offender] would presumptively be fined \$30,000 and receive a sentence of 10 to 37 months. The state courts in this circuit authorize punishments on a similar scale. . . . We recognize that these are merely possible sentences and are not conclusive as to what a court might do in an individual case. Nonetheless, we infer from the statutes that the imposition of the equivalent of a \$68,000 fine in this case, while large, is not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence.²⁰⁴

Again, under the *McGruder* interpretation of *Harmelin* and *Solem*, the second and third *Solem* factors only need to be reviewed if the first factor provides an inference of gross disproportionality.²⁰⁵ But these factors, particularly when used in combination with the *Sentencing Guidelines* as the *Whalers Cove* court used them, provide relatively objective criteria for federal courts to consider when deciding whether a given civil forfeiture is unconstitutionally excessive.

CONCLUSION

With *Austin*, the United States Supreme Court has made it clear that civil seizures of property are generally fines, and are therefore

203. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992).

204. *Id.* at 39.

205. See *supra* notes 127-31 and accompanying text.

subject to Eighth Amendment review. Yet, the Court did not expressly tell the lower courts how such review should be conducted. Justice Blackmun's majority opinion, however, provides insight. The opinion is based on the notion that civil forfeitures generally serve to *punish* the property owner. Accordingly, the standard for determining whether a given civil forfeiture is an Excessive Fine should be similar to the standard already used by the courts in Cruel and Unusual Punishment reviews. A civil seizure is excessive, and therefore unconstitutional, if the value of the seized property is grossly disproportionate to the property owner's culpable conduct.

When attempting to weigh the property owner's conduct against the dollar value of the seized property, courts should use objective criteria as much as possible. In the federal arena, the judiciary can use the *Federal Sentencing Guidelines* as an analytical tool to place an approximate value or weight on the property owner's culpable conduct. This "value" can then be more readily compared to the value of the seized property. Thus, although the *Sentencing Guidelines* were originally designed and implemented for use in the *criminal* law, they can be of assistance to federal courts conducting Eighth Amendment review of *civil* forfeitures in the wake of *Austin v. United States*.