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## Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture after *Austin v. United States*

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## Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture after Austin v. United States

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# Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After *Austin v. United States*\*

BY SARAH N. WELLING\*\*  
AND MEDRITH LEE HAGER\*\*\*

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#### INTRODUCTION

In 1971, agents of the federal government seized a \$20,000 yacht after finding a small quantity of marijuana on board.<sup>1</sup> Ten years later

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<sup>1</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665-67 (1974) (holding that seizure did not deny due process regardless of lack of pre-seizure notice and hearing).

government agents confiscated a twenty-eight foot boat that held drugs consisting of one marijuana twig and two marijuana leaves.<sup>2</sup> Since then, the government has taken possession of a \$250,000 home because a drug transaction occurred in a car parked in the driveway<sup>3</sup> and of a smaller dwelling because the owner used the telephone inside to set up a drug deal at another location.<sup>4</sup> In another incident, local, county, state, and federal agents shot and killed the owner of a Malibu, California ranch during a raid on the property.<sup>5</sup> The government excused its actions on the mistaken assumption that the owner had grown marijuana on the land, but the Ventura County District Attorney's office concluded that "the Los Angeles County Sheriff's Department was motivated, at least in part, by a desire to seize and forfeit the ranch for the government."<sup>6</sup> Actions like these, even when they involve citizens who cannot be characterized as completely innocent, have fueled recent criticism of civil forfeiture statutes.

The statistical evidence of forfeiture actions supports the anecdotal evidence of aggressive enforcement. Since 1984, government agencies have executed more than 200,000 forfeiture actions.<sup>7</sup> The value of these forfeitures has increased each year, with the federal government seizing cash and property with a total value of \$580 million in 1989, compared with \$207 million in 1988 and \$94 million in 1986.<sup>8</sup> By most estimates, forfeitures have added over \$1 billion to state and federal budgets since the mid-1980s.<sup>9</sup> The Department of Justice asset-sharing program split

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<sup>2</sup> *United States v. One 1982 28' Int'l Vessel*, 741 F.2d 1319, 1320 (11th Cir. 1984) (affirming that forfeiture was appropriate notwithstanding the small quantity of marijuana found).

<sup>3</sup> *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1557 (11th Cir. 1991) (holding that Congress expressly contemplated forfeiture of the whole tract of property based on drug activity on a portion of the tract).

<sup>4</sup> *United States v. 916 Douglas Ave.*, 903 F.2d 490, 491 (7th Cir. 1990) (holding that there was a "substantial connection" between the house and the homeowner's drug activities), *cert. denied*, 498 U.S. 1126 (1991).

<sup>5</sup> David Heilbroner, *The Law Goes On a Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine), at 70.

<sup>6</sup> *Id.* (quoting a report of the Ventura County District Attorney's Office).

<sup>7</sup> See Heilbroner, *supra* note 5 (declaring that such forfeiture actions have netted \$3.6 billion in assets).

<sup>8</sup> Joy Chatman, *Losing the Battle, but Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After Austin v. United States*, 38 ST. LOUIS U. L.J. 739, 747 (1994).

<sup>9</sup> See Heilbroner, *supra* note 5 (estimating \$3.6 billion with \$1.7 billion still "in the pipeline"); Charles Oliver, *A Forfeiture of Civil Liberties?*, INVESTOR'S BUS. DAILY, Mar. 7, 1995, at A1 (estimating a total of \$3.2 billion).

approximately \$826 million in cash and property in one five-year period.<sup>10</sup>

The government generated these resources with relatively little effort. In more than eighty percent of civil forfeiture cases, neither the state nor the federal government ever charges the potential claimant with a crime,<sup>11</sup> and because indigent property owners, unlike indigent defendants, do not receive court-appointed attorneys, many feel that they cannot afford to reclaim the property.<sup>12</sup> Under ever-increasing budget constraints, "[l]aw enforcement on the federal, state and local levels became increasingly dependent on the much-needed revenue generated under these statutes."<sup>13</sup> Yet as agencies increased their dependence on forfeiture, well-publicized confiscations focused attention on these actions and led to calls for reform.<sup>14</sup>

As the use of forfeiture increased, even government officials began to recognize the possibility of mixed priorities in the forfeiture programs.<sup>15</sup> After the Malibu, California ranch seizure, California redrafted its forfeiture laws to require a criminal conviction.<sup>16</sup> Legislators in the state of Washington have also considered various proposals to control enforcement of forfeiture laws, such as setting a seizure minimum to confine the use of the law to property connected with major drug dealers.<sup>17</sup> On the federal level, Representative Henry Hyde, a Republican from Illinois, and Representative John Coyners, Jr., a Democrat from

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<sup>10</sup> Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure, 59 Fed. Reg. 44,701, 44,703 n.6 (1994) (sharing over \$736 million in cash and \$90 million in property with state and local agencies).

<sup>11</sup> Oliver, *supra* note 9 (stating that with civil forfeiture, the government can seize property allegedly used in a crime without engaging in a criminal prosecution).

<sup>12</sup> See William Chesire, *How the Government, State and Federal, Ignores the Bill of Rights*, ARIZ. REPUB., Feb. 16, 1995, at B6 (stating that, in many states, to contest seizure of assets, claimants must post a cash bond of 10% within 10 days or they forfeit the seized property).

<sup>13</sup> Chatman, *supra* note 8, at 739.

<sup>14</sup> *Id.* at 740 (citing high profile reports of abuse of civil forfeiture as the reason for reform).

<sup>15</sup> See John H. Hingson III, *A Cry for Reform; Revamping the Government's Power to Seize*, CONN. L. TRIB. May 16, 1994, at 25 (quoting the former director of the Department of Justice's Asset Forfeiture Office, Michael Zeldin: "We had a situation in which the desire to deposit money into the asset-forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law-enforcement objectives.").

<sup>16</sup> See Heilbroner, *supra* note 5.

<sup>17</sup> Russell Carrollo & Dean Marchionni, *State Drug Forfeiture Law Faces Review, Changes*, NEWS TRIB., July 22, 1994, at A1 (proposing a minimum seizure of \$5000).

Michigan, each proposed legislation designed to limit forfeiture abuses, although a review proposed by Attorney General Janet Reno preempted their efforts.<sup>18</sup> Similarly, the Administrative Conference of the United States attempted to address what it considered a “fundamental issue about the fairness and effectiveness of the entire administrative civil seizure/forfeiture process,” by recommending the establishment of a Central Forfeiture Registry and time limits to provide better notice to claimants — a considerably watered-down version of the original proposal.<sup>19</sup>

Initially, legal arguments for reform met with little success. Courts felt unable to control law enforcement agencies, given the permissive language of the statutes and the presumed inapplicability of most constitutional protections in the civil context. By 1993, only one circuit court had declared that forfeitures could sometimes rise to such a level as to violate the Eighth Amendment.<sup>20</sup> Other circuits expressed dissatisfaction with the law but apparently felt bound to allow all seizures in which the government had met the statutory requirements.<sup>21</sup> In *Austin v. United States*, the Supreme Court reversed this trend by unanimously holding that the lower courts could overturn civil forfeitures on the grounds that they constituted constitutionally excessive fines, and by directing the inferior courts to establish a test for excessiveness.<sup>22</sup>

This Article surveys the approaches taken by courts in fashioning a test to satisfy *Austin*. It begins with a brief overview of the applicability of the Eighth Amendment in general, especially the Excessive Fines Clause,<sup>23</sup> and a review of the reasoning which led the Supreme Court to apply the Eighth Amendment to civil forfeiture cases.<sup>24</sup> This Article then examines the scope of the *Austin* decision, including the difficult question

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<sup>18</sup> See Hingson, *supra* note 15 (discussing how the Department of Justice’s proposals backed off from the stance taken by the two bills).

<sup>19</sup> See Adoption of Recommendations and Statement Regarding Administrative Practice and Procedure, 59 Fed. Reg. 44,701, (1994) (recommending such measures to provide “better and more reliable” notice to property owners).

<sup>20</sup> *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1991) (agreeing with appellant that the Eighth Amendment attaches when an individual is subject to civil sanctions classified as punitive), *cert. denied*, 113 S. Ct. 55 (1992).

<sup>21</sup> See, e.g., *United States v. 508 Depot St.*, 964 F.2d 814, 816-17 (8th Cir. 1992) (“[W]e believe that the principle of proportionality is a deeply rooted concept in the common law . . . and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue . . .”).

<sup>22</sup> 113 S. Ct. 2801, 2812 (1993).

<sup>23</sup> See *infra* notes 29-40 and accompanying text.

<sup>24</sup> See *infra* notes 41-57 and accompanying text.

of its applicability to proceeds of criminal activity.<sup>25</sup> It also discusses the emerging issue concerning the ability of the courts to mitigate the severity of forfeitures.<sup>26</sup> The main body of the paper reviews the two primary tests for excessiveness which have emerged from the lower courts<sup>27</sup> and endorses a test based on a combination of the two as best comporting with the requirements of the Excessive Fines Clause of the Eighth Amendment.<sup>28</sup>

## I. THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

Until *Austin* was decided, the Excessive Fines Clause of the Eighth Amendment lived mainly in the shadow of the Cruel and Unusual Punishments Clause.<sup>29</sup> Instead of distinguishing between the clauses, courts had often treated the two as part of a unified attempt by the drafters of the Constitution to restrain the government's prosecutorial power.<sup>30</sup> After *Austin*, this view is untenable. The Supreme Court has indicated that the two clauses should be interpreted separately, apparently limiting the application of the Cruel and Unusual Punishments Clause to cases concerning the "duration and conditions of confinement" and other restrictions on liberty more substantial than the payment of fines.<sup>31</sup> While the standards developed under the many cases applying the Cruel and Unusual Punishments Clause may be relevant in Excessive Fines Clause analysis, they are not binding precedent for cases decided under *Austin*.<sup>32</sup>

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<sup>25</sup> See *infra* notes 58-104 and accompanying text.

<sup>26</sup> See *infra* notes 266-98 and accompanying text.

<sup>27</sup> See *infra* notes 105-265 and accompanying text.

<sup>28</sup> See *infra* notes 299-317 and accompanying text.

<sup>29</sup> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>30</sup> See Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1234 (1987). The Excessive Fines Clause has its origin in the Virginia Declaration of Rights, which mirrors the English Bill of Rights of 1689. Massey argues that the English Bill applied to a wide range of civil and criminal fines. *Id.*

<sup>31</sup> *Alexander v. United States*, 113 S. Ct. 2766, 2775 (1993) (stating that the Cruel and Unusual Punishments Clause applies only to confinement conditions and not to criminal forfeiture).

<sup>32</sup> See *Solem v. Helm*, 463 U.S. 277, 292 (1983) (gauging the proportionality of the punishment to the crime by balancing "(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"); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (rejecting application of the



Unlike the Cruel and Unusual Punishments Clause, the Excessive Fines Clause of the Eighth Amendment has, until recently, received virtually no attention from the courts. The Supreme Court did not decide a case on the Excessive Fines Clause until 1989.<sup>33</sup> At that time, in *Browning-Ferris Industries v. Kelco Disposal*, it acknowledged the historical understanding that the entire Eighth Amendment applied "primarily, and perhaps exclusively," to exercises of the government's prosecutorial power.<sup>34</sup> Thus, an award of punitive damages in a civil suit between purely private parties did not trigger the application of the Cruel and Unusual Punishments Clause.<sup>35</sup> Many courts read this decision as restricting the application of the Excessive Fines Clause to criminal proceedings, and accordingly they rejected any defense to civil forfeitures based on Eighth Amendment violations.<sup>36</sup> The Second Circuit, however, saw the civil forfeiture in some cases as a sufficiently punitive exercise of government power.<sup>37</sup> Therefore, the circuit courts split over whether the Excessive Fines Clause applied to any actions other than criminal prosecutions.<sup>38</sup>

The decision in *Austin* answered this question, holding that the Eighth Amendment limits any government action which imposes a punishment, regardless of whether the action is characterized as criminal or civil.<sup>39</sup>

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Cruel and Unusual Punishments Clause standard developed in *Solem v. Helm* in cases implicating the Excessive Fines Clause), *cert. denied*, 115 S. Ct. 1792 (1995); *Hill v. State*, 868 F. Supp. 221, 225 (M.D. Tenn. 1994) (using *Solem*); *United States v. Shelly's Riverside Heights*, 851 F. Supp. 633, 637 (M.D. Pa. 1994) (using *Solem* as a guide); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (rejecting *Solem*); see also *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 263 n.3 (1989) (stating that although the insights are instructive, the Cruel and Unusual Punishments Clause is not controlling).

<sup>33</sup> See *Browning-Ferris*, 492 U.S. 257.

<sup>34</sup> *Id.* at 262.

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., *United States v. Plot 20, Lot 17*, 960 F.2d 200, 206 (1st Cir. 1992) (holding that the Eighth Amendment does not apply to civil forfeiture); *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 727 (7th Cir. 1991) (stating that civil forfeiture is remedial in nature).

<sup>37</sup> See *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35 (2d Cir. 1991) ("Forfeitures that are overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures are shown to serve articulated, legitimate civil purposes."), *cert. denied*, 113 S. Ct. 55 (1992).

<sup>38</sup> The courts have always assumed that the Excessive Fines Clause applies to criminal cases. See *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 974 n.9 (S.D. Fla. 1994) (reasoning that standards which had once only been applied to criminal forfeitures could now apply to civil forfeitures).

<sup>39</sup> *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993).

The Cruel and Unusual Punishments Clause represents a separate branch of analysis, perhaps limited to cases involving confinement or similar conditions, and the Excessive Fines Clause has assumed new importance, with the threshold question of applicability resting on the distinction between the punitive or remedial nature of the fine, not the civil or criminal nature of government action.<sup>40</sup>

## II. THE DECISION IN *AUSTIN V. UNITED STATES*

The Supreme Court breathed life into the Excessive Fines Clause with its decision in *Austin v. United States*.<sup>41</sup> In 1990, Richard L. Austin met Keith Engebretson at an automobile body shop owned by Austin and agreed to sell him some cocaine. Austin left the body shop and went to his adjacent mobile home, returning with two grams of cocaine which he sold to Engebretson.<sup>42</sup> The South Dakota State Police raided the property the next day and uncovered small amounts of marijuana and cocaine, a twenty-two caliber revolver, drug paraphernalia, and \$4700 in cash. Austin eventually pled guilty to one count of possession of cocaine.<sup>43</sup>

After Austin's indictment, the United States filed a civil forfeiture action against the body shop and mobile home. Austin answered the complaint, arguing that the forfeiture would violate the Eighth Amendment, but the district court granted summary judgment for the United States.<sup>44</sup> The Court of Appeals for the Eighth Circuit "reluctantly agree[d] with the government" and affirmed.<sup>45</sup> The Supreme Court granted certiorari to resolve the conflict among the circuit courts over the applicability of the Eighth Amendment to civil forfeiture.<sup>46</sup>

The Supreme Court agreed with Austin. The Court first pointed out that nothing in the text or history of the Eighth Amendment or the Excessive Fines Clause confines the application of the clause to criminal cases.<sup>47</sup> Rather, the history of the amendment suggests that the drafters

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<sup>40</sup> David Lieber, *Eighth Amendment — the Excessive Fines Clause*; *Austin v. United States*, 113 S. Ct. 2801 (1993), 84 J. CRIM. L. 805, 814 (1994) (comparing the inclusion of civil and criminal forfeitures in the Eighth Amendment to specific limitations to the criminal context in the Fifth and Sixth Amendments).

<sup>41</sup> 113 S. Ct. 2801 (1993).

<sup>42</sup> *Id.* at 2803.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992).

<sup>46</sup> *Austin*, 113 S. Ct. at 2804.

<sup>47</sup> *Id.* at 2804-05 (stating that although some provisions have specific limitations, the

intended it to limit "the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'"<sup>48</sup> The definition of punishment does not depend on the classification of an action as criminal or civil, and any punishment falls within the limits of the Excessive Fines Clause. If the Court found that a civil forfeiture served in part to deter and to punish, rather than having a purely remedial purpose, then the Eighth Amendment would apply.<sup>49</sup>

To make its determination, the Court reviewed the historical development of civil forfeiture in England and in the United States. It stated that the understanding of forfeiture found in early cases and the early writings of Congress equated forfeitures with fines and viewed both as punishment.<sup>50</sup> Nothing in the history of the modern statute in question, 21 U.S.C. § 881(a)(4) and (7), contradicted this historical understanding of forfeiture as punishment.<sup>51</sup> In fact, the presence of express "innocent owner" defense provisions that allowed owners who did not know of or consent to the illegal use of their property to retain possession made the modern statutes more closely resemble punishment, as did the decision by Congress to tie the forfeiture directly to certain crimes. Therefore, this section serves at least in part to punish the owner of the property, and the Excessive Fines Clause applies.<sup>52</sup>

Having reached this conclusion, the Court declined to establish a test for determining what qualifies as a constitutionally excessive forfeiture, believing that "[p]rudence dictates that we allow the lower courts to consider that question in the first instance."<sup>53</sup> Justice Scalia concurred in the judgment but had no such reservations about articulating a constitutional standard. In his opinion, "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 standard, 'guilty' and hence forfeitable?"<sup>54</sup> Unlike statutes imposing criminal fines, forfeiture statutes have traditionally determined the appropriate value of the penalty by reference to what property the criminal activity has "tainted."<sup>55</sup> Therefore, the value of the seized

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Eighth Amendment does not).

<sup>48</sup> *Id.* at 2805 (quoting *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 265 (1989)).

<sup>49</sup> *Id.* at 2806.

<sup>50</sup> *Id.* at 2807.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2812.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2815 (Scalia, J., concurring).

<sup>55</sup> *Id.* (Scalia, J., concurring).

property has no relevance, and the inquiry must focus on whether the seized property has a close enough relationship to the underlying offense.<sup>56</sup> The majority did not reject the use of this factor but refused to adopt it as the sole relevant criterion, leaving the lower courts to make the first attempt at defining excessiveness in the forfeiture context.<sup>57</sup>

### III. THE SCOPE OF THE *AUSTIN* DECISION

#### A. *To What Statutes Does Austin Apply?*

As the *Austin* decision suggests, current Eighth Amendment analysis seems to have moved beyond traditional civil/criminal distinctions to one or more new sets of classifications. After *Austin*, the difference between punitive and non-punitive forfeitures, rather than between civil and criminal ones, defines the scope of the excessiveness inquiry. *Austin* almost certainly has implications for a broad range of civil actions,<sup>58</sup> and its relevance to a given claim will ultimately depend on the punitive or remedial nature of the statute in issue.<sup>59</sup> The punitive or remedial nature of the statute depends in turn on the type of property it authorizes for forfeiture. Below, the Article examines the various categories of forfeitable property to determine whether *Austin* applies to them.

#### 1. *Facilitating Property*

*Austin* expressly applied the Excessive Fines Clause to 21 U.S.C. § 881(a)(4) and (7), which authorize the forfeiture of vehicles and real property used to facilitate the commission of a drug offense.<sup>60</sup> The

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<sup>56</sup> *Id.* (Scalia, J., concurring).

<sup>57</sup> *Id.* at 2812 n.15.

<sup>58</sup> One court has stated that "*Austin* does not directly or impliedly suggest that either its holding or statements to the effect that a forfeiture can be an excessive fine under the Eighth Amendment are or should be applicable to any actions other than forfeitures under [those statutory sections specifically mentioned by *Austin*]." See *McNichols v. Commissioner*, 13 F.3d 432, 434 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 2705 (1994). This surprising statement was made without support and is probably limited in its application to tax cases.

<sup>59</sup> See *infra* note 63 and accompanying text.

<sup>60</sup> 21 U.S.C. § 881(a) (1988) provides that the following can be forfeited:

(4) All 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] . . .

Supreme Court reached this conclusion after examining the historical role of the Excessive Fines Clause as a restraint on the government's prosecutorial power and the historical role of forfeiture in this country and England, and decided that these sections of § 881 served at least in part to punish and deter the underlying criminal behavior.<sup>61</sup> Therefore, all actions brought under these two sections must undergo Excessive Fines Clause scrutiny. Furthermore, it seems that the same analysis would apply to any forfeiture statute with similar provisions and legislative purpose. Thus, courts have held that the excessiveness test applicable to § 881 applies, as well, to those sections of 18 U.S.C. § 981 which deal with property used to facilitate currency offenses.<sup>62</sup> At least one court has stated that *Austin* will apply to all punitive forfeitures, without regard to the specific nature of the underlying crime or the methods used to accomplish the forfeiture.<sup>63</sup> Because the facilitating property does not necessarily represent the profits derived from criminal activity and does not, in and of itself, present a threat to society, a seizure of facilitating property has the potential for excessiveness.<sup>64</sup> Therefore, the courts agree that the Constitution requires that such forfeitures be limited to the amount necessary to achieve legitimate punitive and remedial goals.<sup>65</sup>

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

<sup>61</sup> *Austin*, 113 S. Ct. at 2804-08, 2810.

<sup>62</sup> See *United States v. Taylor*, 13 F.3d 786, 790 (4th Cir. 1994) (holding *Austin* applicable to a forfeiture of funds under 18 U.S.C. § 981 (1988) and to a forfeiture of illegal gambling paraphernalia under 18 U.S.C. § 1955 (1988)).

<sup>63</sup> See *Quinones-Ruiz v. United States*, 873 F. Supp. 359, 363 (S.D. Cal. 1995) (applying *Austin* to an administrative forfeiture of currency and stating that *Austin* "held that punitive forfeitures are subject to the Excessive Fines Clause"). State forfeiture statutes modeled after their federal counterparts and in court on 42 U.S.C. § 1983 (1988) claims must also pass muster under the Excessive Fines Clause because, in all probability, the state's seizure of property used to facilitate the commission of a crime also serves to punish and deter. See *Hill v. State*, 868 F. Supp. 221, 224-25 (M.D. Tenn. 1994) (applying *Austin* to a state statute modeled after 21 U.S.C. § 881).

<sup>64</sup> "A forfeiture [of property which facilitates a crime] may incapacitate the owner who permits the illegal use, but hardly rids society of a noxious instrumentality." *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 180 (E.D.N.Y. 1990), *aff'd*, 954 F.2d 29 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 55 (1992).

<sup>65</sup> See, e.g., *United States v. Toyfoya*, No. CR-93-0505 EFL, 1994 U.S. Dist. LEXIS 12266, at \*17-18 (N.D. Cal. Aug. 29, 1994) (discussing court's duty to tailor forfeiture to bring it within constitutional bounds).

## 2. *Contraband*

The lower courts have adopted a similarly uniform approach to the seizure of contraband but have reached the opposite conclusion. Courts have consistently declined to apply the Excessive Fines Clause to such forfeitures because the goal of removing the offending material from circulation fully explains the forfeiture and provides the statute with a purely remedial, as opposed to punitive, purpose.<sup>66</sup> This logic applies as well to a forfeiture of "derivative contraband" or property essential to the commission of the underlying offense.<sup>67</sup> When the government removes, for example, the scales used to measure drugs or the lab equipment used to manufacture them, it does so because such property creates a danger to society. No matter what the value of this property, its seizure serves a purely remedial purpose because it prevents future violations. Therefore, *Austin* does not apply.

## 3. *Proceeds of Criminal Activity*

*Austin's* applicability to a third type of property, the proceeds of criminal activity, presents a more difficult question. While not contraband itself, the property does represent the gain derived from criminal activities. Its removal provides means whereby the government may reduce the incentives for crime. Yet one could say the same of most punishments. And the fact that § 881(a)(6), which provides for the forfeiture of drug proceeds, also reaches other types of property, including property intended for use in a crime, has complicated the courts' approach to the problem.

### a. *Courts Which Refuse to Apply Austin to Proceeds*

The Fifth Circuit first adopted the position that § 881(a)(6) presented a question different than that posed by the other subsections in a case

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<sup>66</sup> See *United States v. Two A-37 Cessna Jets*, No. 90-CV-0852E, 1994 U.S. Dist. LEXIS 5620, at \*8-9 (W.D.N.Y. Apr. 19, 1994) (forfeiting jets used to illegally import firearms); *United States v. Proceeds from Approx. 15,1538 (sic) Lobster Tails*, 834 F. Supp. 385, 391 (S.D. Fla. 1993) (applying *Austin* to illegally imported contraband); see also *United States v. Austin*, 113 S. Ct. 2801, 2811 (1993); *infra* notes 68-76 and accompanying text.

<sup>67</sup> In an unpublished opinion, the Ninth Circuit distinguished the FCC's seizure of illegal broadcasting equipment because "although unlike the assets seized in *Austin*, the equipment was the instrumentality of the misbehavior, and its seizure prevented future violations." *United States v. Reveille*, No. 93-55433, 1994 U.S. App. LEXIS 7179, at \*9 (9th Cir. Apr. 5, 1994); see also *Cooper v. Greenwood*, 904 F.2d 302, 304-05 (5th Cir. 1990) (defining derivative contraband).

dealing with a double jeopardy claim.<sup>68</sup> Relying on the Supreme Court case of *United States v. Halper*,<sup>69</sup> the court felt bound to classify the forfeiture, whether civil or criminal, as punishment only if the forfeiture proved so great that it “bore no rational relationship to the costs incurred by the government and society resulting from the defendant’s criminal conduct.”<sup>70</sup> By comparing the value of the proceeds of the illegal drug sales forfeited in the case to the costs of “detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combatting the allure of illegal drugs, caring for the victims of the criminal trade when preventive efforts prove unsuccessful, [and] lost productivity,” the court concluded that forfeitures of proceeds under § 881(a)(6) “[serve] the wholly remedial purpose of reimbursing the government.”<sup>71</sup> The court went on to contrast this subsection with the other subsections of 881:

Unlike the real estate forfeiture statute that can result in the confiscation of the most modest mobile home or the stateliest mansion, the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold. The more drugs sold, the more proceeds that will be forfeited. As we have held, these proceeds are roughly proportional to the harm inflicted upon the government and society by the drug sale. Thus the logic of *Austin* is inapplicable to § 881(a)(6) – the forfeiture of drug proceeds.<sup>72</sup>

Even without the *Halper* rational relation test, the court felt that the confiscation of proceeds could not require *Austin* analysis. Since the forfeiture in this case takes away property derived from unlawful activities, “the forfeiting party loses nothing to which the law ever entitled him.”<sup>73</sup> The court compared the seizure of the drug proceeds to the repossession of money stolen from a bank. Since the claimant had not invested “honest labor” in producing the proceeds, she had no reasonable

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<sup>68</sup> *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir.) (forfeiting proceeds from illegal drug sales), *cert. denied*, 115 S. Ct. 574 (1994). According to *United States v. \$405,089.23 in United States Currency*, 33 F.3d 1210, 1219 n.8 (9th Cir. 1994), the answer to “whether a particular forfeiture constitutes punishment will always be the same for purposes of the Double Jeopardy Clause and the Eighth Amendment.”

<sup>69</sup> 490 U.S. 435 (1989).

<sup>70</sup> *Tilley*, 18 F.3d at 298-99 (citing *Halper*, 490 U.S. at 448-49).

<sup>71</sup> *Id.* at 299.

<sup>72</sup> *Id.* at 300.

<sup>73</sup> *Id.*

expectation that the law would protect her continued possession. Therefore, "instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme."<sup>74</sup> Since this does not constitute punishment, this case did not implicate the Double Jeopardy Clause, and by analogy, the Eighth Amendment did not apply.<sup>75</sup> The Fifth Circuit clearly only addressed true proceeds in its arguments, and the opinion did not indicate how the court would treat the other types of property which § 881(a)(6) covers.<sup>76</sup>

*b. Courts Which Apply Austin to Proceeds*

Other courts have rejected these arguments and concluded that the Excessive Fines Clause does apply to all of § 881(a)(6). The Ninth Circuit, in another case based on double jeopardy issues, expressly rejected the Fifth Circuit's reasoning as misapplying the standard enunciated in *Austin*.<sup>77</sup> According to the court, "[i]n order to determine whether a forfeiture constitutes 'punishment' we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit."<sup>78</sup> For three reasons derived from *Austin*, the court concluded that forfeitures under § 881(a)(6) and § 981(a)(1)(A) could qualify as punishment:

First because of "the historical understanding of forfeiture as punishment," there is a strong presumption that any forfeiture statute does not serve solely a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> In fact, the court read § 881(a)(6) as reaching all funds "involved in a narcotics transaction in some fashion." *\$405,089.23*, 33 F.3d at 1221. This view clearly comports with the language of the section, which provides for the forfeiture of

all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments and securities used or intended to be used to facilitate a violation of this title . . . .

<sup>77</sup> *Id.* at 1220.

<sup>78</sup> *Id.* (citation omitted).



owners or lien holders, it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.<sup>79</sup>

Furthermore, the court examined the language of 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) and found them to extend beyond just property derived from criminal activity.<sup>80</sup> Therefore, under the courts' analysis, the statutes did provide for punishment, and the Double Jeopardy Clause operated to bar the separate forfeiture action.

Similarly, the Northern District Court of Illinois opined that "the critical question is whether forfeitures under § 881(a)(6) can be defined as solely remedial."<sup>81</sup> Because it read forfeitures under § 881(a)(6) as stretching beyond merely the proceeds of illegal activity, the court felt that the section did not serve a purely remedial purpose.<sup>82</sup> A forfeiture of money the owner intends to use to purchase drugs or property to facilitate a drug offense will, in the court's view, serve in part to punish the owner. Such a forfeiture thus falls under the protection of *Austin* and the Excessive Fines Clause. However, after examining the forfeiture in question, the court concluded that it did not violate the Eighth Amendment as it did not qualify as grossly disproportionate.<sup>83</sup>

The courts all seem to acknowledge that the application of *Austin* depends on the punitive nature of the statute, but while some turn to the purpose of the statute or the section as a whole to make their evaluation, others focus on the specific character of the property involved. In large part, the dilemma could be solved by applying *Austin* and the Excessive Fines Clause to the statutes in their entirety. While this approach would provide constitutional protection to all the property described by the statutes, courts could easily conclude that the seizure of criminally

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<sup>79</sup> *Id.* at 1221.

<sup>80</sup> See *supra* note 76 (providing relevant portions of 21 U.S.C. § 881(a)(6)). 18 U.S.C. § 981(a)(1)(A) provides for forfeiture of property as a result of a racketeering conviction.

<sup>81</sup> *United States v. 4204 Thorndale Ave.*, No. 92C-3744, 1994 U.S. Dist. LEXIS 17415, at \*27 (N.D. Ill. Nov. 23, 1994) (condoning forfeiture of drug sale proceeds).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 29. Additionally, different panels of the Fourth Circuit have disagreed over whether the Excessive Fines Clause applies to proceeds, so the law in that circuit remains unsettled. See *United States v. Shifflet*, No. 94-5287, 1995 U.S. App. LEXIS 5949, at \*8 n.2 (4th Cir. Mar. 23, 1995) (discussing which of several conflicting decisions to follow in a case where a man's truck is forfeited due to his son's drug dealing).

derived property or proceeds did not violate their chosen excessiveness test. Because proceeds represent the fruit of illegal activity, the property and the crime share a strong nexus. Furthermore, since greater amounts of proceeds almost necessarily result from greater amounts of criminal activity, rough proportionality will always exist. This approach avoids an unduly narrow reading of the sections, allowing courts to continue to characterize the entire statutes as punitive and removing the need to resort to comparison with the societal costs of illegal drug activity and other crimes to justify the remedial label.<sup>84</sup> As more courts address the issue, a consensus may emerge around this or another approach. However, two circuits have already disagreed, making this one of the more clearly defined areas of controversy under *Austin*. Given the government's expressed intention to concentrate its forfeiture strategy on proceeds, which it views as exempt from constitutional review,<sup>85</sup> this is one of the most important issues.

*B. Does the Criminal/Civil Distinction Matter?*

As these cases illustrate, the distinction between criminal and civil forfeiture appears less important for Eighth Amendment analysis than the distinction between punitive and remedial purposes.<sup>86</sup> Few cases have discussed the remaining significance, if any, of the criminal/civil distinction, and the Supreme Court has provided little guidance in this area. In *Alexander v. United States*, decided at the same time as *Austin*, the Court held that the Excessive Fines Clause limits criminal forfeiture under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),<sup>87</sup> just as it does civil forfeitures.<sup>88</sup> The Court did not elaborate on the standards to apply and referred instead to *Austin* and its express refusal to formulate a test for excessiveness.<sup>89</sup> This position left the lower courts to decide whether to apply the same excessiveness test to both criminal and civil forfeitures or to develop two separate definitions.

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<sup>84</sup> See *Forfeiture Manual Signals Help for Victims*, 3 No. 11 DOJ ALERT (Sept. 6-20, 1993) (indicating that the Department of Justice will argue that forfeitures serve the remedial purpose of reimbursing society for the costs of detecting and preventing criminal activity).

<sup>85</sup> *Id.*

<sup>86</sup> See, e.g., *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578, at \*6 (9th Cir. July 12, 1995) (noting the reduced importance of the distinction).

<sup>87</sup> 28 U.S.C. § 524 (1988).

<sup>88</sup> 113 S. Ct. 2766, 2776 (1993).

<sup>89</sup> *Id.* at 2775-76.

### 1. Courts Distinguishing Criminal and Civil

The courts which have addressed this issue directly have taken opposite approaches. In a criminal forfeiture case,<sup>90</sup> the Northern District Court of California concluded that “[d]espite *Alexander’s* reference to *Austin*, in the [c]ourt’s opinion, the analysis for criminal forfeiture differs from the proportionality determination made in civil forfeiture cases.”<sup>91</sup> The court apparently relied on Justice Scalia’s statement in *Austin* that while the legitimacy of civil forfeitures should depend on the nexus between the property and the crime, rather than its value, “in the case of monetary fines and criminal in personam forfeitures ‘the touchstone is the value of the fine in relation to the offense.’”<sup>92</sup> The court then went on to adopt a proportionality test derived from the factors enunciated in *Solem v. Helm*,<sup>93</sup> a Cruel and Unusual Punishments Clause case. As the court acknowledged,<sup>94</sup> other circuits have applied the *Solem* factors in the same manner to civil forfeitures,<sup>95</sup> but the *Toyfoya* court apparently felt bound to adopt the Scalia test in the civil arena, while fashioning a more value-based test for criminal cases.

The Fourth Circuit also decided that the determination of excessiveness should differ based on the nature of the case and distinguished its earlier adoption of an instrumentality test as applying only to civil forfeitures.<sup>96</sup> It viewed a criminal forfeiture as the functional equivalent of a fine, and “[b]ecause an in personam criminal forfeiture is a form of monetary punishment assessed against a criminal defendant for the commission of some offense, it is clear that the excessiveness inquiry should focus, at least in part, on the value of the property being forfeited,

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<sup>90</sup> 21 U.S.C. § 853 (1988) (defining criminal forfeiture).

<sup>91</sup> *United States v. Toyfoya*, No. CR-93-0505 EFL, 1994 U.S. Dist. LEXIS 12266, at \*3 (N.D. Cal. Aug. 29, 1994). This conclusion might be changed in the wake of *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578 (9th Cir. July 12, 1995), cited *supra* in note 86.

<sup>92</sup> *Id.* at \*4 (quoting *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring)).

<sup>93</sup> 463 U.S. 277 (1983) (considering the Cruel and Unusual Punishments Clause of the Eighth Amendment).

<sup>94</sup> *Toyfoya*, 1994 U.S. Dist. LEXIS 12266, at \*5-6.

<sup>95</sup> *See, e.g., United States v. Shelly’s Riverside Heights*, 851 F. Supp. 633, 637 (M.D. Pa. 1994) (holding that civil forfeiture of a log cabin and other property was excessive in relation to the seriousness of the offense of marijuana cultivation).

<sup>96</sup> *United States v. Wild*, 47 F.3d 669, 673-74 (4th Cir. 1995) (vacating criminal forfeiture of a house in a drug case and remanding the case for trial to determine whether the forfeiture was excessive under the proportionality test).

i.e., the amount of the fine."<sup>97</sup> Therefore, different considerations applied to the two types of cases.

## 2. *Courts Treating Criminal and Civil the Same*

In contrast, the Southern District Court of Indiana felt no need to make a criminal/civil distinction in a civil forfeiture case brought under § 881(a)(7). In fact, it relied on dicta in a pre-*Austin* case which noted that "if this court were to treat civil forfeitures in the same manner as criminal forfeitures [as the court feels that *Austin* mandates], then the same rules would govern both types of forfeitures,"<sup>98</sup> for guidance in formulating a test. The court then mentioned factors relevant in the criminal context and described how they could easily be adapted to fit civil cases. For instance, instead of the harm caused by the claimant's conduct, "the court might instead evaluate the harm caused by the conduct associated with the property, or the harm directly caused by the property, subject to forfeiture. Similarly, instead of evaluating the claimant's 'motive in committing the crime' the Eighth Amendment analysis would be better served if the court looked at the claimant's motive in allowing the use of his property for the alleged criminal activities. . . ."<sup>99</sup> The court did not apply this test, considering a motion to dismiss an inappropriate occasion, but simply reaffirmed its intention to treat both types of cases under the same rules.<sup>100</sup> A District Court in Florida also indicated that the two types of cases should receive similar treatment, saying that "since the Supreme Court has held that the Excessive Fines Clause of the Eighth Amendment applies to civil as well as criminal cases, the grossly disproportionate standard should likewise apply to civil cases."<sup>101</sup>

While the Indiana court felt compelled by earlier dicta to apply the same factors to criminal and civil forfeitures, common sense also supports the view that the Excessive Fines Clause analysis should be the same for both types of cases, especially given that the threshold applicability test

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<sup>97</sup> *Id.* at 674.

<sup>98</sup> *United States v. Five Acres*, No. IP-93-609-C, 1993 U.S. Dist. LEXIS 20102, at \*50 (S.D. Ind. Dec. 22, 1993) (quoting *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 728 (7th Cir. 1991)).

<sup>99</sup> *Id.* at \*51-52.

<sup>100</sup> *Id.* at \*53.

<sup>101</sup> *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 974 n.9 (S.D. Fla. 1994) (ordering forfeiture of home due to drug conviction despite Eighth Amendment and Double Jeopardy Clause challenges).

applies without regard to the civil or criminal nature of the action. While the presence of a criminal conviction may certainly weigh more or less heavily in the Excessive Fines Clause analysis, criminal forfeitures are not necessarily more amenable to standards imported from the Cruel and Unusual Punishments Clause than their civil counterparts, and criminal forfeitures present no unique problems which would require the courts to fashion two entirely separate tests for the application of one clause. Actually, many tests applied in civil cases expressly acknowledge the possible presence of a criminal conviction and allow for that in their balance of factors.<sup>102</sup> This sort of accommodation seems more apt to encourage clarity and uniformity instead of allowing two separate lines of cases to develop under the one clause.

### C. *Retroactivity*

Finally, the courts have yet to settle the extent of *Austin's* retroactive applicability. In an unpublished opinion, the Ninth Circuit has expressly held *Austin* applicable to "cases not yet final on June 28, 1993."<sup>103</sup> In so doing, it relied on a number of opinions which had seemed to indicate a willingness to go at least this far in applying the decision retroactively but had never reached the precise question. For instance, the Third Circuit did not reach the question of whether *Austin* applied to cases not yet final at the time that the Supreme Court reached its decision, but it noted a "trend in that direction."<sup>104</sup>

## IV. TESTS FOR EXCESSIVENESS

### A. *Introduction*

When it declined to establish a "multi-factor test for determining whether a forfeiture is constitutionally 'excessive,'"<sup>105</sup> the Supreme Court guaranteed that it would have a wide variety of options from which to select when it finally chooses to revisit the issue. Because only one

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<sup>102</sup> See W.E. Shipley, Annotation, *Conviction or Acquittal as Evidence of the Facts on Which It Was Based in Civil Action*, 18 A.L.R.2D 1287, 1299-1307 (1951).

<sup>103</sup> *United States v. 25445 Via Dona Christa*, No. 93-55797, 1994 U.S. App. LEXIS 35465, at \*2 (9th Cir. Dec. 9, 1994) (ordering forfeiture of home where narcotics and paraphernalia were sold).

<sup>104</sup> *United States v. Rural Route No. 1, Box 224*, 14 F.3d 864, 873 n.9 (3d Cir. 1994) (allowing civil forfeiture of real property used to facilitate the distribution of cocaine).

<sup>105</sup> *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993).

circuit had applied the Eighth Amendment to civil forfeitures prior to *Austin*,<sup>106</sup> most courts started from scratch and designed a test drawn from a wide variety of sources. Occasionally, circuits remanded cases to the district courts with only the broadest guidelines as to the test the lower courts should use;<sup>107</sup> many circuits considered a number of different tests before settling on a relatively stable formulation.<sup>108</sup> After the field cleared, two contenders emerged. A number of courts relied heavily on Justice Scalia's concurring opinion in *Austin* and adopted an "instrumentality" test, so named because it focuses on the use of the property in the commission of the illegal act and suggests a return to the guilty property fiction upon which courts had historically rested their forfeiture decisions. Under this test, if the property in question has a sufficient connection to the crime so as to render it guilty by traditional standards, then the forfeiture does not violate the Excessive Fines Clause. If only a fortuitous or incidental connection exists between the property and the underlying crime, then the forfeiture cannot stand. A number of courts have adopted either a pure version of this test, or a version which considers other factors but strongly emphasizes instrumentality analysis.

Perhaps an equal number of courts have rejected the Scalia approach, turning instead to a footnote in the majority opinion of *Austin* which indicated that the Court, while "not rull[ing] out the possibility that the connection between the property and the offense may be relevant, in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture . . . was excessive."<sup>109</sup> These courts adopted the primary alternative to the instrumentality test, which has come to be called proportionality analysis. While proportionality tests appear less uniform than their instrumentality counterparts and tend to involve many more factors, they all have as their core a comparison of

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<sup>106</sup> See *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1991) (rejecting claim that forfeiture of condominium in a drug case was a violation of Eighth Amendment), *cert. denied*, 113 S. Ct. 55 (1992).

<sup>107</sup> See *Rural Route No. 1, Box 224*, 14 F.3d at 875 (listing factors but not establishing a test).

<sup>108</sup> The Fourth Circuit decided a series of cases using a variety of tests, culminating in its adoption of the instrumentality test in *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995). See *United States v. Borroneo*, 1 F.3d 219, 221 (4th Cir. 1993) (affirming civil forfeiture of currency allegedly connected to drug activity); *United States v. Stewart*, No. 93-1642, 1994 U.S. App. LEXIS 5239, at \*10 (4th Cir. Feb. 7, 1994) (remanding forfeiture of real and personal property to determine whether a substantial connection existed between seized assets and criminal activity).

<sup>109</sup> *Austin*, 113 S. Ct. at 2812 n.15.

the severity of the forfeiture to the seriousness of the crime. Although the government has indicated that it will continue to argue that civil forfeitures under § 881 do not exceed constitutional limits unless disproportionate to the overall societal effects of the drug trade,<sup>110</sup> most courts have taken an approach that evaluates the claimant's specific behavior and looks at circumstances unique to the claimant's case, such as the extent of his criminal involvement, the type of the crime, and the claimant's financial status. In many cases, the judgment concerning the severity of the penalty depends upon the value of the property forfeited, although other factors may influence the decision. Additionally, many courts have transplanted proportionality factors found under the Cruel and Unusual Punishments Clause into the civil forfeiture cases, with varying degrees of modification.<sup>111</sup> While these courts generally do not totally disregard the connection between the property and the illegal activity, their approach differs from the instrumentality approach in that they stress the value of the property, a factor which has no significance under Scalia's instrumentality test.

A few courts have chosen to split the difference and apply both instrumentality and proportionality analyses in a two-step process.<sup>112</sup> Under this hybrid approach, neither consideration receives greater weight, and the forfeiture must pass both tests to survive constitutional analysis. Finally, at least two courts have adopted approaches which seem unique in that they adopt neither a clear instrumentality nor a clear proportionality approach, but instead impose a test derived from an entirely different source.<sup>113</sup> While interesting, these cases are notable only for their unusualness, and it is the instrumentality and the more amorphous proportionality tests which dominate excessive fines jurisprudence.

## B. *The Instrumentality Approach*

### 1. *Scalia's Concurrence – The Birth of the Test*

Unlike his colleagues in the majority, Justice Scalia did not agree that prudence dictated that the lower courts attempt to formulate a test without guidance. In his *Austin* concurrence, Scalia suggested "that the sole measure of an in rem forfeiture's excessiveness is the relationship between

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<sup>110</sup> See *Forfeiture Manual Signals Help for Victims*, *supra* note 84.

<sup>111</sup> See *infra* notes 173-204 and accompanying text.

<sup>112</sup> See *infra* notes 205-57 and accompanying text.

<sup>113</sup> See *infra* notes 258-65 and accompanying text.

the forfeited property and the offense."<sup>114</sup> He argued that while the constitutionality of monetary fines and perhaps in personam forfeitures depends upon the value of the fine in relation to the offense, statutory in rem forfeitures have not rested on an assessment of the appropriate value of the penalty but rather on what property the illicit activity had "tainted."<sup>115</sup> Justice Scalia suggested looking not at the value of the forfeited property in relation to the predicate crime, but rather to the closeness of the relationship between the two. Scalia stated:

Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal. But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense — the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. The question is not *how much* the property is worth, but *whether* the confiscated property has a close enough relationship to the offense.<sup>116</sup>

Thus, "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?"<sup>117</sup>

## 2. Courts Applying the Instrumentality Tests

### a. The Fourth Circuit

Once again, the majority in *Austin* did not discount the importance of the connection between the property and the crime but merely refused to characterize it as the sole factor. However, at least two courts have followed Scalia's lead and have adopted a "pure" instrumentality test. In *United States v. Chandler*, a case brought under § 881(a)(6) and (7), the Fourth Circuit rejected its earlier proportionality analysis in favor of a "three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility

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<sup>114</sup> *Austin*, 113 S. Ct. 2801, 2812 n.15 (1993).

<sup>115</sup> *Id.* at 2815 (Scalia, J., concurring).

<sup>116</sup> *Id.* (Scalia, J., concurring).

<sup>117</sup> *Id.* (Scalia, J., concurring).



of separating offending property that can readily be separated from the remainder."<sup>118</sup> The court adopted this approach after reviewing the congressional purpose behind the forfeiture statute. In the court's view, Congress had no intention of imposing punishment of a particular value but intended to punish the owner by seizing whatever property had been tainted by the illegal activity, regardless of value. "Accordingly, the constitutional limitation on the government's action must be applied to the degree and the extent of the taint, and not to the value of the property or the gravity of the offense."<sup>119</sup>

While concentrating on the use of the property itself, the court also acknowledged that forfeiture in reality punishes the owner. Therefore, the courts must also consider the extent of the owner's culpability when reviewing excessiveness. If the owner has only an incidental involvement in the underlying offense, then this factor will weigh in favor of excessiveness. Finally, the court noted that an otherwise excessive forfeiture could survive if the court could easily separate the offending property from the entire parcel that the government seeks to seize.<sup>120</sup> Therefore, the court must also consider its ability to mitigate forfeitures to make them conform to constitutional standards.

Perhaps because it had earlier seemed to endorse a proportionality analysis,<sup>121</sup> the Fourth Circuit went on to explain why it now rejected proportionality in the civil forfeiture context. It noted that most proportionality courts had based their decisions on a review of the three factors derived from *Solem v. Helm*:<sup>122</sup> The inherent gravity of the offense, the sentences imposed for similarly grave offenses in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions.<sup>123</sup> However, the court noted that the recent decision of *Harmelin v. Michigan*<sup>124</sup> had called the validity of *Solem* into question, with perhaps a majority of the Justices rejecting the notion that the Eighth Amendment includes a strict proportionality requirement.<sup>125</sup> Additionally, the *Solem*

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<sup>118</sup> 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

<sup>119</sup> *Id.* at 364.

<sup>120</sup> *Id.*

<sup>121</sup> See *United States v. Borromeo*, 1 F.3d 219, 221 (4th Cir. 1993) ("[T]he proportional relationship of the value of the proceeds to the harm occasioned by a defendant's criminal conduct may, in a given case, be relevant under the Supreme Court's approach in *Austin*.").

<sup>122</sup> 463 U.S. 277 (1983).

<sup>123</sup> *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (citing *Solem v. Helm*, 463 U.S. 277, 292 (1983)), *cert. denied*, 115 S. Ct. 1792 (1995).

<sup>124</sup> 501 U.S. 957 (1991).

<sup>125</sup> *Chandler*, 36 F.3d at 365.

test derives from the Cruel and Unusual Punishments Clause, not the Excessive Fines Clause, and it may not be relevant to Excessive Fines Clause analysis.<sup>126</sup>

After rejecting the proportionality principle, the court went on to apply its test to the facts. Chandler's house and thirty-three acre farm had served as the site of over 130 drug transactions, and was an important instrument of drug activity.<sup>127</sup> In fact, it had been modified to facilitate the drug operation which permeated the entire structure. Chandler himself actively participated in the drug activity.<sup>128</sup> Chandler failed to provide evidence that a court could separate the property, but as the court held forfeiture of the entire property constitutional, ability to mitigate did not influence the decision.<sup>129</sup> The court applied its multi-factor analysis and reached its decision on excessiveness without inquiry into the value of the property involved. Under this test, "[n]o one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been had the offensive conduct been carried out as intended."<sup>130</sup>

*b. The Eastern District of Wisconsin*

The Eastern District Court of Wisconsin likewise adopted a pure instrumentality test, with far less analysis or discussion in *United States v. 2828 N. 54th Street*, an action brought pursuant to § 881(a)(7).<sup>131</sup> In deciding for the government on a motion for summary judgment, the judge merely stated that he found "that the forfeiture of [the claimant's] right, title and interest in the defendant real property does not constitute an excessive fine in violation of the Eighth Amendment because he had established a substantial drug manufacturing operation at that property."<sup>132</sup> While this statement surely represents the instrumentality test, the court did not offer any rationale for its choice of standards.

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<sup>126</sup> *Id.* at 365-66.

<sup>127</sup> *Id.* at 366.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 365.

<sup>131</sup> 829 F. Supp. 1071, 1072-73 (E.D. Wis. 1993).

<sup>132</sup> *Id.* at 1073.

c. *The Middle District of Alabama*

In addition to the two courts adopting a pure instrumentality test,<sup>133</sup> a few have turned to hybrid approaches emphasizing the nexus between the property and the illicit act while also including factors found in many proportionality tests. For instance, the Middle District Court of Alabama originally adopted a pure instrumentality approach, but after an Eleventh Circuit case suggested that courts should engage in some form of proportionality review, the court applied a "two step balancing test which emphasizes 'instrumentality' analysis but includes 'proportionality.'"<sup>134</sup> In the original decision of *United States v. 427 & 429 Hall Street*, the court found probable cause to believe that the claimant did not qualify as an innocent owner and determined that the forfeiture did not violate the Eighth Amendment under the instrumentality test.<sup>135</sup> However, on rehearing, the court felt bound to reevaluate its Excessive Fines Clause determination after a decision by the Eleventh Circuit, which did not articulate a clear test but seemed to suggest that the court should undertake a proportionality evaluation.<sup>136</sup>

In reviewing its decision, the court rejected any test which depended heavily on the notion of disproportionality because "[i]t is an extremely subjective test and thereby easily manipulated to produce desired results."<sup>137</sup> According to this court, the fault with the test lies in its failure to provide guidance for future decisions:

This approach makes paramount the personal, subjective feelings of the individual judge as to simply "what seems right" on a case by case basis, rather than giving objective guidance to courts in an effort to achieve consistent application of the law. Moreover, the application of the test produces a significant increase in the burden placed upon the Government within forfeiture cases and thereby changes the substance of forfeiture law as enacted by Congress. *Austin* does not justify such a result.<sup>138</sup>

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<sup>133</sup> See *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995) and *United States v. 2828 N. 54th St.*, 829 F. Supp. 1071 (E.D. Wis. 1993).

<sup>134</sup> *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389, 1399 (M.D. Ala. 1994) (denying motion for new trial following the decision in *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421 (M.D. Ala. 1994)).

<sup>135</sup> *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421, 1424-26 (M.D. Ala. 1994).

<sup>136</sup> See *United States v. 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994).

<sup>137</sup> *427 & 429 Hall St.*, 853 F. Supp. at 1398.

<sup>138</sup> *Id.* at 1398-99.

Thus, the court adopted a test focusing on instrumentality yet including additional steps. First, the fact finder must decide if a "substantial connection" between the predicate crime and defendant property exists. If so, then the fact finder must determine whether the forfeiture constitutes a "grossly disproportionate" punishment, given the nature of the predicate crime.<sup>139</sup> The first step examines the relationship between the property and the offense, with the government having the burden of establishing the substantial connection by showing a pattern of illegal activities occurring at the defendant property.<sup>140</sup> If it does so successfully, then a presumption in favor of forfeiture arises, and the burden shifts to the claimant, giving even those who cannot establish an innocent owner defense an opportunity to defeat the forfeiture.<sup>141</sup> At this stage, a court must balance the value of the property against the scope of the predicate crime. In the case of drug trafficking, the court should consider "the amount of drugs involved, their value, the length of time over which drug trafficking occurred, and the effect of the distribution on individuals and the community."<sup>142</sup> The court should not, however, consider the claimant's culpability as a relevant factor. By the time the court reaches the constitutional issue, the government would have already met its burden of proving the property subject to forfeiture, and any innocent owner defense necessarily would have failed. Therefore, the claimant's culpability would no longer be in doubt.<sup>143</sup>

After applying this test, the court concluded that

the forfeiture of this property valued at \$60-65,000 is not grossly disproportionate to the sale of cocaine on two separate occasions and the possession of cocaine on another occasion with intent to sell it, where the cocaine totaled approximately [four] grams and the trafficking occurred in an apparently legitimate grocery store located within one-tenth mile of the basketball courts of a junior high school.<sup>144</sup>

While one could argue that reliance on gross disproportionality raises the same subjectivity concerns that the court sought to avoid, the court points out that it has struck a balance in determining excessiveness. "Requiring proof of gross disproportion against a presumption favoring forfeiture

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<sup>139</sup> *Id.* at 1399.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1400.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1402.

provides an escape valve for obvious injustices and at the same time should promote consistency in the application of the law.<sup>145</sup> Whether this proves true or not, the court managed to preserve its instrumentality inclinations in the face of arguably contrary direction from the Eleventh Circuit Court of Appeals.

*d. The Central District of California*

The Central District Court of California also chose to focus on the connection between the property and the underlying crime.<sup>146</sup> When both parties moved for summary judgment, the court applied a "multi-factor test that focuses on an evaluation of the relationship of the property to the alleged offense, rather than an analysis of the property's actual monetary value."<sup>147</sup> Before developing its own test, the court rejected the Cruel and Unusual Punishment analysis of *Solem*.<sup>148</sup> The court first noted that "[a]s a practical matter, it is impossible to meaningfully compare the value of property subject to a civil forfeiture based on a criminal act with the possible criminal penalty for that act imposed in the same and other jurisdictions,"<sup>149</sup> two comparisons which the *Solem* analysis requires. Especially in this case, where use of the Federal Sentencing Guidelines for comparison would require the court to calculate a sentence for a crime for which the owner had been acquitted, such an approach offers neither logical consistency nor much utility. Furthermore, this method would result in a misuse of the criminal penalties, as Congress intended both the civil and criminal statutes to discourage drug

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<sup>145</sup> *Id.* at 1400.

<sup>146</sup> *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 734-35, 737 (C.D. Cal. 1994).

A recent Ninth Circuit case, *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578 (9th Cir. July 12, 1995), has reduced the importance of the *Zumirez* decision. However, the case remains one of the most frequently cited on this issue, and several other courts have adopted its test outright. Thus it remains an important case for analytical purposes.

In *Zumirez*, the government seized a house in which police had found cocaine valued at around \$15,200. A state court acquitted the owner of the house of any involvement in distributing the cocaine, so the government based its forfeiture on the fact that the owner had allowed his son to use the property for illicit purposes and on allegedly false statements made by the owner to a loan officer which were discovered when the government deposed the owner about the drug offense. *Id.* at 737-42.

<sup>147</sup> *Id.* at 732.

<sup>148</sup> *Id.* at 731.

<sup>149</sup> *Id.* at 732.

trafficking, and "[o]ne is not intended to mitigate the effects of the other."<sup>150</sup>

Instead, the court chose to weigh three factors, treating none of the three as dispositive. "The first of these factors, the inherent gravity of the offense compared with the harshness of the penalty, emanates from *Solem v. Helm*, but is appropriately applied in the Excessive Fines context."<sup>151</sup> The court then must undertake a detailed analysis of this first inquiry, adopting a somewhat novel approach to determining the gravity of the offense. Because

[p]robable cause for a civil forfeiture is comparatively easy for the government to establish and it may seek to forfeit property linked with criminal activity under circumstances where (1) the claimant has been convicted of the criminal act or acts underlying the forfeiture; [or] (2) the claimant has never been charged with any crime; [or] (3) the claimant has been charged and acquitted of the act or acts underlying the forfeiture<sup>152</sup>

the first inquiry considers the claimant's conduct, "the gravity of which decreases in each of the three situations."<sup>153</sup> A claimant who has been acquitted "cannot be treated 'as if' he had committed that offense for purposes of evaluating the gravity of his conduct."<sup>154</sup> Additionally, whenever the claimant's conduct falls into the second or third category, the court must examine only the gravity of the conduct in which the claimant himself has engaged, rather than the gravity of the offenses probably committed on the property.<sup>155</sup> Next, the court must turn to the harshness of the penalty imposed. In this evaluation, "the court must not only consider the monetary value of the property forfeited, but also the intangible value of the particular type of property involved."<sup>156</sup> Thus a forfeiture of real property usually imposes a greater sanction than the forfeiture of personal property of equal value, especially if it implicates the "sanctity of the home."<sup>157</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (citations omitted).

<sup>152</sup> *Id.* at 733.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 734.

<sup>157</sup> *Id.*

Although *Zumirez* is usually seen as emphasizing instrumentality concerns because its second and third steps focus on the use of the property, the second factor received far less discussion than the harshness analysis.<sup>158</sup> The court phrased the second relevant question as whether “the property was an integral part of the commission of the crime.”<sup>159</sup> This statement echoes Justice Scalia’s traditional guilty property test. Lastly, the court chose to give separate emphasis to “whether the criminal activity involving the defendant property was extensive in terms of time or spatial use,”<sup>160</sup> a question also often considered under a pure instrumentality test. This examination asks if the defendant property played an extensive or pervasive role in the commission of the crime, and “is like the second factor except that the inquiry is quantitative rather than qualitative.”<sup>161</sup>

In concluding its discussion, the *Zumirez* court noted the exceptional need for constitutional protection in the forfeiture context, where the government stands to profit from the outcome of the case. It then endorsed its own test as giving “renewed significance to the Eighth Amendment’s Excessive Fines Clause and [having] the added benefit of checking the government’s potential for abusive use of the civil forfeiture statutes.”<sup>162</sup> After applying the test, the court acknowledged that the owner did permit illegal conduct on his property, but since the house provided “nothing more than a place at which drugs were sold” for an undefined period of time, the forfeiture of property involving \$625,000 in equity violated the Excessive Fines Clause.<sup>163</sup>

#### *e. Other Courts Applying the Zumirez Test*

Other courts have frequently cited the *Zumirez* case,<sup>164</sup> and at least two have adopted its test outright. The Northern District Court of Illinois adopted the *Zumirez* instrumentality test after reviewing cases decided before and after *Austin*, but it appeared to shift the focus slightly toward proportionality analysis.<sup>165</sup> The government brought its action under

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *United States v. 1215 Kelly Rd.*, 860 F. Supp. 764, 766 (W.D. Wash. 1994).

<sup>162</sup> *Zumirez*, 845 F. Supp. at 735.

<sup>163</sup> *Id.* at 738.

<sup>164</sup> *See, e.g., United States v. 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994); *Quinones-Ruiz v. United States*, 873 F. Supp. 359, 364 (S.D. Cal. 1995).

<sup>165</sup> *United States v. Rural Route No. 1, Mound Rd.*, No. 90-C-4722, 1994 U.S. Dist.

§ 881(a)(7), but the claimant also stood convicted of ten counts of using a telephone to commit a felony.<sup>166</sup> Apparently these phone calls to arrange drug transactions which were made from the defendant property represented the only link between the property and the offense. The court decided that “[w]hile this telephonic link is not overwhelming, we cannot say that it is so tenuous as to render forfeiture excessive as a matter of law.”<sup>167</sup> The court then noted that it would reconsider the excessive fines issue should the facts develop differently than expected.<sup>168</sup> The Western District Court of Washington also found the *Zumirez* court’s test persuasive and adopted it with almost no discussion in a memorandum opinion.<sup>169</sup>

### 3. *Commentary on the Instrumentality Test*

The instrumentality test has also found some support among commentators, at least as a threshold inquiry, largely because of its perceived ability to control judicial subjectivity. In one legal publication’s survey of leading cases, an author noted that “[t]he dangers of judicial subjectivity, which provide the foundation for Justice Scalia’s impulse to restrict judicial discretion, lend substantial support to the imposition of an instrumentality test.”<sup>170</sup> Theoretically, this test will limit subjectivity by removing the need to consider the magnitude of the claimant’s culpability. When combined with a “secondary” proportionality test, this threshold inquiry should eliminate the most questionable cases, leaving the judiciary to weigh the seriousness of the offense only after an initial determination in favor of constitutionality.<sup>171</sup>

The instrumentality approaches proposed present a fairly uniform body of law in that they all place paramount importance on the role of the property in the underlying offense. Under these tests, a forfeiture violates the Excessive Fines Clause unless the forfeited property has a substantial connection to the criminal activity. To meet this standard, the property must have played an integral role in the offense, a determination usually made by looking at the spatial and temporal extent of its use.

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LEXIS 6433, at \*8-11 (N.D. Ill. May 16, 1994).

<sup>166</sup> 21 U.S.C. § 843 (1988 & Supp. 1993).

<sup>167</sup> *Rural Route No. 1, Mound Rd.*, 1994 U.S. Dist. LEXIS 6433, at \*8.

<sup>168</sup> *Id.* at \*11.

<sup>169</sup> *United States v. 1215 Kelly Rd.*, 860 F. Supp. 764, 766 (W.D. Wash. 1994).

<sup>170</sup> *The Supreme Court, 1992 Term – Leading Cases*, 107 HARV. L. REV. 144, 214 (1993).

<sup>171</sup> *Id.*



Because this test limits a court's inquiry to the facts surrounding the property's connection with the crime, it would, in theory, reduce judicial discretion and lead to greater uniformity in this area of the law.

### C. *The Proportionality Approach*

Proportionality analysis, so named because it compares the harshness of the punishment (the forfeiture) to the seriousness of the underlying crime, presents the primary alternative to the instrumentality approach. As previously noted, many of the cases adopting the proportionality view base their inquiry on the Cruel and Unusual Punishments Clause analysis found in *Solem v. Helm*.<sup>172</sup> However, these cases also include a wide variety of other factors and resemble a "totality of the circumstances" test that is broader than the Scalia standard. Generally, the proportionality approach differs from the instrumentality approach in that it places greater emphasis on the value of the property seized and less on the nexus between it and the underlying crime.

#### 1. *Courts Applying Proportionality Review*

##### a. *The Eleventh Circuit*

Although the Eleventh Circuit has not explicitly spelled out its test, most other courts, including the district courts in the Eleventh Circuit, read the opinion in *United States v. 18755 North Bay Road*<sup>173</sup> as imposing a proportionality requirement.<sup>174</sup> In that case, the government seized the home of Emilio and Yolanda Delio, an older couple, under a statute providing for the forfeiture of property used in an illegal gambling operation.<sup>175</sup> The court concluded that forfeiture of a home arguably valued at \$150,000 imposed a disproportionate penalty. The court noted that the legislative history of the statute indicated that Congress intended to reach large gambling syndicates, rather than illicit gambling which appears "sporadic or of insignificant monetary proportions."<sup>176</sup> Therefore, although the house facilitated the

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<sup>172</sup> 463 U.S. 277 (1983). Although the decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), effectively overruled *Solem* in the area of cruel and unusual punishment analysis, courts have not hesitated to use it as a starting point for their excessive fines analysis. For instance, the Third Circuit has noted the effect of *Harmelin* on *Solem*, but distinguished it as interpreting the Cruel and Unusual Punishment Clause rather than the Excessive Fines Clause, and continued to utilize the *Solem* factors in its proportionality cases. *United States v. Rural Route No. 1, Box 224*, 14 F.3d 864, 874 n.10 (3d Cir. 1994).

<sup>173</sup> 13 F.3d 1493 (11th Cir. 1994).

<sup>174</sup> See, e.g., *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389, 1398 (M.D. Ala. 1994); *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 973 (S.D. Fla. 1994).

<sup>175</sup> 18 U.S.C. § 1955 (1988).

<sup>176</sup> *18755 N. Bay Rd.*, 13 F.3d at 1498.

Delios' illegal card games, the insignificance of the card games argued against the forfeiture of such a valuable piece of property.<sup>177</sup>

*b. The Middle District of Pennsylvania*

The court for the Middle District of Pennsylvania employed a more clearly defined proportionality test to invalidate a forfeiture under § 881(a)(6) and (7) in *United States v. Shelly's Riverside Heights*.<sup>178</sup> Drawing on a Third Circuit case which refused to establish a test but offered some guidelines,<sup>179</sup> the court applied a modified *Solem* analysis.<sup>180</sup> When the government challenged this application, the court acknowledged that subsequent decisions had cast doubt on the validity of the *Solem* factors. However, the court distinguished these latter decisions as applying to the Cruel and Unusual Punishments Clause and pointed out that Scalia, one of *Solem's* primary detractors, indicated that the Excessive Fines Clause may raise different issues. Thus, the court concluded that "a proportionality analysis under *Solem* may still have continuing validity on whether a fine is excessive under the Eighth Amendment."<sup>181</sup>

In applying its test, the court first noted that the owner of the cabin and land in question, Tab Deaner, had in his possession a relatively small amount of marijuana and that the government had failed to supply any proof of intent to distribute. "Further, while the Government seeks to seize a parcel of land of approximately ten acres, the evidence suggests that the illegal activity was entirely confined to the cabin, which sits on one small portion of that large tract of land."<sup>182</sup> The court also took notice of the fact that the judge in Deaner's criminal case had not imposed a fine, believing that Deaner lacked the ability to pay. Turning to the *Solem* factors, the court acknowledged the seriousness of the crime but opined that "[i]n the realm of drug offenses, however, [Deaner's] was not a crime of tremendous gravity,"<sup>183</sup> as the activity did not extend beyond the cabin itself and provided Deaner with no other benefit than a ready supply of marijuana. As the cabin and the land appeared to be the

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<sup>177</sup> *Id.* at 1498-99.

<sup>178</sup> 859 F. Supp. 150, 152-54 (M.D. Pa. 1994) (denying the Government's motion for reconsideration of *United States v. Shelly's Riverside Heights*, 851 F. Supp. 633 (M.D. Pa. 1994)).

<sup>179</sup> *United States v. Rural Route No. 1, Box 224*, 14 F.3d 864 (3d Cir. 1994).

<sup>180</sup> *Shelly's Riverside Heights*, 859 F. Supp. at 152-53.

<sup>181</sup> *Id.* at 153.

<sup>182</sup> *United States v. Shelly's Riverside Heights*, 851 F. Supp. 633, 638 (M.D. Pa. 1994).

<sup>183</sup> *Id.*

only significant possessions Deaner owned, the fact that their value did not approach the maximum allowable criminal fine did not favor forfeiture in the eyes of the court.<sup>184</sup> Because the court found itself ill-equipped to divide the property and mitigate the loss as the government suggested, it found the forfeiture “clearly excessive in light of the crime committed.”<sup>185</sup> In fact, the court borrowed the language of an earlier Third Circuit decision to state that “the attempted forfeiture reaches ‘such a level of excessiveness that in justice the punishment is more criminal than the crime.’”<sup>186</sup>

*c. The Northern District of Alabama*

The court for the Northern District of Alabama utilized a similar proportionality analysis to reach the same conclusion in another § 881 case. In *United States v. 461 Shelby County Road*, the court rejected the government’s suggestion that a forfeiture could only qualify as excessive if it “shocks the conscience.”<sup>187</sup> Because such a test seemed designed to justify the vast majority of forfeitures, the court deduced that:

The United States obviously wants, at all costs, to avoid “proportionality” as the controlling criterion for judging the excessiveness question, and yet the word “excessive” necessarily implies an analysis based on an exercise of judicial discretion relating to the degree of an individual owner’s criminal culpability to the severity of the punishment represented by the value of his property to be divested.<sup>188</sup>

Therefore, in any case where the government has attempted to seize a person’s home, the offender’s ability to pay must “dominate the excessiveness inquiry.”<sup>189</sup> The court placed great emphasis on this consideration, stating:

It is much more likely that the taking of the homeplace would constitute an excessive fine than the taking of other property of equal value. Society already has more homeless people than it wants or can take care of, and this court is wary of adding the [claimants] to the list of the

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* (quoting *United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993)).

<sup>187</sup> 857 F. Supp. 935, 937 (N.D. Ala. 1994).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 938.

homeless. It makes this court wince to think of the [claimants] who have regularly made their home mortgage payments, being forced into the street while their mortgage payments enure to the benefit of the United States.<sup>190</sup>

The court also agreed with the Middle District of Pennsylvania that forfeitures present an "all or nothing" proposition.<sup>191</sup> While not condoning the owner's actions in this case, the court relied on the probation officer's report to conclude:

The fact that drug trafficking cannot be condoned does not lead inexorably to the taking away of the only residence of two small drug traffickers long after those traffickers have paid their debts to society and have cooperated fully with law enforcement. A taking that would be as "unfair" as this one would be, would be "excessive."<sup>192</sup>

Finally, after ruling the forfeiture excessive, the court used the government's proposed test against it and concluded: "Nobody has ever accused this court of being a bleeding heart, but its conscience nevertheless would be shocked if the [claimants'] residence were forfeited to the United States in this case."<sup>193</sup>

#### *d. Courts Using Proportionality in Other Contexts*

The Middle District Court of Tennessee also adopted the traditional *Solem* factors but refused to decide the issue on a motion to dismiss.<sup>194</sup> However, in *United States v. Alexander*,<sup>195</sup> a RICO case remanded to the Eighth Circuit, which may or may not be relevant in the civil forfeiture area,<sup>196</sup> the court provided a more detailed list of possible factors for the district courts to consider. According to the Eighth Circuit, the Supreme Court had directed it to consider "the extent and duration of

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 939; see *infra* notes 266-98 and accompanying text.

<sup>192</sup> 461 *Shelby County Rd.*, 857 F. Supp. at 940.

<sup>193</sup> *Id.*

<sup>194</sup> *Hill v. State*, 868 F. Supp. 221, 221 (M.D. Tenn. 1994) (holding that a claim that forfeiture violated Fourth, Fifth, and Eighth Amendment rights was sufficient to overcome motion to dismiss).

<sup>195</sup> 32 F.3d 1231 (8th Cir. 1994).

<sup>196</sup> *Id.* at 1236 (discussing the difference between forfeiture of proceeds and punishment).

Alexander's criminal activities," as well as the gravity of the offense.<sup>197</sup> As to the issue of value, the court found "it inherent in the inquiry that the court determine both the extent of the criminal activity and the quantum of the property forfeited."<sup>198</sup> The court quoted *Austin* to support this proposition and noted that it felt a forfeiture of proceeds could not implicate review under the Excessive Fines Clause.<sup>199</sup> It then went on to provide a non-exhaustive list of other areas of possible inquiry, including "an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct."<sup>200</sup> The court then qualified its instructions by noting that "the issue is fact-bound," and that "the language of the Eighth Amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime."<sup>201</sup> Although not extraordinarily helpful in defining the appropriate factors to determine excessiveness, *Alexander* does illustrate the breadth of circumstances drawn in for consideration under the proportionality standard.

## 2. Austin's Proposed Proportionality Test

Many of the courts engaging in proportionality review have utilized factors first suggested by Austin in his brief to the Supreme Court. Austin's brief demonstrated the realization that a detailed proportionality analysis could prove substantially more burdensome than the more focused instrumentality approach and proposed a threshold excessiveness inquiry which would eliminate any need to review the forfeiture in the case of large drug traffickers.<sup>202</sup> First, the value of the property seized would be compared to both the total value of the claimant's assets and the value of the drugs involved to determine if a prima facie case of excessiveness existed. If so, the court would need to examine the forfeiture more closely and the government would have to show the

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (citations omitted).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1236-37 (citations omitted) (quoting *United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993)).

<sup>201</sup> *Id.* at 1237 (quoting *Sarbello*, 985 F.2d at 724).

<sup>202</sup> Brief for Petitioner at part II.B.6, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073) (LEXIS, Genfed Library, Briefs file).

forfeiture was not grossly disproportionate.<sup>203</sup> Thus, forfeiture of a large scale drug trafficker's connected property would probably not involve a substantial part of his net worth nor would it be grossly in excess of the value of the drugs involved, and no further examination is needed. However with a less successful dealer, or any person in possession of a small amount of drugs, the investigation should proceed.

Austin's brief then suggested factors which the court should consider to determine excessiveness: the extent of the property's involvement with the criminal act, whether the property represents the claimant's home or livelihood, any additional punishment imposed on the owner, the need to deter the claimant from future activity, and the expenditure of government funds to investigate and stop the illegal activity occurring on the property.<sup>204</sup> This sort of inquiry looks at the unique facts of the claimant's case in a way that an instrumentality test does not. Most notably, the evaluations of the claimant's financial status and the examination of her motive and depth of involvement in the criminal activity provide for a highly individualized application of the Excessive Fines Clause to the circumstances of each case. While a strict reliance on the *Solem* factors would have left proportionality with at least some objective standards, the multi-factor tests involve much more, exposing the tests to criticism that they are subjective and incapable of providing meaningful guidance to the lower courts.

#### *D. Tests Combining Instrumentality and Proportionality*

##### *1. Courts Applying Combined Tests*

###### *a. The Third Circuit*

A number of courts have incorporated both proportionality and instrumentality review into a test which weighs both equally. While the Third Circuit has not fully articulated its test, in *United States v. Rural Route No. 1, Box 224*, the court followed the Eighth Circuit's approach and suggested a wide range of factors to guide the district courts.<sup>205</sup> While the court thought that any determination of excessiveness must include a consideration of the relationship between the property and the alleged criminal offense, the court cautioned that "the district court

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> 14 F.3d 864, 873-74 (3d Cir. 1994).

should avoid conflating the Eighth Amendment inquiry with § 881(a)(7)'s nexus requirement, although the two share some characteristics."<sup>206</sup> The court also mentioned the *Solem* factors, as well as those found in its earlier treatment of RICO forfeiture cases.<sup>207</sup>

*b. The Second Circuit*

Prior to the *Austin* decision, the Second Circuit had applied the Excessive Fines Clause to an in rem forfeiture in the case of *United States v. 38 Whalers Cove Drive*.<sup>208</sup> While *Whalers Cove* clearly adopted a proportionality test, it focused almost exclusively on a comparison between the value of the property and the potential criminal fines to which the claimant was subject.<sup>209</sup> This narrow focus caused some courts to question the propriety of applying the *Whalers Cove* analysis to post-*Austin* civil forfeiture cases, especially those involving owners who had not directly participated in criminal activity.<sup>210</sup>

The property at issue in the *Milbrand* case had been purchased by the claimant, Marcia Milbrand, and used by her son to establish a substantial marijuana growing operation. After rejecting Marcia's innocent owner defense as "simply not credible,"<sup>211</sup> the court addressed her claim that the forfeiture of the property and improvements valued at approximately \$66,000 violated the Excessive Fines Clause. The Court began by reviewing the instrumentality approach adopted by the Fourth Circuit, and its own decision in *Whalers Cove* which clearly leaned toward proportionality review. Noting that it had yet to address the Excessive Fines issue where the claimant had not also committed the underlying offense, the court then announced a new, multi-factor test which includes both principles.

The new test includes consideration of:

- (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in "

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<sup>206</sup> *Id.* at 873.

<sup>207</sup> *Id.* at 874-76.

<sup>208</sup> 954 F.2d 29 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 55 (1992).

<sup>209</sup> *Id.* at 37.

<sup>210</sup> See *United States v. 143-147 East 23rd St.*, No. 94 Civ. 4148(MP), 1995 WL 353667 (S.D.N.Y. June 12, 1995). The Second Circuit resolved this uncertainty by explicitly addressing the issue of a non-participating owner in *United States v. Milbrand*, 1995 WL 368907 (2d Cir. June 21, 1995).

<sup>211</sup> *Milbrand*, 1995 WL 368907, at \*7.

comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.

Thus, while the analysis does not ignore the criminal penalties which could be imposed on the perpetrator of the crime, "[w]here the owner of the property is not [the criminal] . . . , a consistent approach requires analysis of the amount of the penalty in light of the role and culpability of the owner in the illicit use of her property."<sup>212</sup> Applying this analysis, the court found forfeiture of the property well within the boundaries of the clause. The property served as the site of an extensive drug operation which could have subjected a criminal defendant to a fine of at least \$2 million. Furthermore, the claimant also had a significant degree of culpability. Rather than merely passively allowing the illicit use of her property, Marcia, being "admittedly aware of Mark's involvement in growing marijuana, . . . proceeded to buy him a farm."<sup>213</sup> In upholding the forfeiture, the Second Circuit provided the most clearly defined discussion about the differing factors which come into play when analyzing the rights of non-participating claimants, rather than those actively involved in the underlying crime.

*c. The Ninth Circuit*

The Ninth Circuit has recently joined those courts endorsing a combined test which includes both instrumentality and proportionality review.<sup>214</sup> Rather than giving the two prongs equal weight, however, the court viewed the instrumentality test as a threshold inquiry.<sup>215</sup> Before a forfeiture may proceed, the government bears the burden of establishing a sufficient connection between the property and the underlying crime.<sup>216</sup> Once this link has been established, the claimant may prevail

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at \*8.

<sup>214</sup> *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578 (9th Cir. July 12, 1995).

<sup>215</sup> *Id.* at \*5.

<sup>216</sup> *Id.* at \*8.



on her Eighth Amendment claim only by showing that the forfeiture would impose a grossly disproportionate punishment.<sup>217</sup>

In *United States v. 6380 Little Canyon Road*, the court discussed the components of its two pronged test before remanding the case to the District Court for further consideration. The opinion did not contain much discussion of the propriety of instrumentality review. Largely for the historical reasons enunciated by Justice Scalia, the court stated that any valid forfeiture must satisfy an instrumentality standard. However, because of this test's "potentially harsh results,"<sup>218</sup> the court hesitated to use it as the sole test for excessiveness, and accepted "the proportionality test as a check on the instrumentality approach."<sup>219</sup>

The court relied on a number of sources to support this decision. It cited both the *Austin* majority's refusal to endorse the Scalia approach and the reduced importance of the criminal/civil distinction in the forfeiture area as indicating a need for proportionality review.<sup>220</sup> In addition, such a test is consistent with the proportionality standard found in cases decided under the Excessive Bail Clause.<sup>221</sup> In keeping with its view regarding the increasing convergence of criminal and civil forfeiture standards after *Austin*, the court also relied on language in *United States v. Alexander*,<sup>222</sup> a criminal forfeiture case decided the same day as *Austin*, which suggested a need for proportionality review. Finally, the court felt that "proportionality analysis is especially appropriate in the civil forfeiture context because it is the sovereign that profits from such forfeitures. . . . This incentive enhances the need for close scrutiny of *in rem* forfeitures."<sup>223</sup>

As to the test itself, the court adopts a fairly standard set of factors. Those used to determine the harshness of the penalty include: the fair market value of the property, its intangible value, and the effect of its loss on the claimant. An evaluation of the claimant's culpability rests on the owner's level of involvement with the criminal activity, including his recklessness or negligence in allowing its use and the harm caused by the activity, including its nature, duration and effect on the community.<sup>224</sup> Finally, when the court finds a forfeiture of an entire piece of property

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at \*6.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at \*6-7.

<sup>221</sup> *Id.* at \*6.

<sup>222</sup> 113 S. Ct. 2766 (1993).

<sup>223</sup> *6380 Little Canyon Rd.*, 1995 WL 408578, at \*7.

<sup>224</sup> *Id.* at \*8.

excessive, "the court should limit it to an appropriate portion or the more poisonously tainted portion of the property."<sup>225</sup>

*d. The Southern District of California*

In *Quinones-Ruiz v. United States*, the Southern District of California Court chose to combine proportionality and instrumentality review in its evaluation of an administrative forfeiture of unreported currency.<sup>226</sup> "For lack of better authority,"<sup>227</sup> the court chose to follow a pre-*Austin* RICO forfeiture case which it read as endorsing both the nexus and value requirements.<sup>228</sup> In applying the proportionality prong of the test, the court rejected the Central District Court of California's method of discounting the seriousness of the offense based upon whether the claimant had been charged or convicted for two reasons. First, the court could not clearly determine how to implement the procedure. Second, and more importantly, it found that the discounting method would force the government to put on any strong evidence of guilt within its possession, thus "eliminat[ing] the Congressionally mandated probable cause forfeiture scheme."<sup>229</sup> Therefore, the court compared the forfeiture of the cash to the maximum permissible sentence under the Federal Sentencing Guidelines for violations of the currency reporting laws. The court found a "medium nexus" between the property and the crime, viewing the essence of the crime as lying to the government; while the money did not fall into the categories of instrumentality or contraband, it was the subject of the lie.<sup>230</sup> Therefore, according to this court, the forfeiture met the nexus requirement of the Excessive Fines Clause and thus did not violate the Constitution.

*e. The Southern District of Florida*

Like the court for the Middle District of Alabama, the court for the Southern District of Florida read the Eleventh Circuit as endorsing

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<sup>225</sup> *Id.* at \*9.

<sup>226</sup> 873 F. Supp. 359 (S.D. Cal. 1995). This approach appears consistent with the approach adopted by the Ninth Circuit in the recent case of *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578 (9th Cir. July 12, 1995).

<sup>227</sup> 873 F. Supp. at 363-64.

<sup>228</sup> *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

<sup>229</sup> *Quinones-Ruiz*, 873 F. Supp. at 364.

<sup>230</sup> *Id.*

proportionality analysis.<sup>231</sup> But unlike the other district court, the Florida court adopted a test which balances both proportionality and instrumentality, without using the instrumentality test as a threshold.<sup>232</sup> The Florida court's test queries are: "(1) Was there a substantial connection between the defendant property and the offense in question?" and "(2) Is the forfeiture of the defendant property a grossly disproportionate penalty given the nature of the offense involved?"<sup>233</sup> The first part of the test restates the guilty property analysis upon which the instrumentality test is based. If the government shows a substantial connection between the property and the offense, then the claimant must demonstrate gross disproportionality. "This entails weighing the nature of the offense committed against the value of the property"<sup>234</sup> and represents a standard derived from various criminal forfeiture cases.<sup>235</sup> The court then remanded the issue for further factual development.<sup>236</sup>

*f. The Northern District of Georgia*

The court for the Northern District of Georgia likewise believed the Eleventh Circuit had endorsed proportionality analysis and, relying in part on the circuit court's opinion, devised a test which combines instrumentality and proportionality review in a unique way.<sup>237</sup> As the first prong of its test, the court adopted a straightforward instrumentality approach which requires a "substantial connection" between the defendant property and the criminal activity. "The first prong of this test apparently functions as an 'on/off' switch: if there is not a sufficient nexus between the property and the crime, then the forfeiture is an excessive fine, regardless of the harshness of the penalty or the seriousness of the offense."<sup>238</sup> Once a forfeiture survives this step, the claimant may still prevail by showing that the forfeiture would be a grossly disproportionate punishment.<sup>239</sup>

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<sup>231</sup> *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 973 (S.D. Fla. 1994).

<sup>232</sup> *Id.* at 973-74.

<sup>233</sup> *Id.* at 973.

<sup>234</sup> *Id.* at 974.

<sup>235</sup> *Id.* at 974 n.9.

<sup>236</sup> *Id.* at 974.

<sup>237</sup> *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1283 (N.D. Ga. 1995).

<sup>238</sup> *Id.* at 1291-92.

<sup>239</sup> *Id.* at 1292.

This second step, involving proportionality issues, functions as a "dimmer switch"; it insures that the severity of the forfeiture roughly approximates the seriousness of the offense.<sup>240</sup> "The amount of 'dimming' needed to close the difference between these two concepts indicates whether the forfeiture is excessive."<sup>241</sup> This test reflects a fairly common proportionality approach. This court's method differs, however, from the usual proportionality test in the way that it chose to measure the harshness of the penalty and the severity of the offense.

The court began its analysis by noting that many other courts have used the value of the property to measure the harshness of the penalty. However, the Georgia court agreed with Justice Scalia, who said the monetary value of the property has no relevance in the forfeiture context and even more expensive property could be shielded from forfeiture.<sup>242</sup> Under the Georgia approach, a court should conduct an examination of the hardship the forfeiture will inflict on the claimant, the subjective value of the property, and the claimant's financial condition.<sup>243</sup> In evaluating the harshness of the offense, the court rejected an individualized approach and instructed that the focus should be placed on the offense that supplied probable cause for forfeiture rather than on the claimant's level of involvement. To reach this conclusion, the court relied on the fact that the excessiveness issue only arises after the innocent owner defense has failed.<sup>244</sup>

Similarly, the Georgia court rejected the method of calculating the gravity of the offense by reference to possible civil or criminal penalties.<sup>245</sup> Since maximum penalties are merely hypothetical and the court has no accurate means to predict whether the full penalty would have been imposed, the Georgia court thought that this inquiry invites needless speculation. Instead, the court stated that courts should look at whether Congress intended the forfeiture laws to punish the type of behavior in question.<sup>246</sup>

In applying its test, the court found that although the truck contained hallucinogenic psilocin mushrooms when police stopped its driver, "[t]here was simply nothing special about the truck."<sup>247</sup> The presence

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1288-89.

<sup>243</sup> *Id.* at 1289.

<sup>244</sup> *Id.* at 1289-90.

<sup>245</sup> *Id.* at 1290-91.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1293.

of the drugs was an isolated event, the driver kept them concealed on his person rather than in the truck itself, and the claimant did not purchase the truck for use in criminal activity.<sup>248</sup> Despite the fact that only an incidental link existed between the property and the crime, the court addressed the proportionality issue for the sake of clarity. The court concluded that possession of a small amount of mushrooms on one occasion by someone with no history of drug trafficking did not fall under the category of serious crimes that Congress intended to reach with § 881. While lacking information on the burden the forfeiture imposed on the claimant, the court felt that "Mickey Mouse" behavior such as this did not warrant a forfeiture.<sup>249</sup> It concluded that "[i]f the forfeiture of [the claimant's] truck strikes any blow at all against 'racketeering and organized drug trafficking,' that blow is extremely feeble," and it overturned the forfeiture.<sup>250</sup>

*g. Other Courts Applying Combined Tests*

District courts in Michigan and Ohio have also adopted tests which include an inquiry into the extent of the property's involvement in the crime and the value of the property. The Eastern District Court of Michigan restated the law of forfeiture precedents as a three-pronged inquiry: (1) how extensively was the property used in the predicate crime, (2) what is the property's value, and (3) is the forfeiture an excessive penalty, in light of the answers to the first two prongs.<sup>251</sup> The first two steps require factual determinations, while the third forces a court to "balance the results of the factual determinations with equitable considerations."<sup>252</sup> To answer these questions, a court should look at all the facts and circumstances of a given case.<sup>253</sup> When the Michigan court applied the test, it found that the forfeiture of property valued at \$87,000 was appropriate, considering the extensive use of the property in growing drugs and the amount of the applicable criminal fine.<sup>254</sup> With even less discussion, the Southern District Court of Ohio adopted a combined two-step test, comparing the value of the property combined with the claimant's criminal sentence to the maximum federal criminal penalty, and

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1294.

<sup>250</sup> *Id.*

<sup>251</sup> *United States v. 2408 Parliament*, 859 F. Supp. 1075, 1077-78 (E.D. Mich. 1994).

<sup>252</sup> *Id.* at 1078.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

noting the repeated use of the property as the site of drug sales, to find the forfeiture constitutional.<sup>255</sup>

## 2. *Commentary on the Combined Approach*

A combined test has some obvious advantages. By giving the instrumentality approach substantial weight, the court can protect the government's interest in seizing the tools of criminal activity.<sup>256</sup> Yet it is also true that "the [E]ighth [A]mendment . . . embodies fluid concepts that vary in application with the circumstances of each case."<sup>257</sup> Therefore, the more unstructured proportionality test allows the courts to continue to tailor punishments to comport with current notions of justice. Combining the two tests provides a workable compromise between the government's interest in criminal enforcement and the need to protect citizens from excessive penalties.

### *E. Unusual Tests*

At least two courts have largely sidestepped the proportionality/instrumentality debate to apply standards which fall outside these categories. The Southern District Court of Indiana thought earlier dicta required it to apply the same standard to civil forfeitures as it would to criminal forfeitures.<sup>258</sup> The factors necessary for a determination include "[t]he circumstances surrounding the defendant's criminal conduct, the harm caused by his conduct, his motive in committing the crime, the value of the drugs involved, and the nexus between the property used in the criminal activity."<sup>259</sup> The court also discussed how to best modify the inquiries to fit their new civil context. For instance, instead of looking at the harm caused by the claimant's conduct or the claimant's motive in committing the crime, the court could instead look at the harm caused by the property itself or at the claimant's motive in allowing the illegal use

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<sup>255</sup> *United States v. 429 S. Main St.*, 843 F. Supp. 337, 341-42 (S.D. Ohio 1993), *aff'd in part, rev'd in part*, 52 F.3d 1416, 1417 (6th Cir. 1995) (remanding for predeprivation notice determination).

<sup>256</sup> See M. Lynette Eaddy, Note, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After Austin v. United States*, 45 FLA. L. REV. 709, 730 (1993).

<sup>257</sup> *Id.* at 731 (quoting *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987)).

<sup>258</sup> *United States v. Rural Route No. 3, Box 288*, 1993 U.S. Dist. LEXIS 20102, at \*50 (S.D. Ind. Dec. 22, 1993).

<sup>259</sup> *Id.* at \*51 (citation omitted).

of the property.<sup>260</sup> While this approach resembles many of the two-step tests used by other courts, the Southern District of Indiana is apparently unique in adopting a standard straight from the criminal law.

The District Court for Colorado has adopted the most unusual approach. Instead of relying on earlier criminal cases or decisions from other jurisdictions, the court instead applied a three part test formulated by the Department of Justice.<sup>261</sup>

Under this analysis, a civil forfeiture should not violate the Eighth Amendment where:

A. The criminal activity involving the property has been sufficiently extensive in terms of time and/or special use of the property; *or*

B. The role of the property was integral or indispensable to the commission of the crime[s] in question; *or*

C. The particular property was deliberately selected to secure a special advantage in the commission of the crime[s].<sup>262</sup>

If the forfeiture can satisfy any one of these factors, then it will not violate the Excessive Fines Clause.<sup>263</sup> While the factors resemble those used in the instrumentality tests, this test is more government-oriented because only one of three possible factors must be satisfied to establish constitutionality. The court decided that the forfeiture of the claimant's real and personal property proved consistent with the Eight Amendment, in part because "the thrust of the case law suggests that forfeitures should rise to the level of an excessive fine only in the rarest of cases."<sup>264</sup> Since the forfeiture did not reach "draconian" levels, it survived scrutiny.<sup>265</sup> While the government obviously supports this standard, most courts have not adopted a constitutional standard which so favors the state, and the decision remains outside the mainstream.

#### V. APPLYING THE TEST — THE COURT'S ABILITY TO MITIGATE

In addition to the substantive question of determining excessiveness, the Supreme Court's refusal to define a standard has given rise to a

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<sup>260</sup> *Id.* at \*52.

<sup>261</sup> *United States v. 9844 S. Titan Court*, 865 F. Supp. 709, 715 (D. Colo. 1994).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

number of procedural questions as the courts apply the tests that they have designed. Courts have concluded that excessiveness should be decided by the trier of fact.<sup>266</sup> The burden of proof remains less clearly defined.<sup>267</sup> Finally, the propriety of ordering a forfeiture of less than all

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<sup>266</sup> As the Third Circuit acknowledged, neither *Austin* nor its companion case, *Alexander*, provides any guidance as to whether the judge or jury decides if a forfeiture violates the Excessive Fines Clause. See *United States v. Rural Route No. 1, Box 224*, 14 F.3d 864, 876 (3d Cir. 1994). The Court of Appeals went on to quote a pre-*Austin* case which suggested that in the civil forfeiture arena, "the infusion of the earthy common sense of a jury might upon occasion mitigate appropriately the harsh impact sometimes characteristic of *in rem* procedure." *Id.* (quoting *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 469 (7th Cir. 1980)). However, that court ultimately left the decision to the District Court suggesting that, due to the current uncertainty of the law, the District Court submit a special interrogatory to the jury, and alternately treat the answer as non-binding and decide the case itself.

The court in *461 Shelby County Road* also noted that whether the court or the jury should determine excessiveness remains a matter of speculation. *United States v. 461 Shelby County Rd.*, 857 F. Supp. 935, 937 (N.D. Ala. 1994). It then went on to decide the case by granting summary judgment sua sponte in favor of the claimant, because the government had conceded the absence of any genuine issues of material fact. *Id.* at 940. However, in *United States v. 24124 Lemay St.*, the court specifically ruled that the issue presented a question of law. See 857 F. Supp. 1373, 1376 (C.D. Cal. 1994). To support its holding, the court pointed to the manner in which courts decide alleged violations of the Fourth, Fifth and Sixth Amendments, all of which also raise questions of law. *Id.* at 1376-77. Therefore, it believed that the court should decide the issue of excessiveness as well, and granted summary judgment. *Id.* at 1383-84.

<sup>267</sup> In both cases adopting proportionality tests and those stressing instrumentality concerns, some courts have chosen to place the primary burden of showing excessiveness on the claimant. For instance, in *Shelly's Riverside Heights*, primarily a proportionality case, the Middle District of Pennsylvania cited a pre-*Austin* decision for the proposition that once the government has demonstrated probable cause to believe the property facilitated a crime, "the burden then shifts to the defendant." 851 F. Supp. 633, 637 (M.D. Pa. 1994) (citing *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993)). Similarly, in *United States v. 1215 Kelly Road*, a case applying the California instrumentality test to the forfeiture of a cabin and small farm, the Western District of Washington recognized "that the United States has made a prima facie case for forfeiture and that the burden is now upon the claimants to show that forfeiture of the entire fifteen acres would be an excessive fine . . ." 860 F. Supp. 764, 766 (W.D. Wash. 1994). Thus, in appropriate cases, the government may receive summary judgment unless the claimant introduces evidence sufficient to support an Eighth Amendment claim.

In contrast, in many cases adopting a two-step approach combining the tests, the government will often shoulder some of the burden beyond merely proving the elements of forfeiture. Under this approach, the court must undertake Eighth Amendment review "once the claimant raises the specter of excessiveness." *United States v. 13143 S.W. 15th Lane*, 872 F. Supp. 968, 974 (S.D. Fla. 1994). The government bears the initial burden of establishing a substantial connection between the property and the offense, by showing a "pattern of illegal activities occurring at the defendant real property." *United States v.*



of the property sought in order to reach a more just result, a process often urged upon the court by the government to preserve otherwise excessive seizures, has caused considerable controversy and already resulted in a split among the lower courts. The government apparently urges such "mitigation" fairly frequently when it appears that the court may rule in favor of the claimant.<sup>268</sup> Claimants also make the argument for mitigation in an effort to salvage what they can from a successful forfeiture action. The courts have disagreed on the role of mitigation, with some accepting evidence of possible mitigation and even incorporating it into their tests, and others questioning not only their willingness, but also their ability, to divide the property in this fashion.

#### A. Courts Which View Forfeiture as All or Nothing

The government presented the case in favor of mitigation to the Middle District of Pennsylvania, arguing on rehearing that the court should instead mitigate the excessiveness of a forfeiture which it had previously overturned on constitutional grounds.<sup>269</sup> The government had sought a ten acre tract of land and a cabin allegedly used in the cultivation of drugs and owned in joint tenancy by the claimant and his companion.<sup>270</sup> Comparing the culpability of the property to the seriousness of the offense, the court found the forfeiture of the entire tract excessive.<sup>271</sup> In response to the government's suggestion that the court allow something less than the total forfeiture, the court replied that while "[a] monetary fine may be lessened by a certain dollar increment; a forfeiture is essentially an all-or-nothing penalty."<sup>272</sup> With regard to

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427 & 429 Hall St., 853 F. Supp. 1389, 1399 (M.D. Ala. 1994). If the government meets this standard, the burden shifts and the claimant must show that the forfeiture would amount to a grossly disproportionate penalty, through a comparison of the value of the property and the nature of the offense. The courts have adapted this grossly disproportionate standard from a variety of criminal cases. See, e.g., *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578 (9th Cir. July 12, 1995).

Only one court has addressed the actual level of proof required, rather than the allocation of the burden, and defined the appropriate standard as a preponderance of the evidence. *United States v. Shelly's Riverside Heights*, 851 F. Supp. 633, 637 (M.D. Pa. 1994).

<sup>268</sup> See *infra* notes 269-81 and accompanying text.

<sup>269</sup> *United States v. Shelly's Riverside Heights*, 859 F. Supp. 150, 154 (M.D. Pa. 1994).

<sup>270</sup> *Id.* at 151.

<sup>271</sup> *Id.* at 152.

<sup>272</sup> *Id.* at 154.

approving the forfeiture of the cabin alone, the court stated "[i]t is not clear that we have authority to do so and we are not inclined to divide up the property — Solomon-like — leaving a cabin with no access and a parcel of property with an island in the middle."<sup>273</sup> Therefore, because the court refused to mitigate the excess, the court's earlier ruling of excessiveness stood and the claimants retained their property.<sup>274</sup>

The Northern District of Alabama also ruled against the government in a case in which the concept of mitigation received substantial attention.<sup>275</sup> The United States seized the home of the claimants under § 881(a)(7), but the court relied in part on the report of the claimants' probation officer to conclude that they had paid their debt to society and deserved no further punishment, especially punishment of this magnitude.<sup>276</sup> In the court's original order it invited suggestions on "how to accomplish the miracle of declaring forfeited less than all of [the claimant's equity in their house]."<sup>277</sup> The court appeared to criticize the government's reliance on the courts to tend to the consequences of the government's lack of restraint. The court pointed out that "[w]hen the United States undertakes a forfeiture, it is the United States which has selected the amount of the 'fine,' and not the Congress, and not the courts."<sup>278</sup> Using the example of the owner of a 100,000 acre ranch who knows one of his hired hands is "peddling pot" from the bunkhouse, the court illustrated its difficulty with the concept of mitigation:

While this court acknowledges its responsibility to discriminate between "excessive" and "non-excessive" fines, it does not acknowledge that it, or any other court, is capable of declaring and implementing a *partial* forfeiture in order to prevent the punishment from being too severe, namely, being out of proportion to the criminal conduct. The very prospect of ordering the forfeiture of a 0.001 undivided interest in a 100,000 acre ranch, as reflective of the owner's failure to report his marijuana-selling ranchhand, is only topped by the thought of attempting to carve out a particular couple of hilly acres from the 100,000 acres, together with ingress and egress to it, and vesting it neatly in the United States. No court, high or low, has thus far told this court how to "split the baby," so to speak, and this court is not Solomon.<sup>279</sup>

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<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *United States v. 461 Shelby County Rd.*, 857 F. Supp. 935 (N.D. Ala. 1994).

<sup>276</sup> *Id.* at 940.

<sup>277</sup> *Id.* at 936 n.1.

<sup>278</sup> *Id.* at 939.

<sup>279</sup> *Id.*

Because the court “seriously doubts that any federal judge has the time, the Solomonic wisdom, and the magic wand with which to perform the miracle of achieving proportionality in forfeiture cases in which the value of the property proposed to be forfeited clearly exceeds the owner’s culpability,”<sup>280</sup> it concluded that the all-or-nothing approach presented the only solution. Since the forfeiture of the entire property constituted an excessive fine, and division proved “impractical, if not impossible,”<sup>281</sup> the claimants prevailed.

#### B. Courts Which Allow Mitigation of the Forfeiture

In contrast to the courts which find mitigation impossible, some apparently believe that *Austin* requires them to consider the possibility. In a brief opinion, the Court for the Western District of Washington began by recognizing “that the general rule has been that property subject to forfeiture is all that which was simultaneously conveyed by a single deed.”<sup>282</sup> However the court then noted that strict application of this rule would avoid consideration of the excessiveness issue, in direct contravention of *Austin*.<sup>283</sup> The court apparently discounted the possibility of applying *Austin* review to the entire parcel of property and simply declaring too large a forfeiture unconstitutional. Rather, the Court decided that it “may choose to forfeit only a portion of the property, instead of the entire [area] described by the claimants’ deed, if it finds that forfeiture of the entire property would be an excessive fine.”<sup>284</sup> The court placed the burden of suggesting possible divisions of the property on the claimants.<sup>285</sup> This leaves them in the position of arguing against division and hoping that the court will find the entire forfeiture excessive, but taking the chance that they will lose everything, or suggesting ways to preserve a forfeiture which might otherwise have violated the Excessive Fines Clause. Thus, a willingness to mitigate appears to favor the government in this case.

In a Fourth Circuit case,<sup>286</sup> the claimant failed to introduce evidence in favor of mitigation, and since the forfeiture met the instrumentality test

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 940.

<sup>282</sup> *United States v. 1215 Kelly Rd.*, 860 F. Supp. 764, 765 (W.D. Wash. 1994).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 766.

<sup>286</sup> *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

enunciated by the court, he lost his entire thirty-three acre farm. While the test used by the court included an inquiry into "the possibility of separating offending property that can readily be separated from the remainder,"<sup>287</sup> the court also felt that "a judgment of forfeiture is largely an all-or-nothing situation. . . . However, a concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from nonimplicated property, when the offending property is readily separable."<sup>288</sup> The court adopted a practical approach, designed to give claimants a chance to salvage some of their property. As in the previous case allowing mitigation, the claimant bears the burden of showing the divisibility of the property.<sup>289</sup>

The Ninth Circuit has also strongly endorsed the mitigation of potentially excessive forfeitures.<sup>290</sup> In fact, it has stated, "[a] forfeiture of an owner's property that was an instrumentality of the crime, but which appears to be an excessive fine, within the meaning of the Eighth Amendment, *must* be reduced."<sup>291</sup> A forfeiture may still be disproportionate even if the entire parcel of property served as the instrumentality of a crime. In such a case, the court should limit the forfeiture to "an appropriate portion or the more poisonously tainted portion of property."<sup>292</sup>

Finally, a number of criminal cases have endorsed the mitigation principle. In *United States v. Toyfoya*, the Northern District of California quoted at length a pre-*Austin* Ninth Circuit decision which appeared to grant the court wide latitude to fashion a remedy to avoid the cancellation of a forfeiture on Eighth Amendment grounds.<sup>293</sup>

If, on remand in this case, the district court finds . . . [the forfeiture is excessive], it must limit the forfeiture to such a portion of the interest as it deems consistent with these principles; or it may condition the forfeiture upon the payment of such sum or relinquishment of such other property as seems just under the circumstances; or it may limit or eliminate other punishment it would otherwise impose so as to bring the total sanction within constitutional bounds.<sup>294</sup>

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<sup>287</sup> *Id.* at 365.

<sup>288</sup> *Id.* at 364.

<sup>289</sup> *Id.* at 366.

<sup>290</sup> *United States v. 6380 Little Canyon Rd.*, No. 93-15982, 1995 WL 408578, \*8 (9th Cir. July 12, 1995).

<sup>291</sup> *Id.* (emphasis added).

<sup>292</sup> *Id.* at \*9.

<sup>293</sup> No. CR-93-0505 EFL, 1994 U.S. Dist. LEXIS 12266, at \*17 (N.D. Cal. Aug. 29, 1994).

<sup>294</sup> *Id.* at \*17-18 (quoting *United States v. Busher*, 817 F.2d 1409, 1416 (9th Cir.

The court appeared inclined to adopt the view "that judicial mitigation of the extent of the forfeiture is the remedy once an Eighth Amendment violation is found."<sup>295</sup> The Eighth Circuit has also endorsed the tailoring of the forfeiture in order to preserve its constitutionality in the criminal context.<sup>296</sup> These cases may help tip the balance toward mitigation in the civil context, since some courts appear predisposed to adopt that view in any case. Perhaps to limit criticism of its narrow excessiveness standard, the Department of Justice continues to support mitigation in a number of circumstances. In its proposed regulations, the Justice Department would allow ruling officers to mitigate based on findings of hardship or adequate excuse.<sup>297</sup> Mitigating factors would include efforts on behalf of the claimant toward reform, and a proportionality analysis.<sup>298</sup> By making these concessions at the mitigation stage, the Department of Justice may deflect some criticism of its narrow excessiveness standard.

#### CONCLUSION

##### A. *Comparison and Analysis of the Proposed Tests*

In most cases, an application of either instrumentality or proportionality review will yield the same results. If the government seizes a very expensive boat carrying a large quantity of drugs, the forfeiture may stand either because the owner has clearly allowed the boat to play an important role in the drug trade or because the value of the drugs involved will probably approach that of the boat. Conversely, if the government seizes a similarly valued vehicle after finding a sufficiently small amount of drugs as to indicate only personal use, the Excessive Fines Clause could bar the forfeiture because the vehicle has only an incidental connection to the drugs, or because their value and the owner's culpability appear small by comparison. In most cases involving drugs for personal use, it would stretch the boundaries of either test to seize everything but contraband and its derivatives.

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1987) (alteration in original).

<sup>295</sup> *Id.* at \*78.

<sup>296</sup> *United States v. Bieri*, 21 F.3d 819, 824 (8th Cir. 1994) (stating that if a district court finds in a particular case that forfeiture amounts to an excessive fine in violation of the Eighth Amendment, that court has the discretion to "order forfeiture of less than the whole in an effort to preserve the forfeiture. . .").

<sup>297</sup> *New Forfeiture Rules Favor Innocent Owners*, 4 No. 15 DOJ ALERT 3 (Aug. 15, 1994).

<sup>298</sup> *Id.*

Other cases present a harder choice. Take the example of a low income family growing marijuana on their small farm. Almost certainly, the forfeiture of the property would pass the instrumentality test, since the criminal activity could not have occurred without the land. However, proportionality analysis could reach a different conclusion based on a consideration of the claimant's financial status, the extent of the criminal activity, and other factors unique to the case.

In these latter cases, the government would clearly prefer an instrumentality approach. Given its decision to focus on seizing proceeds, the Department of Justice will probably continue to promote tests based on the link between the property and the criminal activity.<sup>299</sup> Such an approach does have some obvious advantages. The fact that it relies on only one inquiry rather than the multiple factors present in proportionality tests indicates an ease of application that the other approach lacks. Instead of looking at the value of the seized property, possible criminal sanctions, the level of the claimant's involvement with the crime, and her financial status, the court may focus all its attention on the connection between the property and the crime. This test would require less factual development and seems more amenable to resolution on summary judgment. Of course, the Eighth Amendment does not guard against judicial confusion, and ease of application can only weigh in favor of a test which fulfills the substantive requirements of the clause.

The instrumentality test seems on its face consistent with the commonly understood rationale of forfeiture. As the Fourth Circuit pointed out, Congress did not intend to establish any particular dollar fine in the forfeiture statutes, but rather to punish by seizing whatever property the criminal activity tainted.<sup>300</sup> However, application of the Excessive Fines Clause of the Constitution should not depend on Congressional intent. Actually, one could argue that the Eighth Amendment exists precisely because Congress may one day intend to impose an excessive fine. While the courts may feel that excessiveness in the forfeiture context means confiscating non-tainted property and nothing else, they should not feel bound to adopt this view by congressional actions.

The instrumentality test has also received praise for its usefulness in limiting judicial discretion.<sup>301</sup> By narrowing the range of permissible factors, the test should in theory provide more guidance to courts in

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<sup>299</sup> See *Forfeiture Manual Signals Help for Victims*, *supra* note 84.

<sup>300</sup> See *United States v. Chandler*, 36 F.3d 358, 364 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

<sup>301</sup> See *Leading Cases*, *supra* note 170, at 214.

making their decisions. Courts have especially focused on a review of the claimant's culpability as entailing a substantial abuse of discretion.<sup>302</sup> Yet the instrumentality test itself seems susceptible to varying applications. For example, consider the forfeiture of a house whose owner used its telephone to arrange for the sale of drugs at another location. Many people would consider this precisely the sort of incidental or fortuitous link between the crime and the property which would make the forfeiture excessive. Yet the Northern District of Illinois did not consider the link insufficient as a matter of law.<sup>303</sup> Any test will have to deal with drawing the line between excessive and permissive forfeitures and the application of any test will involve discretion. The instrumentality test limits the exercise of this discretion to a more clearly defined area but does not eliminate it.

The instrumentality test is particularly helpful in establishing a minimum threshold which all forfeitures must meet. Forfeiture is best suited for property closely linked to crime. If the property bears only a slight relationship to the offense, regardless of its value, its confiscation serves little purpose apart from enriching the government. Such a forfeiture punishes the owner exactly as a criminal fine would, without removing either the mechanism or the rewards of the criminal activity, yet the owner probably remains subject to criminal penalties linked to the same behavior. By limiting forfeitures to cases where the government can identify a minimum connection between the crime and the property, the courts can preserve forfeiture as a useful weapon against those deeply involved in criminal activity, while avoiding the most obviously incongruous results.

Proportionality tests are desirable because they allow the courts to consider certain factors which an instrumentality test would rule out. For instance, some courts believe that any determination of excessiveness must include an evaluation of the forfeiture's impact on the financial status of the claimant. To these courts, the confiscation of a pauper's shack may violate the Constitution, whereas the confiscation of a millionaire's mansion would not. This distinction is fair policy. Seizing

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<sup>302</sup> See *United States v. 427 & 429 Hall St.*, 853 F. Supp. 1389 (M.D. Ala. 1994) (discounting culpability as a factor).

<sup>303</sup> See *United States v. Rural Route No. 1, Mound Rd.*, No. 90-C-4722, 1994 U.S. Dist. LEXIS 6433 (N.D. Ill. May 16, 1994) (stating that numerous phone calls from the residence to negotiate the sale and purchase of illegal drugs constituted the primary relationship between the house and the seized residence and that "[w]hile this telephonic link is not overwhelming, [the court] cannot say that it is so tenuous as to render forfeiture excessive as a matter of law.").

a person's house and only property implicates the traditional protections given to the homeplace, and may simply swell the ranks of the homeless or the bankrupt.<sup>304</sup> On the other hand, consideration of such individualized circumstances makes uniformity of penalties impossible. Although usually we guard against favoritism toward the rich, treating claimants differently on the basis of personal wealth for any reason may raise concerns about fairness. However, this argument is not persuasive. Indigent defendants often receive concessions unavailable to other parties in order to preserve constitutional rights such as representation by counsel, and perhaps an analogy could be drawn to the preservation of Eighth Amendment protections as well.

A more relevant inquiry is the degree of the claimant's culpability. Although the Middle District of Alabama correctly points out it will reach the constitutional issue only after an innocent owner defense has failed,<sup>305</sup> distinctions may still exist between the person who allows illegal activity on her property and the person who engages in illegal activity herself. The criminal law may not even punish the former, while it imposes substantial penalties on the latter. Given the drastic impact that a forfeiture can have, perhaps it is a penalty best reserved for serious offenses. While differentiating between varying degrees of culpability may involve substantial discretion, especially in drug cases, the current administration's abandonment of the "zero-tolerance" drug policy could encourage courts willing to make such distinctions.<sup>306</sup>

Although comparing the harshness of the penalty to the gravity of the offense does serve some purpose, the other factors derived from the Cruel and Unusual Punishments Clause via *Solem* do not fit as well in the forfeiture context. The fact that forfeiture involves widely varying types of property, as opposed to uniform monetary fines, makes any comparison of both inter- and intra-jurisdiction penalties difficult.<sup>307</sup> Additionally, any proportionality analysis, including those employing the *Solem* factors, must necessarily present a relatively fact specific inquiry, with each case involving unique circumstances. Therefore, any extended discussion of these comparative factors would likely be of limited value.<sup>308</sup>

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<sup>304</sup> See *United States v. 461 Shelby County Rd.*, 857 F. Supp. 935, 938 (N.D. Ala. 1994) (noting that "[s]ociety already has more homeless people than it wants or can take care of . . .").

<sup>305</sup> See *427 & 429 Hall St.*, 853 F. Supp. at 1400.

<sup>306</sup> See *United States v. \$191,910.00 in United States Currency*, 16 F.3d 1051, 1054 n.1 (9th Cir. 1994) (acknowledging that the current administration has abandoned the former "war on drugs" stance).

<sup>307</sup> See *Leading Cases*, *supra* note 170, at 214.

<sup>308</sup> *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1288 (N.D. Ga. 1995) ("[W]hile uniform application of civil forfeiture laws might be a laudable goal, the



Similarly, while the court must evaluate the harshness of the penalty according to some standard, the Sentencing Guidelines are a poor comparison. They do illustrate what criminal penalties the government could have chosen to pursue, and perhaps by analogy how seriously Congress and the Sentencing Commission view the underlying offense, but the fact remains that the government did not choose that avenue. The government actually may have rejected the criminal approach due to doubts in its ability to meet the burden of proof.<sup>309</sup> To have the criminal sanction then become relevant in defining the civil penalty is absurd. The Sentencing Guidelines may substantially overstate the appropriate penalty. This is especially true when the claimant has been acquitted of the underlying activity.<sup>310</sup> On the other hand, a forfeiture which otherwise meets the appropriate criteria should not fail simply because the value of the property exceeds the permissible criminal fine. Since Congress did not view the penalties as mutually exclusive, their view of what serves as the appropriate fine in one instance should not set the standard in the other. Additionally, the Sentencing Guidelines have received criticism for failing to make the fine distinctions which proportionality review tends to emphasize.<sup>311</sup> This does leave the determination without many objective guideposts, but a forthright admission of discretionary decision-making may avoid more problems than a mistaken reliance on more objective criteria.

Even with these drawbacks, the Excessive Fines Clause itself seems to call for some type of proportionality review. The word "excessive" implies a comparison of factors.<sup>312</sup> At one time, the Supreme Court endorsed proportionality review under the Cruel and Unusual Punishment Clause,<sup>313</sup> and even Justice Scalia's rejection of proportionality in that context relied in part on an argument that the Cruel and Unusual

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court finds no practical method of achieving that result.").

<sup>309</sup> See *id.* at 1288, 1290.

<sup>310</sup> See *Leading Cases*, *supra* note 170, at 214 ("Because drug laws developed during the 'war on drugs' often permit disproportionate sentencing, there may be no 'proportional' guideposts against which to measure one's judgment.").

<sup>311</sup> See, e.g., Stuart Taylor, Jr., *Janet Reno's Test of Courage*, AM. LAWYER, Sept. 1993, at 34, 35 (urging the reform of drug sentencing).

<sup>312</sup> See *United States v. One 1990 Ford Ranger Truck*, 876 F. Supp. 1283, 1287 (N.D. Ga. 1995) ("[T]he wording of the clause suggests a proportionality inquiry: a forfeiture can only be 'excessive' if it is compared to something else."); see also *United States v. 461 Shelby County Rd.*, 857 F. Supp. 935, 937 (N.D. Ala. 1994).

<sup>313</sup> See *Solem v. Helm*, 463 U.S. 277, 284-90 (1983) (stating that "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence").

Punishment Clause "did not explicitly prohibit 'disproportionate' or 'excessive' punishments,"<sup>314</sup> a problem not presented here. More informatively, in a case decided under the Excessive Bail Clause, the Court noted that the word "excessive" denotes disproportionality between the level of bail and the risk of flight.<sup>315</sup> With *Austin* eroding the distinction between criminal and civil forfeitures, these other standards suggest possible content for a test under the Excessive Fines Clause.

### *B. A Combined Test*

As this discussion indicates, there is a place for both instrumentality and proportionality review of civil forfeiture. Clearly, "it makes sense to scrutinize government action more closely when the state stands to benefit."<sup>316</sup> To guard against excessiveness in this area of the law, a test should consider both the use of the defendant property in criminal activity, and the claimant's culpability as compared to the severity of the sanction. By using the instrumentality approach as a threshold, and requiring the government to carry the burden of establishing a substantial connection between the forfeited property and the crime, the courts may preserve forfeiture as an effective weapon against property used primarily for illegal purposes and interject stability into the law. This objectivity assumes greater importance when one recognizes the difficulty of comparing punishments in forfeiture cases.<sup>317</sup> However, despite the considerable appeal of objective standards, any excessiveness determination should also include an evaluation of the claimants' culpability, which may vary greatly in forfeiture cases, in relation to the severity of the penalty. By combining the two inquiries, the courts can design a manageable excessiveness standard which best fulfills the requirements of the Constitution.

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<sup>314</sup> *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (Scalia, J., concurring).

<sup>315</sup> See *Stack v. Boyle*, 342 U.S. 1, 5-6 (1951).

<sup>316</sup> *Harmelin*, 501 U.S. at 978 n.9.

<sup>317</sup> See *Leading Cases*, *supra* note 170, at 214 ("In the area of civil asset forfeiture, however, the power of objective comparison [of like cases] is substantially constrained.").