



1994

**Constitutional Law—21 U.S.C. § 881 and the Eighth Amendment:
Application of the Proportionality Requirement to Civil Forfeitures.
Austin v. United States, 113 S. Ct. 2801 (1993)**

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Recommended Citation

T. Michelle Ator, *Constitutional Law—21 U.S.C. § 881 and the Eighth Amendment: Application of the Proportionality Requirement to Civil Forfeitures. Austin v. United States*, 113 S. Ct. 2801 (1993), 17 U. ARK. LITTLE ROCK L. REV. 95 (1994).

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CONSTITUTIONAL LAW—21 U.S.C. § 881 AND THE EIGHTH AMENDMENT: APPLICATION OF THE PROPORTIONALITY REQUIREMENT TO CIVIL FORFEITURES: *AUSTIN V. UNITED STATES*, 113 S. Ct. 2801 (1993).

I. INTRODUCTION

Civil forfeiture has come to the forefront of law enforcement in recent years as a forceful weapon in combating America's serious illegal drug problem. Civil forfeiture is a procedure whereby the government may without compensation confiscate a person's property.¹ Civil forfeiture is not a new approach to law enforcement, but has been utilized for hundreds of years.² However, with the advent of a recent federal civil forfeiture statute, Title 21 U.S.C. § 881,³ forfeiture has become more widely used in the United States. This statute empowers law enforcement officers to seize and retain property which has been used to facilitate illegal drug activity or which has been gained as a result of a drug crime.⁴

In a typical civil forfeiture case, federal prosecutors may initiate civil forfeiture proceedings simultaneously with a criminal prose-

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

2. See *Austin v. United States*, 113 S. Ct. 2801, 2806-07 (1993). Forfeiture practices can be traced to Biblical and pre-Judeo-Christian practices. Exodus 21:28 has been cited as support for the historical origins of forfeiture. The verse states, "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten" Exodus 21:28 (King James); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974), *reh'g denied*, 417 U.S. 977 (1974).

3. Controlled Substances Act, 21 U.S.C. § 881 (1988 & Supp. V 1993).

4. 21 U.S.C. § 881(a)(4), (a)(6) (1988 & Supp. V 1993). The text of subsection (a)(4) reads:

The following shall be subject to forfeiture to the United States and no property right shall exist in them: 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 property . . . [in violation of Title 21].

21 U.S.C. § 881(a)(4) (Supp. V 1993).

The text of subsection (a)(6) reads:

The following shall be subject to forfeiture to the United States and no property right shall exist in them: 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 subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter

21 U.S.C. § 881 (a)(6) (1988).

cution.⁵ Civil forfeiture under Section 881 has been lauded as an important and powerful law enforcement device, since it provides a method which may not be available in a criminal prosecution for removing the tools and economic incentives associated with illegal drug trade.⁶ For example, the government may seek forfeiture of real or personal property which was used to facilitate a crime.⁷ Money and other fruits of the crime are also subject to civil forfeiture.⁸

Technically, civil forfeiture is an action in rem which is lodged against the property and not the criminal defendant.⁹ For this reason, constitutional protections afforded to criminal defendants have not historically been applied in civil forfeiture proceedings.¹⁰ Despite the in rem nature of the civil forfeiture proceeding, in the past two years the United States Supreme Court has handed down at least five important decisions which may signal the Court's increasing willingness to provide constitutional protections to property owners in civil forfeiture cases.¹¹ In one of those cases, *Austin v. United States*,¹² the Court rejected previous lower court decisions when it unanimously held that the Eighth Amendment's Excessive Fines

5. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Mar. 23, 1994).

6. 1992 U.S. DEP'T OF JUST. ANN. REP., DEP'T OF JUST. ASSET FORFEITURE PROGRAM 1, at 1-3.

7. 21 U.S.C. § 881(a)(4) (Supp. V 1993).

8. 21 U.S.C. § 881(a)(6) (1988).

9. In civil forfeiture actions, the property itself, rather than the owner, is a party to the action. See 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 2.03 (1992). Even though courts have recognized that allowing a party to bring suit against the property is a "legal fiction" because the owner of the property is the one who suffers loss if forfeiture occurs, courts have continually upheld this "fiction" based primarily on legal precedent. *Id.*

10. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) *reh'g denied*, 417 U.S. 977 (1974) (stating that the owner's guilt is constitutionally irrelevant in forfeiture cases).

11. See *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (holding that pursuant to the Due Process Clause of the Fifth Amendment, notice and opportunity to be heard are required before the government may seize property to be forfeited absent special circumstances); *Austin v. United States*, 113 S. Ct. 2801 (1993) (holding that the proportionality requirement applies to civil forfeitures); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (holding that the innocent owner defense applies to protect property owners who can show that they were unaware of the property's involvement in a drug crime); *Republic Nat'l Bank v. United States*, 113 S. Ct. 554 (1992) (holding that no appeal bond is required in order to challenge forfeiture of property which has been removed from the jurisdiction of the trial court); Richard C. Reuben, *Putting the Brakes on Forfeiture—High Court Rulings Forcing Revision on Pretrial Seizure Process*, A.B.A. J., Feb. 1994, at 14.

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

Clause¹³ applies to in rem civil forfeitures.¹⁴ Prior to the *Austin* decision, the Excessive Fines Clause had only been applied to protect parties in criminal actions.¹⁵ Since a property owner is not technically a party to an in rem civil forfeiture action, many courts and scholars reasoned that the Excessive Fines Clause did not protect the owner against excessive forfeitures.¹⁶ Following *Austin*, the Excessive Fines Clause must be applied to civil forfeiture actions to protect against penalties not proportional to the offense committed.¹⁷

This Note will first discuss the facts and procedural history presented by *Austin v. United States*, a civil forfeiture case that may signal a major change in forfeiture law. After the facts are outlined, Part III reviews the general history of forfeiture and of Title 21 U.S.C. § 881. Part III also explains the history of constitutional protections afforded to persons involved in civil forfeiture cases and the different approaches taken by courts in an effort to justify providing constitutional protections to persons who are not technically involved in civil in rem proceedings. Part IV addresses the history of the Eighth Amendment specifically and how courts, including the United States Supreme Court, have applied the Eighth Amendment to civil forfeiture cases. Finally, Part V discusses the significance of the *Austin* decision and its effect on the future of the forfeiture law.

II. SUMMARY OF FACTS

On June 13, 1990, Richard Lyle Austin met with Keith Engebretson at Austin's auto body shop in Minnehaha County, South Dakota, to arrange for Engebretson to buy cocaine from Austin.¹⁸ After they both agreed to the sale, Austin traveled from the auto

13. The Excessive Fines Clause is contained in the Eighth Amendment to the United States Constitution. It provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

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

15. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977).

16. See SMITH, *supra* note 9. The United States Courts of Appeals for the Third and Fourth Circuits previously held that the Excessive Fines Clause may apply to some civil cases. See, e.g., *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989). The United States Court of Appeals for the Second Circuit has also suggested that the Excessive Fines Clause may limit civil forfeitures, but on different reasoning than that applied by the Third and Fourth Circuits. See, e.g., *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992). This case is further discussed in note 50.

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

18. *Id.* at 2803.

body shop to his mobile home where the cocaine was stored.¹⁹ He then returned to the auto body shop and sold two grams of cocaine to Engbretson.²⁰

The following day, law enforcement officers executed search warrants at the auto body shop and the mobile home.²¹ The officers found a twenty-two caliber revolver, some marijuana, and \$4,700 in cash at the body shop.²² A piece of mirror, a small white tube, and a razor were found on top of a barrel in the back of the body shop.²³ From Austin's mobile home, the officers collected an electronic Ohaus scale,²⁴ a small bag of cocaine, a bag of marijuana, \$660 in twenty dollar bills,²⁵ and a container of cocaine marked "1/2."²⁶

Austin was indicted on four counts of violating South Dakota's drug laws on August 2, 1990²⁷ and pleaded guilty to one count of possession of cocaine with intent to distribute.²⁸ The South Dakota state court sentenced Austin to seven years imprisonment.²⁹ On September 7, 1990, the United States initiated an in rem civil forfeiture proceeding in the United States District Court for the District of South Dakota,³⁰ seeking forfeiture of Austin's body shop and mobile home under 21 U.S.C. § 881(a)(4) and (a)(7).³¹

Austin resisted the civil forfeiture by filing a claim and answering the complaint.³² On February 4, 1991, the government moved for summary judgment, and it supported the motion with an affidavit from a Sioux Falls police officer which outlined the drug sale and the items found when the officers executed the search warrants.³³

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *United States v. 508 Depot St.*, 964 F.2d 814, 815-16 (8th Cir. 1992), *rev'd* 113 S. Ct. 2801 (1993).

24. An Ohaus scale is a triple beam scale used for weighing very small objects with great accuracy. These scales are often used by drug dealers to weigh narcotics.

25. Usually, a large number of twenty dollar bills is indicative of drug trade. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 22, 1993).

26. *Depot St.*, 964 F.2d at 816. The "1/2" marking on the container of cocaine indicates that 1/2 ounce of cocaine, a typical measurement of cocaine intended for sale, had been previously measured and packaged for sale. Johnson Interview, *supra* note 25.

27. *Depot St.*, 964 F.2d at 816.

28. *Id.*

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

30. *Id.*

31. *Id.*

32. *Id.* This is the normal procedure for contesting a civil forfeiture. This topic is discussed in Part III.C of this note.

33. *Id.*

Austin opposed the government's motion for summary judgment, arguing that the forfeiture of his body shop and mobile home would violate the Eighth Amendment.³⁴ The district court was not persuaded by Austin's argument and entered summary judgment for the government.³⁵

Austin appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.³⁶ Although the Eighth Circuit determined that Austin's penalty was too great in relation to the offense committed,³⁷ the court "reluctantly" agreed with the government's position that the Eighth Amendment does not apply to a civil forfeiture action.³⁸ The Eighth Circuit stated that proportionality is an important concept in the common law and that fairness would seem to require proportionality to be applied in civil actions that result in harsh penalties.³⁹ However, based on its reading of precedent on this issue, the court refused to hold that proportionality would apply in this case.⁴⁰

The Eighth Circuit reasoned that a civil forfeiture is an action *in rem*,⁴¹ and, traditionally, only persons subjected to *in personam* actions have had the benefit of Eighth Amendment protections.⁴² The Eighth Circuit acknowledged that it is incongruous for the Constitution to protect persons whose property is subject to an *in personam* forfeiture when the same safeguards are not available to persons facing an *in rem* forfeiture of their property.⁴³ The Eighth Circuit stated, "Legal niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets"⁴⁴ [W]e are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."⁴⁵

34. *Id.*

35. *Id.*

36. *Id.*

37. *United States v. 508 Depot St.*, 964 F.2d 814, 818 (8th Cir. 1992).

38. *Id.* at 817.

39. *Id.* The Eighth Circuit stated that the proportionality requirement of the Eighth Amendment is "a deeply rooted concept in the common law." *Id.* at 817 (citing *Solem v. Helm*, 463 U.S. 277, 290-92 (1983)).

40. *Id.* at 818.

41. *Id.* The *in rem* civil forfeiture procedure is discussed in Part III.C of this note.

42. *Id.* at 817.

43. *Id.* at 817-18.

44. *Id.* at 818 (citing *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808-09 (8th Cir. 1992) (Beam, J., dissenting)).

45. *Id.*

The Eighth Circuit stated that it was constrained to agree with the United States Court of Appeals for the Ninth Circuit which previously held that since the Constitution allows in rem forfeiture to be applied against innocent owners, the Constitution must not require forfeitures to be applied proportionally to the offense committed.⁴⁶ The Eighth Circuit declined to follow decisions by the United States Courts of Appeals for the Third and Fourth Circuits on this issue which would have favored the defendant in *Austin*.⁴⁷

Austin filed a writ of certiorari with the United States Supreme Court, and the Court granted certiorari⁴⁸ to resolve an apparent conflict between the decision by the Eighth Circuit and a decision by the United States Court of Appeals for the Second Circuit⁴⁹ over the applicability of the Eighth Amendment to in rem civil forfeitures.⁵⁰ The Supreme Court held that the Eighth Amendment's Excessive Fines Clause does apply in civil forfeitures cases.⁵¹

46. *Id.* at 818.

47. *Id.* at 817-18; see also *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989). An "innocent owner defense" has been consistently rejected by courts based on the idea that an in rem proceeding is against the offending property. In an in rem action, the innocence of the owner is irrelevant. *Depot St.*, 964 F.2d at 817 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-87 (1974), *reh'g denied*, 417 U.S. 977 (1974)). Unlike common law forfeiture rules, Section 881 specifically incorporates an innocent owner defense. 21 U.S.C. § 881(a)(4)(C), (a)(7) (Supp. V 1993). The Eighth Circuit suggested that Congress inject "some sort of proportionality requirement . . . even though the Constitution does not mandate such a result" to aid the non-innocent owner as well. *Depot St.*, 964 F.2d at 818.

48. The Third and Fourth Circuits applied an analysis which was designed to distinguish between criminal and civil proceedings. See, e.g., *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989). These circuits applied the Eighth Amendment's proportionality requirement to civil cases which could be reclassified as criminal. *One 107.9 Acre Parcel of Land*, 898 F.2d at 400-01; *Santoro*, 866 F.2d at 1543-44. Based on the United States Supreme Court's decision in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989), the Eighth Circuit determined that such an analysis was not supported by case law. *Depot St.*, 964 F.2d at 818.

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

50. See *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992). This Second Circuit Court of Appeals case raised issues similar to those raised in *Austin*. A condominium was forfeited under 21 U.S.C. § 881(a)(7) because the owner sold cocaine on the premises. *Whalers Cove*, 954 F.2d at 32. The value of the condominium was approximately three hundred times the value of the cocaine which was sold. *Id.* at 37. The owner of the property argued that the disparity between the value of the condominium and the value of the drugs sold should be considered in the decision whether to forfeit his condominium. *Id.* at 33. This forfeiture, he argued, violated the Excessive Fines Clause of the Eighth Amendment. *Id.* In analyzing this issue, the Second Circuit

III. BACKGROUND

A. General History of Forfeiture

Forfeiture is the taking of a person's property, or other legal right, without compensation.⁵² There are two general types of modern forfeiture—civil forfeiture and criminal forfeiture.⁵³ Criminal forfeiture is an in personam action brought against a criminal defendant.⁵⁴ Civil forfeiture, by contrast, is brought against the property itself rather than the property owner.⁵⁵ The property owner is not a party to the in rem proceeding.⁵⁶ The differences between civil and criminal

Court of Appeals applied a different line of reasoning than that adopted by the Third and Fourth Circuits. *See supra* note 48. The Second Circuit reasoned that if the sanctions imposed under the statute were considered punitive under an analysis announced earlier in *United States v. Halper*, 490 U.S. 435 (1989), then constitutional protections which are "intrinsically personal" and serve a "humane" interest would apply. *Whalers Cove*, 954 F.2d at 35. The court found that the protections afforded under the Eighth Amendment's Excessive Fines Clause were personal. *Id.* at 35-37. Also, relying on *Halper*, the Second Circuit found that the forfeiture was punitive, since the civil forfeiture in this case was not shown by the government to serve an "articulated, legitimate civil purpose." *Id.* at 37. According to the court, examples of an articulated, legitimate civil purpose may include eliminating the criminal's resources and instrumentalities or providing compensation for the government's investigation of the crime and enforcement of the law. *Id.* at 35-36. The government failed to prove that any of these remedial purposes applied in this case. *Id.* at 37. Since the forfeiture was punitive, the Eighth Amendment protections attached to the forfeiture even though it was a civil proceeding. *Id.* The Second Circuit found, however, that even though the Excessive Fines Clause applied to this case, the forfeiture of the condominium was not so excessive in relation to the crime as to violate the Constitution. *Id.* at 37-39.

51. *Austin v. United States*, 113 S. Ct. 2801, 2804 (1993).

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

53. *See SMITH, supra* note 9, for a comparison of in rem and criminal forfeitures.

54. *See SMITH, supra* note 9.

55. *See SMITH, supra* note 9.

56. *See SMITH, supra* note 9. Since the civil in rem action is against the property and not the person, personal protections afforded to criminal defendants were not applicable in civil forfeiture cases prior to the *Austin* decision. *See SMITH, supra* note 9. The protections afforded to criminal defendants by the United States Constitution include: The Fourth Amendment protections against unreasonable search and seizure; the Fifth Amendment protections against self incrimination, deprivation of life, liberty, or property without due process, and double jeopardy; the Sixth Amendment protection of a right to a speedy trial; and the Eighth Amendment protections against excessive bail and fines and against cruel and unusual punishment. *See SMITH, supra* note 9. Many of these protections are not available to property owners in a civil forfeiture proceeding. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (stating that the Fifth Amendment Double Jeopardy Clause does not apply to civil forfeitures); *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (stating that the "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions"); *United States v.*

forfeiture may be more easily understood by examining the history of this unique legal concept.

Forfeiture has been part of our law since Biblical times.⁵⁷ Under the English common law, there were three types of forfeiture:⁵⁸ the deodand,⁵⁹ forfeiture of estate,⁶⁰ and statutory forfeiture.⁶¹ Under the rule of deodand, the value of an object which directly or indirectly caused the death of a person was forfeited to the King.⁶² Supposedly, the King used the money to ensure that prayers were said for the deceased, or for charitable purposes.⁶³ Eventually, the deodand's religious significance ceased, and it simply became a source of revenue to the King.⁶⁴ The King justified continued use of the deodand as a penalty for carelessness.⁶⁵ Deodand was never accepted in the United States.⁶⁶

The second type of early forfeiture, forfeiture of estate, was used as punishment for felonies and treason.⁶⁷ A person convicted

United States Coin & Currency, 401 U.S. 715, 721-22 (1971) (stating that the Fifth Amendment Self-Incrimination Clause applies to civil forfeiture proceedings but only where the forfeiture statute makes the culpability of the owner relevant); *United States v. Zucker*, 161 U.S. 475, 481-82 (1896) (holding that the Sixth Amendment does not apply to civil forfeiture proceedings). *But see* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) (holding that Fourth Amendment protections against illegal search and seizure may be applied to forfeitures which are not remedial in nature); Michael Schechter, Note, *Fear and Loathing in the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1160-63, 1182 (1990); Steffanie Stracke, Comment, *The Criminal Activity Forfeiture Act: Replete with Constitutional Violations*, 57 MO. L. REV. 909, 925 (1992).

57. *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974), *reh'g denied*, 417 U.S. 977 (1974).

58. *See Calero-Toledo*, 416 U.S. at 680-83.

59. *Id.* at 681.

60. *Id.* at 682.

61. *Id.* at 682-83.

62. *Id.* at 681. This practice in forfeiture law has not been limited to English law. Justice Holmes explained that in ancient Greece and Rome, a similar principle, *noxae dedito*, was practiced. OLIVER W. HOLMES, JR., *THE COMMON LAW* 8-9 (1881). According to *noxae dedito*, an "offending" animal, child, slave, or inanimate object had to be surrendered to the injured victim or his or her family. *Id.* Eventually, this type of forfeiture practice was replaced by the payment of the value of the object or person over to the injured party. *Id.* Holmes hypothesized that our modern system of paying monetary damages thus developed from these early forfeiture practices. *Id.*

63. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *300; *see also Calero-Toledo*, 416 U.S. at 681.

64. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *300; *see also Calero-Toledo*, 416 U.S. at 681.

65. SIR MATTHEW HALE, 1 *THE HISTORY OF THE PLEAS OF THE CROWN* 424 (1847); *see also Calero-Toledo*, 416 U.S. at 681.

66. *Calero-Toledo*, 416 U.S. at 682.

67. *Id.*

of such a crime forfeited all of his real and personal property to his feudal lord or to the King.⁶⁸ Forfeiture of estate is unconstitutional in the United States.⁶⁹

The third type of forfeiture, statutory forfeiture, was used in England to forfeit the property of persons who committed statutory felonies and was an in rem action in the Court of Exchequer.⁷⁰ Statutory forfeiture is the only type of early forfeiture that has been accepted by the American courts.⁷¹ Early colonial courts exercised in rem jurisdiction under forfeiture statutes.⁷² Modern criminal and civil forfeitures are current examples of statutory forfeiture.⁷³

The theory behind each type of early in rem forfeiture law was that an object used in wrongful activity was itself guilty of the crime.⁷⁴ Accordingly, the property, rather than its owner, was the subject of an in rem forfeiture suit.⁷⁵ While the reason for the rule may have been long forgotten, the fiction that the offending object may be guilty, and therefore subject to an in rem suit, has carried forward into modern times.⁷⁶

In the United States, in rem forfeiture has been consistently utilized by law enforcement officials to remedy problems in society. Following the American Revolution, civil in rem forfeiture was used to enforce protective tariffs on tea and other luxury goods,⁷⁷ on

68. 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1909); THEODORE F.T. PLUNCKNETT, A CONCISE HISTORY OF THE COMMON LAW 452 (1956); see also *Calero-Toledo*, 416 U.S. at 682.

69. The United States Constitution provides that "[t]he Congress shall have Power to declare Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. CONST. art. III, § 2, cl. 2.

70. 3 WILLIAM BLACKSTONE, COMMENTARIES *261-62; see also *Calero-Toledo*, 416 U.S. at 682.

71. *Calero-Toledo*, 416 U.S. at 683.

72. *Id.* Some early colonists showed "disdain" for forfeitures, however, and refused to accept them into their law. John Brew, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461, 464 (1988).

73. 37 C.J.S. *Forfeitures* § 5(a) (1943). Forfeitures are not favored in the law. *United States v. One 1976 Ford F-150 Pickup*, 769 F.2d 525, 527 (8th Cir. 1985). They must be authorized by a given statute. 37 C.J.S. *Forfeitures* § 5(a). For an interesting example of a forfeiture statute involving firearms, see *King v. United States*, 364 F.2d 235 (5th Cir. 1966) (regarding forfeiture of the rifle and pistol used in the assassination of President John F. Kennedy).

74. OLIVER W. HOLMES, JR., THE COMMON LAW 6-12 (1881).

75. See SMITH, *supra* note 9.

76. In 1881, Justice Holmes explained that "[t]he reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for." OLIVER W. HOLMES, JR., THE COMMON LAW 5 (1881); see also SMITH, *supra* note 9.

77. See *Peich v. Ware*, 8 U.S. (4 Cranch) 347 (1808).

tobacco imports,⁷⁸ and to remedy piracy on the high seas.⁷⁹ Later, forfeiture was used to curb illegal slave trade.⁸⁰ During the Prohibition era of the 1920's, civil forfeiture was used to combat "bootlegging" in an effort to enforce the antiliquor laws.⁸¹ More recently, it has been used to ensure compliance with tax laws.⁸² Today, civil forfeiture is utilized by law enforcement officials to combat problems including illegal gambling,⁸³ copyright violations,⁸⁴ sexual exploitation of children,⁸⁵ money laundering,⁸⁶ organized crime,⁸⁷ and illegal drug trade.⁸⁸

Throughout American history, however, there have been problems associated with the use of forfeiture to handle these social concerns. The lack of constitutional protection prior to *Austin* meant that the government had few restrictions, other than those which were self imposed,⁸⁹ as to the amount of property that could be forfeited as the result of a specific illegal act.⁹⁰ For example, in some early cases, entire ships were forfeited due to a crew member's violation of

78. See *Lilenthals Tobacco v. United States*, 97 U.S. 237 (1877).

79. See *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).

80. See William J. Hughes & Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613, 618 (1984).

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

82. See *Helvering v. Mitchell*, 303 U.S. 391 (1938).

83. 18 U.S.C. § 1955(d).

84. 17 U.S.C. § 509(a) (1988). Forfeiture is also used extensively in other areas including "white collar" banking and financial crime. See Robert G. Morvillo, *Forfeiture and Its Constitutional Dimensions*, N.Y.L.J., June 1, 1993, at 3 (col. 1).

85. 18 U.S.C. § 2254 (1988 & Supp. V 1993).

86. 18 U.S.C. § 981 (Supp. V 1993).

87. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, is one commonly used statute which utilizes forfeiture to remove the profits of organized crime. RICO authorizes in personam forfeiture against persons in violation of its requirements. 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993).

For treatment of the relationship between the Eighth Amendment and in personam forfeitures, see HUGHES & O'CONNELL, *supra* note 80 (reviewing history and modern application of in personam forfeitures); William W. Taylor, III, *The Problem of Proportionality in RICO Forfeitures*, 65 NOTRE DAME L. REV. 885 (1990) (addressing the lack of proportionality required by the statute); Vernon M. Winters, Note, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough*, 14 HASTINGS CONST. L. Q. 451, 452 (1987) (suggesting that RICO should be amended to comply more closely with the Eighth Amendment); Ian A.J. Pitz, Note, *Letting the Punishment Fit the Crime: Proportional Forfeiture Under Criminal RICO's Source of Influence Provision*, 75 MINN. L. REV. 1223 (1991).

88. 21 U.S.C. § 881 (1988 & Supp. V 1993).

89. The Department of Justice carefully follows regulations for ensuring fairness in forfeiture cases. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 23, 1993).

90. See, e.g., *Mitchell v. Torup, Parker* 227, 145 Eng. Rep. 764 (Ex. 1766).

import laws, and as recently as 1973, a leased yacht was subjected to forfeiture because the lessee had one marijuana cigarette on board the yacht.⁹¹ Houses and businesses have also been forfeited because they were used as storage or selling places for illegal drugs.⁹² At least one commentator has argued that the use of forfeiture for such valuable amounts of property, without specific statutory and constitutional protections, may be unfair to property owners because the value of the property forfeited bears no rational relation to the severity of the offense committed.⁹³

B. History of Title 21 U.S.C. § 881

In the early 1970's, Congress revitalized its use of forfeiture in an effort to combat increasing organized crime and illegal drug trade.⁹⁴ The Comprehensive Drug Abuse Prevention and Control Act of 1970 utilized in rem civil forfeiture as a means of curbing illegal drug activities.⁹⁵ The Act allowed the federal government to seize cars, equipment, and other materials used to manufacture or transport illegal drugs.⁹⁶ However, it was soon clear to many that more stringent means than the Act provided would be needed to combat the mounting drug problem.⁹⁷

In 1978, the Act was amended to include a provision aimed at drastically reducing the profit associated with drug related crime.⁹⁸

91. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665, 693 (1974), *reh'g denied*, 477 U.S. 977 (1974).

92. *See, e.g.*, *United States v. 508 Depot St.*, 964 F.2d 814, 815-16 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2801 (1993).

93. Ron Champoux, Note, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L. Q. 247, 257 (1992).

94. The first federal laws to utilize forfeitures for controlling illegal drugs and organized crime were RICO (18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)) and the Controlled Substances Act (21 U.S.C. § 881 (1988)).

95. Comprehensive Crime Control Act, Pub. L. No. 91-513, 84 Stat. 1276 (1970) (codified at 21 U.S.C. § 881 (1988)).

96. 21 U.S.C. § 881 (1988).

97. The limited success of the 1970 version of the statute has been attributed to (1) the limited scope of property which was subject to forfeiture under the statute, (2) the ability of persons to defeat the statute by removing, transferring, or concealing assets prior to conviction, (3) the need to pursue almost all drug related forfeitures via civil proceedings causing a backlog in the court since criminal trials were also necessary to try the property owner, and (4) the untenable financial burden placed on law enforcement agencies in an effort to pursue forfeitures. S. Rep. No. 225, 98th Cong., 2d Sess. 191-97 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374-80; *see also* Damon G. Saltzburg, Note, *Real Property Forfeitures As A Weapon In the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U.L. REV. 217, 217 (1992).

98. S. Rep. No. 225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984

The addition of section 881(a)(6) allowed federal law enforcement officers to subject the proceeds of illegal drug activity to forfeiture.⁹⁹ This new subsection did not allow the government to confiscate real property, however.¹⁰⁰

Significantly, Congress subsequently passed the Comprehensive Crime Control Act of 1984 which provides for forfeiture of real and personal property which was unavailable in the earlier versions of the statute.¹⁰¹ This subsection enhances 21 U.S.C. § 881(a)(4) which allows federal law enforcement officers to seize any property used in any manner to facilitate illegal drug activity.¹⁰²

C. Forfeiture Procedure under Title 21 U.S.C. § 881

There are many types of property which may be subject to forfeiture under 21 U.S.C. § 881.¹⁰³ Before property is forfeited, it must be seized by law enforcement officials.¹⁰⁴ Until recently, this could be accomplished with or without a warrant regardless of whether the forfeitable property was real or personal property.¹⁰⁵ However, in a recent decision, the United States Supreme Court held that the Due Process Clause of the Fifth Amendment requires

U.S.C.C.A.N. 3182, 3374 (stating that the economic aspects of crime must be attacked in order for efforts to control drug trafficking to be successful).

99. 21 U.S.C. § 881(a)(6) (1988); *see supra* note 4.

100. 21 U.S.C. § 881(a)(6) (1988); *see supra* note 4.

101. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified at 21 U.S.C. § 881(a)(7) (Supp. V 1993)).

102. 21 U.S.C. § 881(a)(7) (Supp. V 1993). The text of the statute states that:

The following shall be subject to forfeiture to the United States and no property right shall exist in them: All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment

21 U.S.C. § 881(a)(7) (Supp. V 1993).

103. Forfeitable property includes: illegal controlled substances, 21 U.S.C. § 881(a)(1), (a)(8); equipment, raw materials, or products used to manufacture, transport, or distribute illegal controlled substances, 21 U.S.C. § 881(a)(2), (a)(9); containers used for storage of illegal drugs, 21 U.S.C. § 881(a)(3); conveyances used to transport drugs or to facilitate a drug crime, 21 U.S.C. § 881(a)(4); records and research data used or intended to be used in illegal drug activity, 21 U.S.C. § 881(a)(5); assets which are furnished in exchange for a controlled substance or can be traced to an illegal drug sale, 21 U.S.C. § 881(a)(6); real property used to facilitate a drug crime, 21 U.S.C. § 881(a)(7); drug paraphernalia, 21 U.S.C. § 881(a)(10); and any weapons used to facilitate a drug related crime, 21 U.S.C. § 881(a)(11).

104. 21 U.S.C. § 881(b) (Supp. V 1993).

105. *Id.*

the government to afford notice and meaningful opportunity to be heard before real property can be seized subject to a civil forfeiture.¹⁰⁶ Therefore, in civil forfeiture cases, a warrantless seizure of real property will not be allowed under the new ruling.¹⁰⁷

Currently, the government may seize real property without a warrant if the seizure of the property is incidental to the arrest of a person,¹⁰⁸ if the property has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding,¹⁰⁹ if there is probable cause to believe that the property is a threat to public safety,¹¹⁰ or if there is probable cause to believe that the property was used to facilitate a drug crime.¹¹¹ Property may also be seized by a United States Marshal after the issuance of a warrant for the arrest of the property.¹¹²

Following seizure of property, there are three methods for obtaining its forfeiture under 21 U.S.C. § 881—summary forfeiture,¹¹³ administrative forfeiture,¹¹⁴ and judicial forfeiture.¹¹⁵ Summary forfeiture is used to forfeit controlled substances and materials used to manufacture drugs.¹¹⁶ These items are considered a danger to the public and may be forfeited without notice or a hearing.¹¹⁷

Other property may be forfeited either under the administrative forfeiture process or the judicial forfeiture process. The administrative forfeiture procedure generally applies to property valued at \$500,000 or less and conveyances used to transport or store illegal drugs, regardless of the value of the conveyance,¹¹⁸ as long as the prosecutor has probable cause to believe that the property is subject to forfeiture.¹¹⁹ In the administrative forfeiture process, the agency that seizes the property must promptly notify¹²⁰ any parties who appear

106. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993).

107. *Id.*

108. 21 U.S.C. § 881(b)(1) (Supp. V 1993).

109. 21 U.S.C. § 881(b)(2) (Supp. V 1993).

110. 21 U.S.C. § 881(b)(3) (Supp. V 1993).

111. 21 U.S.C. § 881(b)(4) (Supp. V 1993).

112. 21 U.S.C. § 881(b) (Supp. V 1993). The warrant may be executed by the U.S. Marshal by seizing the property or affixing notice of seizure to the property. See *ARKANSAS CRIMINAL LAW HANDBOOK*, ARK. BAR ASS'N 19.14 (Sept. 1985).

113. 21 U.S.C. § 881(f) (Supp. V 1993).

114. 21 U.S.C. § 881(d) (1988); 19 U.S.C. §§ 1607-1609 (1988 & Supp. V 1993).

115. 21 U.S.C. § 881(d) (1988); 19 U.S.C. §§ 1608-1610 (1988 & Supp. V 1993).

116. 21 U.S.C. § 881(f) (Supp. V 1993).

117. *See id.*

118. 21 U.S.C. § 881(d) (1988); 19 U.S.C. § 1607 (1988 & Supp. V 1993).

119. 19 U.S.C. § 1615 (1988).

120. 19 U.S.C. § 1602 (1988 & Supp. V 1993).

to have an interest in the property¹²¹ that the property has been seized and that the government intends to pursue forfeiture of the property.¹²² The notice must contain a statement of the applicable procedures available to an individual who wants to contest the administrative forfeiture.¹²³ If a person fails to respond to the notification within a given time period, the property is automatically deemed to be forfeited.¹²⁴ In the administrative process, the validity of the forfeiture is determined by an official in the seizing agency, and the agency's declaration of forfeiture is given the same force as a judicial forfeiture order.¹²⁵

The owner of property subject to forfeiture may desire to have a judicial forfeiture proceeding. If so, he may transfer the case from the seizing agency to the appropriate United States Attorney's Office by filing a claim and posting a bond for a percentage of the property's value in the district court.¹²⁶ In cases where administrative forfeiture is available, obtaining judicial forfeiture is at the discretion of the property owner.¹²⁷ However, where the property subject to forfeiture is valued at more than \$500,000, the administrative process is unavailable and judicial forfeiture is required.¹²⁸

In the judicial forfeiture procedure, a United States Attorney files a claim against the property in federal district court pursuant to the Supplemental Rules for Admiralty and Maritime Claims.¹²⁹ Venue is proper in the judicial district where the property owner

121. 19 U.S.C. § 1607 (1988 & Supp. V 1993).

122. 19 U.S.C. § 1608 (1988 & Supp. V 1993).

123. *See id.*

124. *Id.*; *see also* ARKANSAS CRIMINAL LAW HANDBOOK, ARK. BAR ASS'N 19.2 (Sept. 1985). The time varies depending on the property to be forfeited. ARKANSAS CRIMINAL LAW HANDBOOK, ARK. BAR ASS'N 19.2 (Sept. 1985).

125. ARKANSAS CRIMINAL LAW HANDBOOK, ARK. BAR ASS'N 19.4 (Sept. 1985).

126. 19 U.S.C. § 1608 (1988 & Supp. V 1993).

127. *See* ARKANSAS CRIMINAL LAW HANDBOOK, ARK. BAR ASS'N 19.13 (Sept. 1985).

128. 19 U.S.C. § 1610 (1988 & Supp. V 1993). There are special rules for cash, personal property, real property, and conveyances used to transport illegal drugs. Cash and personal property may not be subjected to administrative forfeiture if valued over \$500,000. All real property must be judicially forfeited, and all conveyances may be forfeited via the administrative procedure regardless of value. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 23 1993).

129. Traditionally, admiralty procedural rules govern civil forfeitures. *See* Karen L. Fisher, Note, *Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Prevention and Control Act*, 26 IND. L. REV. 657, 661-63 (1993).

resides, where a criminal trial will take place if criminal charges have been filed against the property owner, or where the property is located.¹³⁰ The property is served with notice, and public notice is also given to ensure that anyone with an interest in the property is informed of the action against the property.¹³¹

In the judicial proceeding, once the government has shown probable cause that the property is subject to forfeiture, the burden shifts to the property owner to show that the property was not used illegally.¹³² At common law, the guilt or innocence of the owner was constitutionally irrelevant in a forfeiture case, since the proceeding was in rem against the property.¹³³ For this reason, the burden of proof associated with criminal cases is not applicable in civil forfeiture proceedings.¹³⁴ This means that under common law rules, an innocent owner's property might be subject to forfeiture even though the owner himself was not involved in the illegal activity which subjected the property to forfeiture.¹³⁵

130. 28 U.S.C. § 1395 (1988).

131. 19 U.S.C. § 1607 (1988 & Supp. V 1993); see also David B. Smith, *The Civil Forfeiture Case's Critical Beginning*, 35 THE PRAC. LAW. 57 (1989) (explaining the forfeiture proceedings and remedies for property owners whose property has been seized). For treatment of attorney's fees and forfeiture cases, see Claudio Riedi, *To Shift or to Shaft: Attorney Fees for Prevailing Claimants in Civil Forfeiture Suits*, 47 U. MIAMI L. REV. 147 (1992).

132. 19 U.S.C. § 1615 (1988 & Supp. V 1993). The government must have probable cause to link property with illegal drug activity but does not have to link the property to a specific transaction. Edith A. Landman & John Hieronymus, *Civil Forfeiture of Real Property Under 21 U.S.C. § 881(a)(7)*, 70 MICH. B. J. 174, 177 (1991) (citing 21 U.S.C. § 881(d), 19 U.S.C. § 1615, and United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986)).

133. United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2801 (1993).

134. Forfeiture proceedings are not subject to the same burden of proof, beyond a reasonable doubt, that is required in criminal proceedings. Austin v. United States, 113 S. Ct. 2801, 2804-05 (1993) (citing *In re Winship*, 397 U.S. 358 (1970)).

135. This rule has provoked criticism by some commentators. For treatment of issues related to the innocent owner concern, see Brad A. Chapman, *The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The "Innocent" Lienholder's Rights*, 21 TEX. TECH L. REV. 2127 (1990) (discussing the effect of the "relation-back" doctrine on forfeiture procedure affecting the rights of innocent land owners); Anne-Marie Feeley, Comment, *Forfeiture of Marital Property Under 21 U.S.C. § 881(a)(7): Irreconcilable Differences?*, 37 VILL. L. REV. 1487 (1992) (discussing the effect of forfeiture of marital property on an innocent spouse); Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990) (discussing the "relation-back" doctrine which imparts ownership of property used in violation of 21 U.S.C. § 881 as of the date of the offense. The "relation-back" doctrine has allowed forfeiture of property in the hands of an innocent transferee based

Both state and federal courts have justified taking property from "innocent" owners by repeating the legal fiction that the offense attaches to the offending object rather than the person.¹³⁶ For example, in *Dobbin's Distillery v. United States*,¹³⁷ the Supreme Court held that the owner of real property and the distillery situated thereon did not have recourse against a forfeiture suit incurred by the illegal conduct of his lessee who was operating the distillery.¹³⁸ The Court stated that the offense attached to the distillery.¹³⁹ The personal misconduct or responsibility of the owner was irrelevant beyond the responsibility arising from the fact that he leased the property to the distiller who used the property wrongly.¹⁴⁰ As in *Dobbin's*, other decisions seem to rely on this underlying rationale that the owner was negligent by entrusting the property to the person committing the illegal act.¹⁴¹ The Supreme Court has, however, reserved judgment as to whether a "totally innocent" owner's property would be subject to forfeiture and has indicated that this issue would raise "serious constitutional questions."¹⁴²

To remedy this concern, when drafting Section 881, Congress specifically provided a defense for an innocent property owner.¹⁴³ Section 881(a)(7) disallows forfeiture of property from an owner whose property was used illegally without his or her knowledge or

on the notion that the transferee did not have ownership rights in the property if it was transferred after the commission of a crime, since the government owned the property as of the date of the crime); Eugene J. Morris & Steven L. Kessler, *Real Property Forfeiture: Seizure of Property Emerges as Law Enforcement Device*, N.Y.L.J., Mar. 13, 1993, at 35 (col. 2) (discussing the marketability of titles of real property subjected to forfeiture and the due diligence requirements of lawyers executing title searches involving property which may have been involved in a forfeiture proceeding). Today, 21 U.S.C. § 881(a)(7) provides a defense for innocent property holders. The statute states that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7) (1988).

136. See, e.g., *Dobbin's Distillery v. United States*, 96 U.S. 395 (1877).

137. 96 U.S. 395 (1877).

138. *Id.* at 402-04.

139. *Id.*

140. *Id.* at 401.

141. See *Austin v. United States*, 113 S. Ct. 2801, 2808-10 (1993).

142. *Id.* at 2809; see also *United States v. Park*, 421 U.S. 658 (1975) (stating in dictum that if a property owner is "totally powerless" to prevent crime, then he is totally innocent and civil forfeiture might not be allowed); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-89 (1974), *reh'g denied*, 477 U.S. 977 (1974).

143. See *supra* note 135 and accompanying text.

consent.¹⁴⁴ Congress did not, however, specify which constitutional protections should be provided to owners who are not innocent, nor did it require that the amount forfeited be in proportion to the severity of the crime committed.¹⁴⁵ In interpreting statutes like Section 881, courts have supplied constitutional protections which are not specifically provided in the text of the statute but which may be warranted by reason and fairness.¹⁴⁶

If the court determines that the property is to be forfeited, ownership of the property is transferred to the United States and the property is taken into the custody of the United States Attorney General.¹⁴⁷ Some contraband must be destroyed,¹⁴⁸ but the Attorney General has discretion as to what may be done with most of the seized property.¹⁴⁹ Forfeited property may be sold and the proceeds used to pay for the costs incurred in fighting crime.¹⁵⁰ The Attorney General may also retain the property for official use or transfer the property to any federal, state, or foreign law enforcement agency which participated directly in the seizure or forfeiture of the property.¹⁵¹ The statute provides that seized cash must be used to pay expenses of the proceedings for forfeiture and sale, including the costs associated with seizure, maintenance of custody, advertising, and court costs.¹⁵² Any money remaining after all costs have been paid must be forwarded to the United States Treasurer to be deposited in the treasury's

144. 21 U.S.C. § 881(a)(7) (1988).

145. *Id.*

146. This has required careful interpretation of the specific wording of the statute. See Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 475-78 (1989) (discussing the meaning of "facilitation" under § 881(a)(7)).

147. 21 U.S.C. § 881(e) (1988 & Supp. V 1993).

148. 21 U.S.C. § 881(e)(4)(B)(2) (Supp. V 1993). Illegal narcotics and dangerous, toxic, or hazardous materials are examples of contraband goods. *Id.* § 881(f)(1).

149. 21 U.S.C. § 881(e) (1988 & Supp. V 1993).

150. 21 U.S.C. § 881(e)(2)(A) (1988). Proceeds may also go toward paying costs of maintaining custody of forfeited goods or to pay monetary rewards of up to \$100,000 to persons who provide original information which leads to the arrest and conviction of a person who kills or kidnaps a federal drug law enforcement agent. *Id.*

151. 21 U.S.C. § 881(e)(1)(A), (E) (1988 & Supp. V 1993). These sections apply to property that is used for law enforcement purposes including office furniture or cars which may be necessary for undercover drug operations. The three objectives of the Federal Asset Forfeiture Program are "(1) law enforcement, (2) enhanced law enforcement cooperation through equitable sharing of forfeiture proceeds, and (3) as a by-product, revenue to enhance forfeitures and strengthen law enforcement." 1992 U.S. DEP'T OF JUST. ANN. REP., DEP'T OF JUST. ASSET FORFEITURE PROGRAM 1, at 7.

152. 21 U.S.C. § 881(e)(2)(A), (B) (1988 & Supp. V 1993).

general fund.¹⁵³ Federal and state law enforcement agencies share in the forfeited profits.¹⁵⁴ Thus, state and local agencies are rewarded for cooperating with federal law enforcement efforts.¹⁵⁵

As a final safeguard, following forfeiture, anyone with an interest in forfeited property has an opportunity to petition for remission or mitigation of the forfeiture.¹⁵⁶ The petition is heard by a representative of the seizing agency if the property was forfeited under the administrative procedure or by a representative of the Department of Justice if the property was forfeited under the judicial procedure.¹⁵⁷ In determining whether remission or mitigation is available to a property owner, the appropriate official will consider a series of factors including the validity of the interest of the person requesting remission or mitigation, whether that person had knowledge of or was involved in the wrongful act, and whether that person took reasonable steps to prevent the wrongful act from occurring.¹⁵⁸

153. *Id.*

154. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 23, 1993).

155. *Id.* 21 U.S.C. § 881(e)(3) (1988 & Supp. V 1993) sets forth the method of distribution. In distributing property to law enforcement officials, the Attorney General must ensure that the property transferred to a state or local agency has a value that is reasonably related to the degree of direct participation that the state or local agency exercised in the law enforcement effort which resulted in the forfeiture. 21 U.S.C. § 881(e)(3). The Attorney General should take into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based. *Id.* Furthermore, the Attorney General should consider what will serve to encourage further cooperation between the recipient state or local agency and federal law enforcement agencies. *Id.*

156. 19 U.S.C. § 1618 (1988 & Supp. V 1993). The statute requires that:

Whenever any person [who] . . . has incurred, or is alleged to have incurred, any fine or penalty [under this chapter] files . . . before the sale [of the property] a petition for the remission or mitigation of such fine, penalty, or forfeiture, the [appropriate official] if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

Id.

157. THE ARKANSAS CRIMINAL LAW HANDBOOK, ARK. BAR ASS'N 19.14 (Sept. 1985). Some commentators have suggested that the process which allows return of property to innocent owners may not be sufficient protection of the owners' interests, since it may take several months following the forfeiture proceeding to return the property to the owner. *Id.* at 19.3-4. In its amicus curiae brief to the United States Supreme Court, the National Association of Criminal Defense Lawyers argued

These protections are set forth by regulation but are not specifically required by the United States Constitution.¹⁵⁹

D. General History of Constitutional Protections in Civil Forfeiture

The lack of procedural safeguards associated with forfeiture laws has been the subject of controversy surrounding the use of civil forfeiture.¹⁶⁰ Property owners have argued that even though the proceeding is in rem against their property and they are technically not a party to the action, the forfeiture action deprives them of their property in violation of rights provided by the Constitution.¹⁶¹

In response to the property owners' arguments, the United States Supreme Court has held that despite the in rem nature of civil forfeitures, owners of forfeited property are to be provided with some constitutional protections.¹⁶² Courts have recognized that harsh consequences may result from a strict application of the distinction between in rem and in personam forfeitures.¹⁶³ However, in order to justify the apparent logical problem of applying personal constitutional protections to aid an individual who is theoretically uninvolved in an in rem action, the courts have had to develop different rationales for allowing constitutional provisions to protect property owners in forfeiture actions. The United States Supreme Court has applied three basic rationales in an effort to solve this problem.

that "[r]elief is so rarely granted to anyone except banks and wholly innocent lien holders that knowledgeable attorneys consider it a waste of time to seek remission or mitigation of forfeiture penalty." *Austin Loss Might Undermine Forfeiture Program*, Prentice Hall Law and Business, Criminal Division (1993); see Christopher M. Neronha, Note, In re Metmor Financial, Inc.: *The Better Approach to Post-Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853 (1990) (discussing the award of post-seizure interest to innocent parties); *Congress Hears Charges of Forfeiture Abuse*, NAT'L L.J., Oct. 12, 1992, at 5.

158. 28 C.F.R. § 9.5(b) (1993).

159. *Id.*

160. See, e.g., Steven L. Kessler, *Tide is Turning in Federal Forfeiture Rulings*, N.Y.L.J., Mar. 5, 1993, at 1 (col. 1); see also Henry C. Darmstadter & Leslie J. Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 29 (1987).

161. This was Austin's argument in *Austin v. United States*, 113 S. Ct. 2801, 2804 (1993).

162. See *supra* note 56.

163. See, e.g., *Alexander v. United States*, 113 S. Ct. 2766 (1993). In *Alexander*, the Court held that in personam criminal forfeiture under RICO was no different than a fine, and so the Eighth Amendment Excessive Fines Clause would apply to disallow disproportionate forfeitures. *Id.* at 2775-76. *Alexander* was decided on the same day that the Court handed down the *Austin* decision. *Id.* at 2766.

1. The Quasi-Criminal Approach

In some instances, the Court has classified civil forfeiture as "quasi-criminal in nature."¹⁶⁴ The idea is that if the effect of the proceeding is like that of criminal proceedings, constitutional rights must be protected.¹⁶⁵ In 1886, in *Boyd v. United States*,¹⁶⁶ the Supreme Court held that civil forfeitures are subject to Fourth Amendment protections against unlawful search and seizure.¹⁶⁷ In that case, the owner and importer of thirty-five cases of plate glass fraudulently attempted to avoid import duties imposed by the federal government by falsifying records regarding the glass.¹⁶⁸ The governing statute in force at the time required the owner to forfeit the records to the government or a confession of wrongdoing would be assumed.¹⁶⁹ The Court stated that even though the forfeiture proceeding was civil in form, it was criminal in nature because the suit was instituted as a result of the commission of a criminal offense.¹⁷⁰ The Court held that the forfeiture requirement was quasi-criminal, and, thus, it was subject to the Unreasonable Search and Seizure Clause of the Fourth Amendment.¹⁷¹ Accordingly, the Court refused to admit evidence which was seized in violation of the Fourth Amendment in order to sustain the forfeiture.¹⁷² The Court also found that the Self Incrimination Clause of the Fifth Amendment was applicable since the defendant faced further criminal sanctions.¹⁷³

The Supreme Court addressed the applicability of the Fourth Amendment to civil forfeiture again in *One 1958 Plymouth Sedan v. Pennsylvania*.¹⁷⁴ In *One 1958 Plymouth Sedan*, the owner of an automobile was stopped by state law enforcement officers.¹⁷⁵ In the

164. *Boyd v. United States*, 116 U.S. 616, 634 (1886).

165. *Id.*

166. 116 U.S. 616 (1886).

167. *Id.* at 635.

168. *Id.* at 617.

169. *Id.* at 617-20. The relevant portion of the statute, "An Act to Amend the Customs Revenue Laws and to Repeal Moieties," reads:

The attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, [may] issue notice to the defendant . . . to produce such book . . . and if the defendant or claimant shall fail or refuse to produce such book . . . the allegations stated in the said motion shall be taken as confessed

Id.

170. *Id.* at 634.

171. *Id.*

172. *Id.*

173. *Id.*

174. 380 U.S. 693 (1965).

175. *Id.* at 694.

trunk of the car, the officers found thirty-one cases of liquor¹⁷⁶ which did not have the required Pennsylvania tax seals attached.¹⁷⁷ The driver was arrested and the car was seized.¹⁷⁸ Following the arrest, the State of Pennsylvania filed for forfeiture of the car.¹⁷⁹ The State attempted to admit evidence into the forfeiture proceeding regarding a search of the car which did not comply with Fourth Amendment requirements.¹⁸⁰ Following the ruling in *Boyd*, the Court refused to admit such evidence.¹⁸¹ According to the Court, the object of forfeiture in civil proceedings, as in criminal proceedings, is to penalize an individual for the commission of an offense against the law.¹⁸² The Court agreed with the *Boyd* Court that the quasi-criminal nature of the forfeiture proceeding mandated this conclusion, and, thus, the forfeiture of the automobile could not stand.¹⁸³ The Court stated that if the car had been contraband per se as was the liquor, then it may have been forfeited anyway.¹⁸⁴

2. The Reclassification Approach

Expounding on the quasi-criminal justification, the Court has also rationalized application of constitutional protections to forfeited property owners by holding that a civil statute may be reclassified by courts as being criminal where the purpose or effect of the statute is extremely punitive.¹⁸⁵ In *United States v. Ward*,¹⁸⁶ the Court set forth a two-prong test which was to be used to determine when a civil statute became so punitive as to become criminal.¹⁸⁷ The test required a court to first determine whether Congress indicated, either expressly or impliedly, a preference for one label or the other when it established the penalizing mechanism.¹⁸⁸ Second, when Congress

176. The police officer noted that the car was "low in the rear, quite low." *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 694-95.

181. *Id.*

182. *Id.* at 699-700.

183. *Id.* at 699.

184. *Id.* Summary forfeiture is applied to contraband goods. 21 U.S.C. § 881(f) (Supp. V 1993).

185. *United States v. Ward*, 448 U.S. 242 (1980); see also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795 (1992) (discussing the rationale, approaches, and trends in application of punitive civil sanctions by courts).

186. 448 U.S. 242 (1980).

187. *Id.* at 248-49.

188. *Id.* at 248.

has indicated an intention to establish a civil penalty, the court may inquire whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.¹⁸⁹ In order to determine whether the statute in question in *Ward* was so punitive as to be considered criminal under the second part of the *Ward* analysis, the Court relied on a test set out earlier in *Kennedy v. Mendoza-Martinez*¹⁹⁰ which required the Court to weigh several factors, including the culpability of the individual involved as well as the history and purpose of the law.¹⁹¹ Utilizing the two tests in concert, the *Ward* Court found that the statute in question was basically remedial in nature and did not require the constitutional protections which would be afforded had it been determined to be more punitive in nature.¹⁹²

3. The Punishment Approach

In 1989, the Supreme Court carried the *Ward* analysis a step further. Rather than requiring a criminal or quasi-criminal classification, in *United States v. Halper*¹⁹³ the Court determined that the distinctions between civil proceedings and criminal proceedings ceased to be important where the civil proceeding inflicted punishment on the offender.¹⁹⁴ In *Halper*, the Court sought to determine when a civil penalty constitutes punishment for purposes of double jeopardy analysis under the Fifth Amendment.¹⁹⁵ A man was convicted of sixty-five counts of Medicaid fraud which caused a \$585 loss to the federal government.¹⁹⁶ He was sentenced to two years in prison and was assessed a \$5,000 fine.¹⁹⁷ Following his conviction, the United

189. *Id.* at 248-49.

190. 372 U.S. 144 (1963). The test set forth in *Kennedy* required a court to consider the following factors when determining whether a civil sanction was so punitive as to warrant reclassification as a criminal sanction:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned

Id. at 168-69.

191. *Ward*, 448 U.S. at 248-49.

192. *Id.* at 254.

193. 490 U.S. 435 (1989).

194. *Id.* at 447-48 (discussing the Double Jeopardy Clause of the Fifth Amendment).

195. *Id.* at 448.

196. *Id.* at 437-40.

197. *Id.*

States brought a civil action against him under the False Claims Act¹⁹⁸ which had a provision requiring an offender to pay a \$2,000 civil penalty, an amount equal to two times the amount of damages sustained as a result of the illegal act and costs of the civil action.¹⁹⁹ Considering court costs, double damages, and other expenses, the total amount of liability was over \$130,000.²⁰⁰

Halper argued that the trial court's imposition of the civil fine following a criminal penalty violated the Fifth Amendment.²⁰¹ The Court agreed.²⁰² The Court noted that the Double Jeopardy Clause protects against multiple punishments for the same offense.²⁰³ In defining what is meant by "punishment," the Court stated that the civil and criminal labels are not important.²⁰⁴ Punishment, the Court said, may be imposed by either civil or criminal actions.²⁰⁵ Both criminal and civil proceedings may have punitive as well as remedial goals.²⁰⁶ Where the purpose of a civil sanction is retribution or deterrence, the sanction constitutes punishment.²⁰⁷ In *Halper*, the Court made it clear that its focus was not on the criminal or civil nature of the proceeding but on whether punishment was being inflicted on the offender.²⁰⁸ This reasoning was extended in *Austin* to provide Eighth Amendment protections to persons whose property is the subject of in rem civil proceedings.²⁰⁹

E. History of Eighth Amendment Protections in Civil Forfeiture

There are two clauses in the Eighth Amendment: the Cruel and Unusual Punishment Clause and the Excessive Fines Clause.²¹⁰ In *Ingraham v. Wright*,²¹¹ a 1977 case, the United States Supreme Court examined the history of the Eighth Amendment and found that since the goal of the Cruel and Unusual Punishment Clause was to limit

198. *Id.* The False Claims Act is found at 31 U.S.C. §§ 3729-3731 (1988).

199. *Halper*, 490 U.S. at 437-40.

200. *Id.*

201. *Id.* at 451.

202. *Id.*

203. *Id.* at 440 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

204. *Id.* at 447-48.

205. *Id.*

206. *Id.*

207. *Id.* at 448.

208. *Id.* at 451.

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

210. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend VIII.

211. 430 U.S. 651 (1977).

the power of courts only in criminal cases, the Cruel and Unusual Punishment Clause does not apply to any civil case.²¹²

A few years later, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,²¹³ the Supreme Court addressed the applicability of the Eighth Amendment's Excessive Fines Clause to civil cases. In *Browning-Ferris*, Kelco brought suit in federal district court against Browning-Ferris Industries (BFI) for antitrust violations and for tortious interference with contract.²¹⁴ The jury found BFI liable and awarded \$51,000 in compensatory damages and \$6,000,000 in punitive damages.²¹⁵ BFI argued that the Excessive Fines Clause should be applied to limit the "excessive" punitive damage award.²¹⁶ The Court rejected BFI's contention based on the reasoning that the Eighth Amendment applies "primarily, and perhaps exclusively," to criminal prosecutions and punishments.²¹⁷

The Court reviewed the history of the Excessive Fines Clause and determined that when the clause was drafted the term "fines" was understood as payment to the government for an offense.²¹⁸ The aim of the Eighth Amendment, the Court said, was to limit potential governmental abuses of its prosecutorial power.²¹⁹ The purpose of the drafters was not to limit the extent of civil damages.²²⁰ The Court held that the Excessive Fines Clause would not limit the punitive damages awarded to a private party in a civil suit where the government neither prosecuted the action nor had any right to receive a share of the damages.²²¹ Importantly, however, the Court declined to "go so far as to hold that the Excessive Fines Clause

212. *Id.* at 659, 664-65. *Ingraham* was not a forfeiture case. In *Ingraham*, the Court was asked to determine whether severe corporal punishment in public schools violated the Eighth Amendment's prohibition on cruel and unusual punishments. *Id.* at 659. The Court reviewed the history of the Eighth Amendment and stated that "[t]he text [of the Eighth Amendment] was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689. . . . [T]he exclusive concern of the English version was the conduct of judges in enforcing the criminal law." *Id.* at 664-65. Early Americans, fearing "the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures" in the United States, included the Eighth Amendment in the Bill of Rights. *Id.* at 665.

213. 492 U.S. 257 (1989).

214. *Id.* at 261.

215. *Id.* at 262.

216. *Id.* at 260-62.

217. *Id.* at 262.

218. *Id.* at 265; see also *supra* note 210.

219. *Browning-Ferris*, 492 U.S. at 266.

220. *Id.*

221. *Id.* at 260.

applies just to criminal cases.²²² Since the Court did not address whether the Excessive Fines Clause applies to civil cases involving government actors, lower courts have been required to make this determination without guidance from the Supreme Court. As a result, lower federal court decisions are widely varied.²²³

IV. REASONING OF THE COURT

A. Overview

The Court granted certiorari to Austin²²⁴ to solve a conflict between the circuits regarding whether the Eighth Amendment Excessive Fines Clause is applicable to civil in rem forfeitures.²²⁵ The government advanced three main arguments against the application of the Excessive Fines Clause to civil forfeitures. First, the government argued that in *Browning-Ferris Industries v. Kelco Disposal, Inc.*,²²⁶ the Court established that the Excessive Fines Clause should not apply to any civil suits.²²⁷ The Court rejected this argument by pointing out that the rule set forth in *Browning-Ferris* was limited to cases involving only private litigants.²²⁸ Because in *Austin* the government was a party to the action, *Browning-Ferris* did not bar application of the Excessive Fines Clause.²²⁹ Second, the government argued that the Eighth Amendment could not apply in a forfeiture case unless the forfeiture proceeding would have been considered a criminal action when the Eighth Amendment was adopted.²³⁰ The

222. *Id.* at 263.

223. *Id.*

224. *United States v. Austin*, 113 S. Ct. 1036 (1993). In *Austin v. United States*, the majority opinion was written by Justice Blackmun. Justices White, Stevens, O'Connor, and Souter joined in the majority opinion. *Austin v. United States*, 113 S. Ct. 2801, 2802-12 (1993). Justice Scalia wrote a concurring opinion. *Id.* at 2812-15 (Scalia, J., concurring). Chief Justice Rehnquist and Justice Thomas joined in Justice Kennedy's concurring opinion. *Id.* at 2815-16 (Kennedy, J., concurring).

225. *Austin*, 113 S. Ct. at 2804. Most circuit courts have held that the Eighth Amendment does not apply to civil forfeitures. Katherine Abernathy, *Eighth Amendment Survey*, 19 AM. J. CRIM. L. 341, 342 (1992) (citing *United States v. One 107.9 Acre Parcel of Land Located in Warren Township*, 898 F.2d 396 (3d Cir. 1990); *United States v. On Leong Chinese Merchants Ass'n Bldg.*, 918 F.2d 1289 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 52 (1991); *United States v. 40 Moon Hill Rd.*, 884 F.2d 41 (1st Cir. 1989); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989); *United States v. 300 Cove Rd.*, 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)). *But see United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992).

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

227. *Austin v. United States*, 113 S. Ct. 2801, 2804 (1993).

228. *See supra* text accompanying notes 221-22.

229. *Austin*, 113 S. Ct. at 2804.

230. *Id.*

Court rejected this argument based on its conclusion that the criminal or civil label placed on an action is irrelevant to the application of the Eighth Amendment.²³¹ Instead, the Court determined that the relevant question is whether the government action is so punitive that it would be considered punishment under the Eighth Amendment both when the Eighth Amendment was adopted and according to modern standards.²³² Finally, the government argued that even under the modern analysis adopted by the Court, since Section 881 forfeiture is designed to protect the public from illegal drug trade, it is remedial in nature rather than punitive. Therefore, the Excessive Fines Clause is not applicable to civil forfeitures.²³³ The Court rejected the argument that all forfeitures are remedial and concluded that the Excessive Fines Clause is applicable to civil forfeitures under Section 881.²³⁴

B. *Browning-Ferris* Does Not Bar Applicability of Excessive Fines Clause

The Court began its analysis by pointing out that its earlier decision in *Browning-Ferris* did not bar applicability of the Excessive Fines Clause in this case.²³⁵ The Court stated that in *Browning-Ferris* it only held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit where the government was not a prosecuting party.²³⁶ Since the government was the prosecuting party in *Austin*, the *Browning-Ferris* rule would not bar application of the Excessive Fines Clause in the *Austin* case.²³⁷ The Court specifically noted that *Browning-Ferris* did not hold that the Excessive Fines Clause applies only to criminal cases.²³⁸

C. No Historical Limitations on Excessive Fines Clause Applicability

The government's second argument was that the Eighth Amendment's Excessive Fines Clause should not apply unless the government's action would have been recognized as criminal

231. *Id.*

232. *Id.* at 2805, 2810.

233. *Id.* at 2811.

234. *Id.* at 2811-12.

235. *Id.* at 2804 (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989)).

236. *Austin v. United States*, 113 S. Ct. 2801, 2804 (1993).

237. *Id.* at 2804 (citing *Browning-Ferris*, 492 U.S. at 263).

238. *Id.* at 2804.

punishment at the time the Eighth Amendment was adopted.²³⁹ Addressing this argument, the Court made two observations. First, the Court studied the text of the Eighth Amendment itself.²⁴⁰ The Court pointed out that some provisions of the Bill of Rights are specifically limited to criminal cases.²⁴¹ For example, the Fifth Amendment says that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself,”²⁴² and the Sixth Amendment states that it applies to “criminal prosecutions.”²⁴³ Significantly, the Eighth Amendment contains no textual limitation which restricts it to criminal cases.²⁴⁴

The Court then proceeded to examine the history of the Eighth Amendment’s Excessive Fines Clause.²⁴⁵ The Court determined that the history of the Excessive Fines Clause does not require it to be limited to criminal cases.²⁴⁶ Noting that the Eighth Amendment was

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* (quoting U.S. CONST. amend. V).

243. *Id.* at 2804-05 (quoting U.S. CONST. amend. VI). The Court acknowledged that when it has applied constitutional protections to civil forfeiture proceedings in the past, it has recognized a distinction between those provisions which are limited to criminal proceedings and those which are not. *Id.* at 2804. The Court cited *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965) and *Boyd v. United States*, 116 U.S. 616, 634 (1886), as examples of the Court’s application of Fourth Amendment protection against unreasonable search and seizure in forfeiture proceedings. *Austin*, 113 S. Ct. at 2804 n.4. The Court pointed out that the Sixth Amendment right to confront one’s accuser has not been applied to forfeiture cases. *Id.* at 2804-05 n.4 (citing *United States v. Zucker*, 161 U.S. 475, 480-82 (1896)). However, the Fifth Amendment Double Jeopardy Clause may protect property owners in forfeiture proceedings if a subsequent sanction is not remedial in nature. *Id.* at 2805 n.4 (citing *United States v. Halper*, 490 U.S. 435, 446-49 (1989)); *see also* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972). Also, the Fifth Amendment right against self incrimination has been applied to forfeiture proceedings even though this clause is textually limited to criminal cases. *Austin*, 113 S. Ct. at 2805 n.4. However, the Self Incrimination Clause has only been applied to civil forfeitures where the forfeiture statute made the culpability of the owner relevant or where the owner faced possible subsequent criminal proceedings. *Id.* at 2805 n.4 (citing *United States v. Ward*, 448 U.S. 242, 253-54 (1980)); *see also* *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971); *Boyd v. United States*, 116 U.S. 616, 634 (1886). Additionally, the Court recognized that under the rule set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), if a civil proceeding is so punitive as to be reasonably considered criminal, protections traditionally afforded in criminal proceedings have been provided. *Austin*, 113 S. Ct. at 2805 n.4.

244. *Austin*, 113 S. Ct. at 2804-05.

245. *Id.* at 2805-06.

246. *Id.* at 2808-09. The Court noted that had the government attempted to argue that the technical distinction between in rem and in personam mattered in

drafted immediately following the drafting of the Fifth Amendment,²⁴⁷ the Court reasoned that if the drafters intended to limit the application of the Excessive Fines Clause to criminal cases, they would have done so just as they limited the Fifth and Sixth Amendments.²⁴⁸ As a historical note, the Court pointed out that the comparable provision in the English Bill of Rights of 1689 was not limited expressly to criminal cases either.²⁴⁹ The Court recognized that the original draft of the English Bill of Rights contained a restrictive provision regarding the Excessive Bail Clause, but the provision was omitted in the final draft.²⁵⁰ The purpose of the Eighth Amendment, the Court concluded, was to limit the government's power to punish regardless of the label placed on the proceeding.²⁵¹

D. *Ward* and *Mendoza* Tests Are Not Applicable

The government's third argument in *Austin* was that the Eighth Amendment could not apply to the civil forfeiture because the forfeiture was not so punitive as to be considered criminal under the *Ward* and *Mendoza* tests.²⁵² The Court rejected this reasoning.²⁵³

this case, it would not have benefited the government. The Court stated that this distinction is primarily a jurisdictional issue which is unimportant when determining whether punishment is intended or imposed. *Id.* at 2808-09 n.9.

247. *Id.* at 2805 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 259, 294 (1989)).

248. *Id.* at 2805 (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989)). The Court stated in *Browning-Ferris* that "[a]fter deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings." *Id.* (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989)).

249. *Id.* at 2805.

250. *Id.* The *Austin* Court stated that when Section 10 of the English Bill of Rights of 1689 was introduced in the House of Commons, there was a restriction in the bail clause which read, "[R]equiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments [shall] be prevented." *Id.*

251. *Id.* (discussing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67, 275 (1989)).

252. *Id.* at 2804.

253. *Id.* at 2804-06. This decision may have surprised some. Prior to *Austin*, many authors hypothesized that when the Court decided to apply the proportionality requirements of the Eighth Amendment to forfeitures, the Court would or should simply allow the lower courts to apply the *Ward* and *Mendoza* tests as they have done in relation to the Fifth Amendment. This would have allowed the lower courts to require proportionality if the punishment was so severe as to require the civil forfeiture to be reclassified as criminal. See Henry C. Darmstadter & Leslie J. Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 49-53 (1987); James B. Speta,

The Court stated that the relevant question was not whether forfeiture under Section 881 is civil or criminal but rather whether it was punishment.²⁵⁴ Since the appropriate question is whether punishment is being inflicted and not whether the sanctions are criminal or civil, the Court reasoned that the tests set forth in *Ward* and *Mendoza* were not applicable to this particular case.²⁵⁵

E. Forfeiture is Punishment

Next, the Court addressed the issue of whether the forfeiture serves as punishment.²⁵⁶ The Court reasoned that a fine may be both remedial in part and penal in part.²⁵⁷ Even if the forfeiture serves some remedial purposes, if it serves at least in part to punish, the Eighth Amendment will apply.²⁵⁸ In its analysis, the Court sought to determine whether forfeiture was regarded as punishment, at least in part, at the time the Eighth Amendment was ratified and whether civil forfeitures under Section 881 should be considered as punishment today.²⁵⁹

1. *History of Forfeiture*

In determining whether forfeiture was viewed as punishment at the time the Eighth Amendment was ratified, the Court reviewed the history of the three types of forfeiture: deodand, forfeiture of estate, and statutory forfeiture.²⁶⁰ The Court pointed out that the deodand was justified on the basis that the owner had been negligent in entrusting his property to a wrongdoer.²⁶¹ Forfeiture of estate, the Court reasoned, was based on the premise that since property is a right which is derived from society, it may be lost when a

Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 182-91 (1990); Ron Champoux, Note, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L. Q. 453, 457-58 (1992) (examining the potential for excessive punishments under 21 U.S.C. § 881). But see David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 435 (1993).

254. *Austin*, 113 S. Ct. at 2806.

255. *Id.* at 2806 n.6.

256. *Id.* at 2806.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* The history of the three types of forfeiture is discussed in Part III.A of this note.

261. *Id.* The Court quoted William Blackstone who wrote, "[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." 2 WILLIAM BLACKSTONE, COMMENTARIES *301.

person violates a law of that society.²⁶² Finally, the Court stated that Blackstone considered statutory forfeiture to be penal.²⁶³ As with deodand, statutory forfeiture was justified on the basis that the owner was somehow negligent in entrusting his property to one who would eventually commit a wrong.²⁶⁴ The Court concluded that all three early types of forfeiture served in part to punish the negligence or intentional wrongdoing of the owner.²⁶⁵

Next, the Court specifically focused on early American thought regarding the purpose of statutory forfeiture,²⁶⁶ since statutory forfeiture was the only type of forfeiture adopted in the United States.²⁶⁷ The Court found that the colonies understood the purpose of in rem forfeiture as being, at least in part, to punish.²⁶⁸ The Court pointed out that some early American statutes specifically required owners to forfeit property as a penalty for statutory violations.²⁶⁹

2. *The Innocent Owner Problem*

The Court then addressed the perplexing question—if the Court has always allowed forfeiture to be used against innocent owners, then how can it be considered punishment for wrongdoing?²⁷⁰ The Court recognized that in past decisions the in rem fiction apparently allowed forfeiture from innocent owners.²⁷¹ The Court pointed out, however, that in those decisions, the Court had justified imposing

262. *Austin*, 113 S. Ct. at 2807 (discussing 2 WILLIAM BLACKSTONE, COMMENTARIES *299).

263. *Id.* at 2807.

264. *Id.*

265. *Id.* at 2806-07.

266. *Id.* at 2807.

267. *Id.*

268. *Id.*

269. *Id.* at 2807-08 (citing Act of July 31, 1789, § 12, 1 Stat. 39). The statute cited by the *Austin* Court stated that property forfeiture was a penalty for violation of a law requiring goods to be unloaded from ships only during the day and with a permit. *Id.* The statute required that for a violation, the ship owner "shall forfeit and pay the sum of four hundred dollars for every offence . . . [a]nd all goods, wares and merchandise . . . shall become forfeited." *Id.* at 2807-08. These statutes are especially notable, the Court said, because forfeiture was listed among other punishments and because the word "forfeit" was used for fine. *Id.* The Court also pointed out that dictionaries which were in use at the time also said that "fine" and "forfeiture" were interchangeable. *Id.* at 2808 n.7.

270. *Id.* at 2808.

271. *Id.* at 2808-09. The Court summarized that "even though this Court has rejected the 'innocence' of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner." *Id.* at 2810.

forfeiture of the property of innocent owners by stating that the owner was not in fact entirely innocent.²⁷² The Court said that its decisions have allowed forfeiture from innocent owners based on two theories. First, forfeiture from innocent owners is appropriate when the property itself is “guilty”; also, the owner may be held responsible “for the wrongs of others to whom he entrusts the property.”²⁷³ Both theories are based, the Court said, on the “notion that the owner who allows his property to become involved in an offense has been negligent.”²⁷⁴ The Court noted that in past decisions, it expressly reserved ruling on the question of whether the in rem fiction could be employed against a truly innocent owner. Since the defendant in *Austin* was not innocent, the Court again reserved its opinion as to that issue.²⁷⁵ The Court indicated, however, that the Constitution might not allow forfeiture to be used to demand property from a truly innocent owner.²⁷⁶

3. *Modern Thought on Civil Forfeiture*

The Court went on to address whether civil forfeitures under Section 881 are considered as punishment today.²⁷⁷ The Court said that Congress intended the forfeiture provision as at least partial punishment since the drafters incorporated a defense for innocent owners into the statute.²⁷⁸ According to the Court, if Congress’s aim

272. *Id.* at 2808-10.

273. *Id.* at 2808.

274. *Id.* at 2809 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974), *reh’g denied*, 417 U.S. 977 (1974); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins’ Distillery v. United States*, 96 U.S. 395 (1877); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)). The Court also cited *Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808). In *Peisch*, the owner failed to pay revenue duties as required by federal law. *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 359 (1808). Despite his nonpayment, the owner attempted to remove goods from the custody of the revenue officer. *Id.* The Court held that the ship could not be forfeited unless the owner or agent had consented to the illegal removal. *Id.* at 363-64. The Court in *Peisch* stated that “the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control.” *Id.* at 365; *see also Austin*, 113 S. Ct. at 2808.

275. *Austin*, 113 S. Ct. at 2809.

276. *Id.* The Court added that “it is only on the assumption that forfeiture serves in part to punish that the Court’s past reservation of that question makes sense.” *Id.*

277. *Id.* at 2810.

278. *Id.* at 2810-11.

had not been so, there would be no reason for the innocent owner defense.²⁷⁹ The Court noted that when drafting a related statute requiring the return of forfeited property to persons who did not intend to commit a criminal act, Congress's purpose was "to impose a penalty only upon those who are significantly involved in a criminal enterprise."²⁸⁰ Likewise, the Court found that the legislative history of Section 881 reveals that the purpose of Section 881 was to deter crime and to punish the wrongdoer.²⁸¹

The Court rejected the government's final contention that the statute is remedial in nature rather than punitive.²⁸² The government based this argument on two considerations. First, the government argued that since the forfeiture removes the instruments of the drug trade, it protects the community from future violations of the anti-drug laws.²⁸³ In response, the Court drew upon its analysis in *One 1958 Plymouth Sedan v. Pennsylvania*.²⁸⁴ The Court stated that like the automobile in *One 1958 Plymouth Sedan*,²⁸⁵ the mobile home and body shop in this case are not a threat to society per se and cannot fairly be said to be contraband.²⁸⁶ Since houses and body shops are not contraband or an "instrument of the crime necessarily," the Court stated that there is no need to remove them from society. Therefore, the forfeiture of this property was not remedial.²⁸⁷

Second, the government argued that the forfeiture provision was remedial because it compensates the government for costs incurred in fighting the illegal drug activity and other problems that illegal narcotics cause in society.²⁸⁸ The Court also rejected this argument by noting that there have been large differences between the cost of law enforcement and the amount sought to be recovered through

279. *Id.* at 2811. This defense allows the return of forfeited property not intended by the owner to be used to violate the law.

280. *Id.* at 2811 (citing *United States v. United States Coin & Currency*, 401 U.S. 715 (1971)).

281. *Id.* at 2811. The Court noted that Congress said, "[T]he traditional criminal sanction of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." *Id.* (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182). Congress also stated that the law was intended to be "a powerful deterrent." *Id.* at 2811 (citing S. Rep. No. 225, 98th Cong., 2d Sess. 195 (1984), reprinted in 1984 U.S.C.C.A.N. 3182).

282. *Id.* at 2811.

283. *Id.*

284. *Id.* (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1956)).

285. *Id.* at 2811.

286. *Id.*

287. *Id.*

288. *Id.* at 2812 n.14.

forfeiture in individual cases.²⁸⁹ The Court reasoned that even if compensation was a partial goal, one aim of the statute was still to punish.²⁹⁰ Since at least one goal of Congress in enacting forfeiture statutes was punitive both when the Eighth Amendment was enacted and today, the Court held that the Eighth Amendment is applicable to in rem civil forfeitures.²⁹¹ Moreover, the Court pointed out that it does not matter whether the courts apply the Excessive Fines Clause to a remedial fine because it will, by definition, never be "excessive."²⁹²

The Court remanded the case to the Eighth Circuit Court of Appeals to determine whether the forfeiture of Austin's mobile home and auto body shop violated the Excessive Fines Clause.²⁹³ The Court refused to establish a multifactor test for determining whether a forfeiture is excessive under the Eighth Amendment, thus leaving it for the lower courts to decide what "excessive" will mean.²⁹⁴

E. Concurring Opinions

Justice Scalia concurred, stating that the Court could have relied on its reasoning in *Browning-Ferris Industries v. Kelco Disposal, Inc.* to decide this case.²⁹⁵ Justice Scalia added that the majority was overstating precedent when it said that the in rem fiction was actually based on a negligence theory.²⁹⁶ Most importantly, Justice Scalia proposed a test which might be used by the lower courts in determining whether a forfeiture is excessive and thus in violation of the Excessive Fines Clause.²⁹⁷

Justice Scalia's concurrence suggested that the proportionality analysis in civil forfeiture cases should be different from those tests

289. *Id.*

290. *Id.* at 2812. The *Austin* Court discussed its earlier analysis in *United States v. Halper*, 490 U.S. 435, 448 (1989), where it stated that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Austin*, 113 S. Ct. at 2812.

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

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 2812-13 (Scalia, J., concurring). In *Browning-Ferris*, the Court stated that when the Eighth Amendment was drafted, "fine" was understood to mean punishment. *Id.* (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)).

296. *Id.* at 2814. Unlike the majority, Justice Scalia would have reserved the question of whether personal culpability is required without engaging in the "misleading discussion" regarding negligence.

297. *Id.* at 2814-15.

which are currently being utilized in regard to criminal fines and in personam forfeiture cases.²⁹⁸ In in personam forfeiture cases the goal of the Eighth Amendment is to prevent potential government abuses of power against the person.²⁹⁹ Therefore, the Excessive Fines Clause requires that the monetary fine be in relation to the offense committed by the defendant.³⁰⁰ In an in rem proceeding, however, the offense committed by the offender is often not relevant in the forfeiture proceeding, and conviction is not a prerequisite to forfeiture.³⁰¹ Section 881 only requires the government to show probable cause that the property was used illegally.³⁰² For these reasons, the test for an in rem civil forfeiture proceeding must be different from proceedings involving monetary fines or in personam forfeiture.³⁰³

Justice Scalia suggested that a civil forfeiture violates the Excessive Fines Clause if the property forfeited cannot "properly be regarded as an instrumentality of the offense."³⁰⁴ The inquiry should not involve the value of the forfeited property, but should question whether it "has a close enough relation to the offense . . . to render the property, under traditional standards, 'guilty' and hence forfeitable."³⁰⁵

A second concurring opinion was authored by Justice Kennedy.³⁰⁶ He wrote that the question of whether in rem forfeitures always amount to an intended punishment of the owner of the forfeited property should be reserved.³⁰⁷ He wrote that the question should be reserved because of the effect it may have on a future decision regarding whether in rem forfeiture would be permitted against the property of an owner who was innocent.³⁰⁸ Justice Kennedy stated that applying civil forfeiture to such a case would be of questionable constitutionality.³⁰⁹

298. *Id.* at 2814.

299. *Id.* at 2814-15.

300. *Id.* at 2815.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Like Justice Scalia's opinion, this concurrence stated that it was misleading and probably not an accurate summation of history to find that forfeitures were ever based on the owner's blameworthy conduct. *Id.* at 2815 (Kennedy, J., concurring).

307. *Id.* at 2816. Justice Kennedy's concurrence stated, "At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question." *Id.*

308. *Id.*

309. *Id.*

V. SIGNIFICANCE OF *Austin v. United States*

Austin v. United States appears to be a landmark decision because for the first time courts must apply constitutional protections provided by the Eighth Amendment to civil forfeitures.³¹⁰ An excessive forfeiture will not be allowed to stand, since it will be in violation of the Excessive Fines Clause.³¹¹ Importantly, the *Austin* decision is one of several recent decisions³¹² which indicate the United States Supreme Court's increasing willingness to apply constitutional protections to protect property owners in civil forfeitures despite the in rem nature of the proceeding.³¹³ However, the significance of the *Austin* decision may be limited by two important factors. First, its holding may be limited to facilitation forfeiture; second, its practical application may be limited by how the courts define what will be considered an excessive forfeiture.

First, the holding of *Austin* may be limited to situations where the property subject to forfeiture was used to facilitate a crime. *Austin* involved civil forfeiture of a mobile home and body shop which were used to facilitate a drug sale. Since there were no proceeds of crime which were forfeited under the facts presented in *Austin*, the holding is arguably limited to facilitation forfeiture.³¹⁴ It is yet to be determined whether the Eighth Amendment Excessive Fines Clause is applicable to proceeds forfeiture cases as well.³¹⁵

Second, the significance of the *Austin* decision may be limited by how the courts define what will be excessive. Before *Austin* reached the Supreme Court, the Eighth Circuit Court of Appeals suggested in its opinion that the forfeiture of Austin's mobile home and body shop might be excessive in relation to the crime he committed.³¹⁶ In the past, however, the Supreme Court has upheld

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

311. *Id.*

312. See *supra* note 11.

313. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 23, 1993).

314. "Facilitation forfeiture" refers to a forfeiture proceeding which is used to obtain property that was used to facilitate a crime. Facilitation forfeiture may be distinguished from "proceeds forfeiture" which targets the ill-gotten fruits of crime. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Apr. 12, 1994).

315. In one lower federal court decision, a California district court applied the Excessive Fines Clause to a proceeds forfeiture case without discussing whether such application is appropriate. See *United States v. 6625 Zumierez Drive*, No. CV. 91-4531 MRP, 1994 WL 65684 (C.D. Cal. Feb. 11, 1994).

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

large forfeitures for relatively small infractions.³¹⁷ These decisions may indicate that even though there is now a proportionality requirement, even large differences in value may not violate the Excessive Fines Clause.

There are two basic tests which the lower courts might adopt for determining whether a civil forfeiture is excessive. One is the general test for determining whether a fine is excessive under the Excessive Fines Clause which was announced in *Solem v. Helm*.³¹⁸ The second possible test is that which was proposed by Justice Scalia in his *Austin* concurrence.³¹⁹

The courts may decide to base a determination on the older *Solem v. Helm* test applied to determine whether a fine is excessive under the Excessive Fines Clause.³²⁰ Under *Solem*, a court must weigh the harshness of the penalty with the seriousness of the offense, the penalty's severity in relation to that which other offenders in the same jurisdiction receive for various offenses, and the penalty's severity in relation to that which offenders in other jurisdictions receive for the same crime.³²¹

The relationship between excessive forfeitures and mandatory fines may prove applicable in a *Solem* analysis. Courts routinely apply large fines in cases where civil forfeiture is not involved. For example, if the defendant in *Austin* had been tried in federal criminal court, he could have received a maximum fine of over one million dollars under mandatory sentencing guidelines.³²² This fine is presumably much greater than the value of the mobile home and auto body shop, the forfeiture of which the Eighth Circuit suggested represented too great a penalty for the crime committed.³²³ It may be problematic that the fine established by Congress is greater than the forfeiture which might be unconstitutionally large.³²⁴ This inconsistency may have either of two possible effects. The discrepancy between excessive forfeitures in relation to acceptable fines may mean that despite the Eighth Circuit's suggestion that the forfeiture

317. See, e.g., *United States v. Halper*, 490 U.S. 435 (1989) (upholding a \$130,000 forfeiture for a \$585 offense); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1973), *reh'g denied*, 477 U.S. 977 (1974) (upholding the forfeiture of a \$25,000 yacht for the possession of one marijuana cigarette).

318. 463 U.S. 277 (1983).

319. *Austin*, 113 S. Ct. at 2812-15 (Scalia, J., concurring).

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

321. *Id.* at 291.

322. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 23, 1993).

323. *Id.*

324. *Id.*

was excessive, the forfeiture was not, in fact, excessive when viewed in light of other penalties Congress has established for the same crime.³²⁵ On the other hand, this apparent inconsistency may indicate that the fines for drug-related crimes established under the mandatory sentencing guidelines may not withstand future challenges under the Excessive Fines Clause.³²⁶ Congress may have to reevaluate the amount of fines imposed as punishment for illegal drug acts if a *Solem* type of analysis is applied to determine whether a given forfeiture is excessive under the Eighth Amendment.

The second test which may be applied is that which was proposed by Justice Scalia in his concurring opinion in *Austin*.³²⁷ Justice Scalia's analysis differs from the *Solem* analysis in that it would focus the courts' attention on the closeness of the relationship between the offending property and the criminal act rather than on the relationship between the value of the property and the severity of the crime committed.³²⁸

It is likely that most lower courts will adopt some type of test which reflects the Scalia analysis. Lower courts should also consider the Supreme Court's decision in *Alexander v. United States*³²⁹ when deciding whether to apply the Scalia analysis to excessive forfeiture problems. The Supreme Court decided *Alexander* on the same day that it decided *Austin*.³³⁰ In *Alexander*, the Court held that the Excessive Fines Clause is applicable to criminal forfeitures.³³¹ It is noteworthy that the *Alexander* majority stated that on remand, the Eighth Circuit Court of Appeals should consider whether the forfeiture in *Alexander* was excessive under the Excessive Fines Clause in light of the criminal defendant's extensive criminal activities which were conducted over a substantial period of time. This suggests an analysis similar to Justice Scalia's concurrence in *Austin*.³³² The Supreme Court's instructions in *Alexander* indicate that the Supreme Court would approve the adoption of an analysis in criminal forfeiture cases similar to the one suggested by Justice Scalia regarding the civil forfeiture in *Austin*. Although the holding in *Alexander* is

325. *Id.*

326. *Id.*

327. *Austin v. United States*, 113 S. Ct. 2801, 2812-15 (1993).

328. *Id.*

329. 113 S. Ct. 2766 (1993).

330. Both cases were decided on June 28, 1993.

331. *Alexander*, 113 S. Ct. at 2776.

332. *Id.*; see also Richard C. Reuben, *Putting the Brakes on Forfeiture—High Court Rulings Forcing Revision on Pretrial Seizure Process*, A.B.A. J., Feb. 1994, at 14, 14-16.

applicable to in personam criminal forfeitures rather than in rem civil forfeitures, it signals the Court's general approval of such an analysis.

To date, at least three lower federal courts have been called upon to apply the *Austin* holding in a civil forfeiture case.³³³ Two courts essentially utilized Justice Scalia's proposed test in their analysis.³³⁴ Based on that reasoning, both courts held that under the given facts, the challenged forfeiture did not violate the Excessive Fines Clause.³³⁵

The third lower federal court fashioned its own multifactor test which incorporates the analyses set forth in *Solem* and *Alexander* as well as the test suggested by Justice Scalia in *Austin*.³³⁶ That court held that three factors should be considered when determining

333. See *United States v. 6625 Zumirez Dr.*, No. CV. 91-4531 MRP, 1994 WL 65684 (C.D. Cal. Feb. 11, 1994); *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421 (M.D. Ala. 1994); *United States v. 84-049 Lawaia St.*, Civ. No. 90-00767 DAE (D. Haw. Nov. 1, 1993).

334. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Apr. 12, 1994) (discussing an unpublished opinion which was announced in November 1993 by the District Court of Hawaii). In *United States v. 84-049 Lawaia St.*, Civ. No. 90-00767 DAE (D. Haw. Nov. 1, 1993), the United States District Court for the District of Hawaii pointed out that Justice Scalia's analysis is similar to the "substantial connection" test which has been applied by some circuits, in decisions predating *Austin*, in an effort to determine whether a given item of property was subject to forfeiture. *Id.* The First and Fourth Circuit Courts have held that in order for real estate to be forfeitable under § .881(a)(7), there must be a substantial connection between the property and the underlying criminal activity. See *United States v. One Parcel of Real Property*, 900 F.2d 470 (1st Cir. 1990); *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990). The Seventh Circuit has rejected a test requiring a connection which is "more than incidental or fortuitous," but has acknowledged that the difference between the two tests is "blurry at best." *United States v. 916 Douglas Ave.*, 903 F.2d 490, 494 (7th Cir. 1990). A substantial connection has been found where there has been repeated use of the property to facilitate a drug crime or where the property was simply important to the facilitation of the crime. *Schifferli*, 895 F.2d at 990-91. Applying reasoning similar to the substantial connection test, the Hawaii court held that since the evidence presented by the government showed a frequent, direct, and substantial use of the property to facilitate illegal drug activity, the forfeiture of the property was not excessive under the Eighth Amendment. The value of the property was not considered. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Apr. 12, 1994).

In another case, an Alabama court also applied Justice Scalia's proposed test as the foundation for its proportionality analysis in a civil forfeiture case. See *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421 (M.D. Ala. 1994). The court found Justice Scalia's test to be "well reasoned" and held that the forfeiture of a grocery store which was used as a selling place in two illegal drug transactions did not violate the Excessive Fines Clause. *Id.* at 1430.

335. *United States v. 427 & 429 Hall St.*, 842 F. Supp. 1421 (M.D. Ala. 1994); *United States v. 84-049 Lawaia St.*, Civ. No. 90-00767 DAE (D. Haw. Nov. 1, 1993).

336. See *United States v. 6625 Zumirez Dr.*, No. CV. 91-4531 MRP, 1994 WL 65684 (C.D. Cal. Feb. 11, 1994).

whether a civil forfeiture is excessive under the Eighth Amendment.³³⁷ First, the court weighed the inherent gravity of the offense against the harshness of the penalty imposed.³³⁸ Second, the court considered whether the property was an integral part of the commission of the crime.³³⁹ Finally, the court determined whether the criminal activity involving the property owner was extensive in terms of the time and spatial use of the property.³⁴⁰ Applying this multifactor test, this court held that the civil forfeiture in question violated the Excessive Fines Clause.³⁴¹

Other lower courts will probably follow similar reasoning and apply one of these tests or a combination of them in determining whether a forfeiture is excessive under the Excessive Fines Clause. If so, the value of the property will not be the most important consideration in determining whether a forfeiture is excessive in facilitation forfeiture cases. The relevant inquiry will be to what extent the property aided in the commission of the crime.

Regardless of the test applied by the lower courts to determine whether a forfeiture is excessive, the effect that the *Austin* decision may have on the day to day workings of law enforcement agencies involved in fighting drug-related crime should be considered. Currently, federal and state law enforcement agencies assert cooperative efforts in investigating and prosecuting drug crimes.³⁴² State and federal agencies share forfeited assets in proportion to the effort each expended on a given case.³⁴³ In many instances, the decision as to whom will prosecute a given case is based, at least in part, on the amount of forfeited property which will be distributed to the prosecuting agency.³⁴⁴ If *Austin* requires a limit on the amount

337. *Id.* at *4.

338. *Id.* The court derived this factor from the test announced in *Solem v. Helm*, 463 U.S. 277 (1983). *Zumirez*, 1994 WL 65684, at *4; see also text accompanying note 321. However, the court explicitly rejected the claimant's argument that a *Solem* type test was sufficient to complete the analysis, stating that it is "impossible to meaningfully compare" the value of property subject to a civil forfeiture which is based on an illegal act with the criminal penalty for the act. *Zumirez*, 1994 WL 65684, at *2.

339. *Zumirez*, 1994 WL 65684, at *5. The court acknowledged that this factor is modeled after the test that Justice Scalia proposed in *Austin*. *Id.*

340. *Id.* at *5-6. This factor reflects the United States Supreme Court's decision in *Alexander*. *Id.*; see also text accompanying note 336.

341. *Zumirez*, 1994 WL 65684, at *4. Utilizing this test, the court found that the forfeiture of a house which was used to store 152 grams of cocaine, 4.7 grams of psilocybin, and one marijuana plant was an excessive forfeiture. *Id.* at *1, 14.

342. Interview with Michael Johnson, First Assistant United States Attorney, in Little Rock, Ark. (Nov. 23, 1993).

343. *Id.*

344. *Id.*

of forfeited property which an agency may retain for itself, this may affect the decision as to whether the state or federal agency will prosecute the case.³⁴⁵ These jurisdictional issues may be of tactical importance to both prosecutors and criminal defendants.³⁴⁶

Additionally, many law enforcement agencies depend on forfeited property at least to some degree to help alleviate the financial burden inherent in expensive criminal investigations and prosecutions.³⁴⁷ This portion of the financial burden may be shifted from criminals to taxpayers if forfeitures are sharply reduced. Finally, as Congress recognized when it enacted Section 881, the effectiveness of the antidrug laws can be greatly enhanced by consistent use of civil forfeiture. A property value based application of the *Austin* ruling may cause courts to develop case law which greatly limits the ability of law enforcement agencies to remove the means and profits of drug trade despite the congressional mandate to do so.

VI. CONCLUSION

The *Austin* decision was the result of a long evolution of forfeiture law.³⁴⁸ Courts have incrementally supplied constitutional protections to persons whose property is the subject of civil forfeiture despite the historical fiction that the property owner is not a party to the action. With the advent of Section 881, civil forfeiture has become more widely used in recent years. In response to its increased use, courts have been more willing than ever to step in and ensure that the government's power which is associated with civil forfeitures is not abused. With its required application of the Eighth Amendment proportionality requirement to civil forfeitures, the *Austin* decision appears to be the latest case in this succession. The modern trend toward applying constitutional protections despite the in rem nature of the action suggests that the Supreme Court's acceptance of the in rem fiction³⁴⁹ may be drawing to a close.

T. Michelle Ator

345. *Id.*

346. *Id.*

347. *Id.*; see *supra* text accompanying note 152.

348. The history of forfeiture law is discussed in Part III.D of this note.

349. See *supra* note 9.