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Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment

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CIVIL FORFEITURE LAW: REPLACING THE COMMON LAW WITH A COMMON SENSE APPLICATION OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

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

Robert Lieske[†]

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I. INTRODUCTION

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹

— Justice Oliver Wendell Holmes

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,² the United States Supreme Court upheld the constitutionality of the Puerto Rican government's seizure without compensation of a pleasure yacht on

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. 416 U.S. 663 (1974).

which had been discovered a single marijuana cigarette.³ The yacht had been leased to two Puerto Rican residents, one of whom was charged with violation of the Puerto Rican Controlled Substances Act.⁴ The Act provided for forfeiture of all vessels used to transport controlled substances, including marijuana.⁵ It was conceded that the owner of the yacht was not guilty of any crime.⁶ He received no prior notice of the seizure of the yacht, valued at approximately \$20,000,⁷ nor was he afforded a prior adversary hearing.⁸ He learned of the seizure only when he attempted to repossess the yacht after the lessees failed to make rent payments.⁹

Civil forfeiture statutes, like the one under which the yacht was seized in *Pearson Yacht*, have become increasingly popular in recent years.¹⁰ In 1991, more than two billion dollars worth of property was

3. The yacht was seized pursuant to the Controlled Substances Act of Puerto Rico, which subjected to forfeiture the following:

[a]ll conveyances, including aircraft, vehicles, mount 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 described in clauses (1) and (2) of this subsection.

P.R. LAWS ANN. tit. 24, § 2512(a)(4) (1979). Marijuana is one of the controlled substances described as property in clauses (1) and (2) of § 2512. *Id.* §§ 2512(a)(1)-(2).

4. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665 (1974).

5. *Id.* at 665-66. The statute under which the yacht was forfeited was P.R. LAWS ANN. tit. 24, § 2101. *Id.* at 665. This statute is typical of legislation designed to combat the increasing level of drug related crime in recent years. Although forfeiture statutes usually target drug related activity, state and federal statutes also target pornography, smuggling, tax evasion, gambling and other activities. *See, e.g.*, John Brew, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461, 464 (1988); *see also* 19 U.S.C. §§ 1592-1624 (1988) (targeting smuggling); 49 U.S.C. §§ 781-789 (1988) (targeting contraband such as drugs, firearms, and counterfeit money); 26 U.S.C. §§ 7302-7321 (1988) (targeting violations of the Internal Revenue Code such as gambling, counterfeiting, or distilling); ALA. CODE § 13A-12-30 (1994) (targeting gambling); ALASKA STAT. § 16.05.195 (1994) (targeting fish and game violations); FLA. STAT. ch. 849.36 (1994) (targeting gambling violations); 47 PA. CONS. STAT. § 6-601 (1994) (targeting liquor law violations).

6. *Pearson Yacht*, 416 U.S. at 668.

7. The value of the yacht was stated in a law review article. *See* Christine Meyer, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 867 (1991).

8. *Pearson Yacht*, 416 U.S. at 667.

9. It was conceded that the owner of the yacht had no prior warning of the illegal activity of the lessees, nor had he in any way participated in the activity. *Id.* at 668. The lease agreement even contained a prohibition against the use of the yacht for unlawful purposes. *Id.*

10. *See, e.g.*, DEL. CODE ANN. tit. 16, § 4784 (Supp. 1990); MO. ANN. STAT. § 195.140-145 (Vernon Supp. 1993); MONT. CODE ANN. § 44-12-101 to -104 (1989); N.Y. PUB. HEALTH LAW § 3387-3388 (Consol. 1985); WIS. STAT. ANN. § 161.55 (West Supp.

forfeited to the federal government.¹¹ This popularity is in part a reaction to the perceived over-expansion of constitutional rights for criminals.¹² Civil forfeiture statutes respond to this perception through the device of an ancient common law fiction which allows the government to treat property as capable of guilt.¹³ Because the relevant inquiry then becomes only the guilt or innocence of the property, and not the property owner, constitutional protections traditionally afforded the individual have been circumvented.¹⁴ As a direct consequence, time-honored constitutional safeguards created to protect individual rights have been effectively ignored.¹⁵

Despite their popularity, civil forfeiture statutes would almost surely be struck down as unconstitutional were it not for the courts' continued reliance on an ancient common law doctrine that is no longer relevant and is unrecognized in any other segment of our society.¹⁶ The courts have admitted as much themselves. For example, in *Pearson Yacht*, the Supreme Court reluctantly concluded that the forfeiture statute was constitutional because "[t]he historical background of forfeiture statutes in this country and this Court's prior decisions sustaining their constitutionality lead to that conclusion."¹⁷ The case reporters are replete with other decisions upholding the constitutionality of civil forfeiture statutes based merely on the recognition that they have always been permitted in the past.¹⁸ An

1993); WYO. STAT. § 35-7-1049 (1977).

11. Sandra Guerra, *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 826 & n.81 (1994).

12. See Kelly McClure, *Federal Civil Forfeiture of Assets: How it Works and Why It Must*, 11 U. BRIDGEPORT L. REV. 419, 422-23 (1991) (discussing the public dissatisfaction with the limited success of federal criminal forfeiture statutes, particularly those directed at drug trafficking); see also Comment, *Civil Forfeiture of Assets: A Final Solution to International Drug Trafficking?*, 10 HOUS. J. INT'L L. 239, 252-53 (1988) (commenting on the inability of criminal forfeiture legislation to effectively combat drug trafficking).

13. For a discussion of the application and effect of the "guilty property" fiction, see *infra* part II.B.

14. For example, in *Pearson Yacht*, the court noted that "[d]espite [the] proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

15. See *infra* note 18.

16. See *infra* part II.B. (discussing the legal fiction permitting the treatment of property as capable of guilt).

17. *Pearson Yacht*, 416 U.S. at 680.

18. See, e.g., *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926) ("It has long been settled that statutory forfeiture[] of property . . . is not a violation of the Due Process Clause of the Fifth Amendment."); *Goldsmith-Grant v. United States*, 254 U.S. 505, 511 (1921) (stating that civil forfeitures are "too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced"); *United States v. Certain Real Property and Premises Known as 38 Whalers Cove, Babylon, New York*, 954 F.2d 29, 33

obvious objection to such a line of reasoning is that the original grounds which justified civil forfeiture in the past have long since disappeared. The "rule simply persists from imitation of the past."¹⁹

In *Austin v. United States*,²⁰ the United States Supreme Court recognized the obvious fact that property forfeiture has the effect of punishing the owner.²¹ Proceeding from this premise, the Court ruled for the first time that civil forfeitures are subject to constitutional protection under the Excessive Fines Clause of the Eighth Amendment.²²

(2nd Cir. 1992) ("The Supreme Court has long held that a forfeiture of property used for illegal purposes may be deemed unduly oppressive only when the owner of the forfeited property is innocent of the wrongful activity, uninvolved and unaware of it, and has done 'all

that reasonably could be expected to prevent the proscribed use of his property."); *United States v. Campos*, 859 F.2d 1233, 1240 (6th Cir. 1988) ("After analysis of the historical background and development of the law of forfeiture, innocence of the owner of property was rejected as a defense to forfeiture despite the hardship involved."); *United States v. One 1975 Pontiac LeMans, Vehicle I.D. No. 2F37M56101227*, 621 F.2d 444, 447 (1st Cir. 1980) ("Courts applying the various federal forfeiture statutes have 'almost uniformly' rejected innocence of the property's owner as a defense to a government forfeiture action."); *Associates Investment Co. v. United States*, 220 F.2d 885, 888 (5th Cir. 1955) ("[I]t is well settled that [forfeiture] is not a denial of due process of law, or a taking of private property for public use without fair compensation.").

19. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); see also *Monell v. Department of Social Servs.*, 436 U.S. 658, 709 n.6 (1978); *United States v. Dege*, 364 U.S. 51, 53-54 (1960); *Lipinski v. New York*, 557 F.2d 289, 293 (2d Cir. 1977); *Commercial Trading Co. v. Hartford Fire Ins. Co.*, 466 F.2d 1239, 1242 n.7 (5th Cir. 1972).

20. 113 S. Ct. 2801 (1993). In *Austin* the Court reversed and remanded an Eighth Circuit Court of Appeals decision which had reluctantly held that the Eighth Amendment does not apply to civil in rem forfeiture proceedings. See *Austin v. United States*, 113 S. Ct. 2801, 2801 (1993). In *United States v. 508 Depot Street*, the Eighth Circuit was reluctant to apply the Eighth Amendment because it felt it was "limited by the technical legal distinctions regarding in personam and in rem actions." *United States v. 508 Depot Street*, 964 F.2d 814, 818 (8th Cir. 1992).

21. *Austin*, 113 S. Ct. at 2811-12. For a detailed discussion of the facts and holding of *Austin*, see *infra* part IV.

22. The Excessive Fines Clause of the Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

Since its decision in *Austin*, the Supreme Court has ruled that civil forfeitures are also subject to constitutional protection under the Fourth and Fifth Amendments. See, e.g., *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1944-45 (1994) (Fifth Amendment); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498-501 (1994) (Fourth and Fifth Amendments).

In *Kurth Ranch*, six family members growing marijuana on their farm were arrested and charged with conspiracy to possess with intent to sell marijuana and, in the alternative, possession with intent to sell. *Kurth Ranch*, 114 S. Ct. at 1943. The marijuana was seized and destroyed. *Id.* at 1942. Each family member pleaded not

guilty and eventually entered a plea bargain, resulting in two family members going to jail. *Id.* Through a civil forfeiture action permitted by Montana law, the Kurths gave up equipment and cash totalling more than \$18,000. *Id.*

The Montana Department of Revenue then moved to assess the Kurths with a statutorily permitted tax on dangerous drugs. *Id.* The tax was based upon the "market value" of the marijuana that was seized, and assessed at \$900,000 by the government. *Id.* The Kurths subsequently filed for bankruptcy and the government's tax claim was reassessed at \$181,000. *Id.* at 1943.

Finding the tax to be approximately 400% of the actual market value of the marijuana, the Supreme Court concluded that the tax assessment was unreasonably high. *Id.* at 1946 n.17 & 1947. The Court further found the tax to be a criminal, rather than civil, penalty due to its punitive nature. *Id.* at 1947. The tax could not be assessed without the commission of an illegal act and, further, the tax was assessed upon property that the defendants no longer possessed. *Id.* at 1948. The Court considered this punitive government action constitutionally questionable. *Id.*

Two of the Kurth defendants were punished by both incarceration and forfeiture. *Id.* The state action of additionally levying a tax, characterized by the Court as a punishment, resulted in punishing the defendants twice for the same crime. The Court held the tax to be a violation of the Double Jeopardy Clause of the Fifth Amendment. *Id.*

Chief Justice Rehnquist and Justices O'Connor and Scalia filed three separate dissenting opinions. *Id.* at 1949-60 (Rehnquist & O'Connor & Scalia, JJ., dissenting). Their common objection was the majority's characterization of the drug tax as a criminal penalty under a Double Jeopardy Clause analysis. *Id.*

In *James Daniel Good*, the defendant's house was raided by police in 1985. *James Daniel Good*, 114 S. Ct. at 497. A large quantity of marijuana and its byproducts was recovered in the home. *Id.* Good pleaded guilty to promoting a harmful drug in the second degree, in violation of Hawaii law. *Id.* Good forfeited more than three thousand dollars in cash that police found in the house, was sentenced, and then fined. *Id.*

In late 1989, using the federal forfeiture law for drug offenses, 21 U.S.C. § 881(a)(7), the federal government filed an in rem action in federal court. *Id.* The government, in an ex parte proceeding, moved to obtain possession of Good's home based upon the 1985 drug conviction. *Id.* A warrant was issued and the property was seized without either prior notice or hearing to Good. *Id.* at 497-98. Good claimed a lack of due process resulting from the forfeiture of his real property. *Id.* at 498. Not insignificantly, the government had five years in which to move for a forfeiture under the statute. *Id.*

The Court did not inquire as to whether either the Fourth or Fifth Amendments operated to the exclusion of the other. *Id.* at 499. Rather, it considered the issue to be whether the Fourth and Fifth Amendments both applied. *Id.* The Court held that Good was not limited to the Fourth Amendment protections against unreasonable search and seizure. *Id.* at 500. The government's stated objective was to seize the home and real property for possession, not for evidentiary purposes through its forfeiture action. *Id.* at 497. Good's right to maintain his home, free from governmental interference was considered an important and historic element of the analysis. *Id.* at 501. The Court found that "[t]he seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment." *Id.* at 501. Accordingly, the Court concluded that Good was protected by the search and seizure protections of the Fourth Amendment and the notice and hearing protections afforded by the Fifth Amendment. *Id.* at 500, 505.

Although the Supreme Court reached the correct conclusion in *Austin*, its reasoning reflects its continuing infatuation with ancient and obsolete common law precepts.²³ The Court also explicitly declined to formulate an Eighth Amendment constitutional test to be applied to civil forfeitures; instead calling on the appellate courts to develop their own test.²⁴ It is therefore up to the lower courts to sever the archaic ties connecting civil forfeiture with the common law.

This Comment attempts to answer the challenge issued in *Austin* — to articulate a test to determine the constitutionality of civil forfeiture statutes under the Excessive Fines Clause of the Eighth Amendment. It argues that a civil forfeiture should be declared excessive under the Eighth Amendment if there is a disproportionate relationship between the cost of the crime committed and the value of the property forfeited.

Part II of this Comment traces the evolution of civil forfeiture law from its common law ancestry up to the recent Supreme Court decision in *Austin*. Part III analyzes the history of the Excessive Fines Clause of the Eighth Amendment. Part IV explains the factual background of *Austin* and carefully describes the Supreme Court's decision of the case. Part V of this Comment analyzes the *Austin* decision, criticizing it for declining to set forth a test for determining the constitutionality of civil forfeitures under the Eighth Amendment. Using *Austin* as the point of departure, this section suggests criteria for determining whether a forfeiture is constitutionally excessive under the Eighth Amendment. Part V concludes by applying the proposed constitutional test to the facts of *Austin* and *Pearson Yacht*.

II. HISTORY OF CIVIL FORFEITURE LAW

The courts' continued acceptance of civil forfeiture statutes rests largely on jurisdictional and precedential grounds. Both are rooted in history and are based upon sound legal principles. However, in the

According to the Court, there were no exigent circumstances to support the government's ex parte action to seize the property. *Id.* at 505. Therefore, under the Fourth and Fifth Amendments, the Court found a requirement to notify Good of the forfeiture action and to permit him a hearing on the matter. *Id.* With respect to the timeliness of the forfeiture, the Court ruled that the government was within the statutory period during which to file the action. *Id.* at 507. Thus, the forfeiture action was not dismissed, despite the government's failure to comply with other statutory requirements. *Id.* The Court ultimately remanded the case back to the district court. *Id.*

23. See *infra* part V.

24. *Austin*, 113 S. Ct. at 2812 ("Austin asks that we establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive.' We decline that invitation. . . . Prudence dictates that we allow the lower courts to consider that question in the first instance.").

case of civil forfeiture statutes, they have been expanded by the courts to the extent that their original purposes have been corrupted.

A. *The Jurisdictional Element of Civil Forfeiture Law*

Forfeiture of assets has been defined in modern times as follows: the divesture without compensation of property used in a manner contrary to the laws of the sovereign. Whenever a statute provides that upon the commission of a specified act, certain property used in or connected with that act shall be "forfeited," the forfeiture takes place immediately upon the commission of the act, and a conditional right to the property then vests in the government.²⁵

Civil forfeiture statutes derive their force from their jurisdictional nature. Forfeiture statutes are either criminal or civil. The critical distinction between criminal and civil forfeiture is the jurisdictional requirement. Civil forfeiture requires in rem jurisdiction, or jurisdiction against the thing.²⁶ Criminal forfeiture requires in personam jurisdiction, or jurisdiction based on a person and involving personal rights.²⁷ Criminal forfeitures therefore implicate the full panoply of constitutional rights before property can be taken by the government. Government prosecutors are able to circumvent these personal constitutional protections by proceeding directly against the property.²⁸ The property is guilty if the government sustains its low burden of showing merely that there is probable cause the property was connected with the commission of certain proscribed activity.²⁹

B. *English Common Law*

There were three kinds of forfeiture recognized in the English common law: escheat upon attainder, deodand, and statutory forfeiture.³⁰ Although only statutory forfeiture is recognized today,

25. *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

26. In rem jurisdiction is the power to adjudicate claims against property or res. *See generally* 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01[3] (2d ed. 1991). Personal jurisdiction over the owner of the property is not required for the application of in rem jurisdiction. *Id.*

27. In personam jurisdiction is the power to bind a person or adjudicate an action involving the person. *See generally id.* § 1.01[2]. Personal jurisdiction over the defendant is required for the application of in personam jurisdiction. *Id.* ("To adjudicate an action in personam — i.e., an action seeking to impose upon the defendants a duty to do, or refrain from doing, some specific act or to pay a sum of money — a court must have jurisdiction of the person of the defendant.")

28. *See infra* notes 64-65 and accompanying text.

29. *See infra* notes 64-65 and accompanying text.

30. Lawrence A. Kasten, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 198 & n.18 (1991)

escheat upon attainder and deodand continue to “contribute[] to modern conceptions of the state’s ability to seize the property of its citizens.”³¹ In particular, the myth that property can be culpable of crime, which underlies these doctrines, continues to be used as a justification for bypassing constitutional rights of individuals.³²

1. *Escheat upon attainder*

Escheat upon attainder, essentially a criminal law doctrine, was premised on the common law theory that the sovereign retained a superior interest in all property.³³ If a subject committed a felony or treason, any interest in property he or she owned escheated, or reverted back, to the Crown at the time the felony was committed.³⁴ The commission of the felony also resulted in corruption of the blood,³⁵ so that any rights of the subject’s innocent heirs were likewise forfeited.³⁶ Nevertheless, the primary function of escheat upon attainder was to punish the property owner for committing a crime.³⁷

2. *Deodand*

The doctrine of the deodand is particularly relevant to understanding modern civil forfeiture law.³⁸ Deodands are any objects which

(describing deodand and escheat upon attainder).

31. *Id.* at 198.

32. See Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 918-19 (1991) (basing the constitutionality of civil forfeiture statutes on their entrenchment in case law).

33. See Kasten, *supra* note 30, at 198.

34. *Id.*

35. *Id.* The effect of the doctrine of corruption of the blood was described by the Supreme Court as follows:

The consequences of attainder were forfeiture of real and personal estates and corruption of blood. An attainted person could not inherit land or other hereditaments, nor retain those he possessed, nor transmit them by descent to any heir. Descents were also obstructed whenever posterity derived a title through one who was attainted.

Furman v. Georgia, 408 U.S. 238, 317 n.8 (1972) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *380-81).

36. Kasten, *supra* note 30, at 198. Escheat upon attainder and corruption of the blood were abolished by the United States Constitution. U.S. CONST. art. III, § 3. “The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” *Id.*

37. See *Austin v. United States*, 113 S. Ct. 2801, 2807 (1993); see also Kasten, *supra* note 30, at 198-99.

38. Although the deodand has never been recognized in the United States, the Supreme Court has consistently used the deodand doctrine that property is capable of guilt as a basis for upholding the constitutionality of civil forfeiture statutes. See *supra*

directly cause the death of a person.³⁹ The doctrine of the deodand can be traced back to the usage of “noxal surrender,” which was widely practiced during the reign of Alfred the Great in the late ninth century.⁴⁰ Noxal surrender occurred by surrendering the object which caused the death to the victim’s family.⁴¹ The purpose was not to make restitution but “as a ransom by the owner of the wrong-doing chattel in order to forestall further action by the injured party.”⁴² The custom of noxal surrender was also recognized in Roman law and African tribal law.⁴³

At English common law, the doctrine of the deodand was practiced differently than the custom of noxal surrender.⁴⁴ Under the English common law, it was immaterial whether the object was owned by the deceased or someone else.⁴⁵ Unlike escheat upon attainder, the goal behind the institution of the deodand was not to punish the property owner for the commission of a crime. Instead, the deodand doctrine was premised on the fiction that property itself, distinct from the conduct of its owner, could be guilty of committing a crime.⁴⁶ If any property directly or indirectly resulted in the accidental death of a subject, the value of that property was forfeited to the sovereign, regardless of the property owner’s fault.⁴⁷ For example, a sword which

note 18; see also *infra* part II.C (discussing the history of civil forfeiture law in the United States).

39. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 185 (1973); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974). Deodand derives from the Latin *Deo dandum*, which means “given to God.” Finkelstein, *supra*, at 180 n.35; *Pearson Yacht*, 416 U.S. at 681 n.16; see also BLACK’S LAW DICTIONARY 436 (6th ed. 1990) (defining deodand as “any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses, and distributed in alms by the high almoner”).

40. Finkelstein, *supra* note 39, at 181.

41. *Id.*

42. *Id.*

43. *Id.* at 181-82.

44. *Id.* at 182.

45. *Id.*

46. Kasten, *supra* note 30, at 199-200. The different rationales underlying the doctrines of escheat upon attainder and the deodand resulted in separate procedural requirements. “Forfeiture consequent to attainder required an underlying criminal conviction, and was, therefore, an additional in personam sanction against the individual and, vicariously, against the individual’s heirs-apparent. Deodand forfeiture, however, was essentially in rem, with only the guilt or innocence of the property at issue.” *Id.* at 200 (footnotes omitted).

47. The property was forfeited even in circumstances where the owner of the object which caused the death was the hapless victim. Finkelstein, *supra* note 39, at 182, 197. The value of the deodand object was assessed and the proceeds given to the Crown. *Id.* at 185.

caused the death of a person would be forfeited to the Crown, whether or not the sword's owner played any part in the death.⁴⁸ Deodand, therefore, was premised only on the guilt or innocence of the property itself, with no intent, at least at the time of the doctrine's origin, to punish the owner.⁴⁹ There was, however, a remedial purpose behind the doctrine of the deodand. The King was to contribute the value of the property to charity or it was to be used to provide money to say Mass for the victim's soul.⁵⁰ The original charitable purpose of deodand gradually disappeared, and it instead became a source of revenue for the Crown.⁵¹ Its continued application was justified as a penalty for the negligence of the owner,⁵² on the grounds "for tho it was not his crime but his misfortune, yet because the king hath lost his subject, and that men may be more careful, he forfeits his goods"⁵³

The deodand continued as a common law doctrine in England through the end of the 18th century largely because the incidents of accidental death were rare and the victims were from the poorest class of persons.⁵⁴ However, when the industrial age arrived at the beginning of the 19th century, "[p]ersons of all classes became potential and actual victims of injury and death, a situation which

48. "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." OLIVER WENDELL HOLMES, *THE COMMON LAW* 23 (Mark DeWolfe Howe ed., 1963) (citations omitted). See also Finkelstein, *supra* note 39, at 223 (noting the similarity between Holmes' statement and the policy justifications put forth by the Supreme Court to uphold the constitutionality of civil forfeiture statutes).

49. The Supreme Court in *Austin* observed that the deodand served, at least in part, to punish the negligence of the owner. *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *152).

50. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

51. The charitable purpose behind the deodand of providing mass for the benefit of the decedent's soul was justified on the grounds that the soul of the dead man had greater priority than any claim by survivors. Finkelstein, *supra* note 39, at 182. This original purpose of the deodand "was soon given up, so that the deodand already at an early date was little more than a source of revenue for whosoever had been designated as the public beneficiary." *Id.*

52. See *Pearson Yacht*, 416 U.S. at 681. Despite the different grounds justifying the continued existence of the deodand, it was always solely a Crown Plea and never a basis for a private cause of action. Finkelstein, *supra* note 39, at 178. The rationale behind the institution of the deodand was the Judeo-Christian "'revulsion' against computing the 'value' of human life in pecuniary terms" *Id.* at 179-80.

53. Finkelstein, *supra* note 39, at 186 (citing MATTHEW HALE, *PLEAS OF THE CROWN*, 477 (W. Stokes & E. Ingersoll eds., 1847)); see also *Austin*, 113 S. Ct. at 2806 ("[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.") (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *301).

54. Finkelstein, *supra* note 39, at 171-72.

rapidly grew more critical with the advent of railroads in the 1830s.⁵⁵ As a result, “[r]ich as well as poor were now frequent victims of accidental death, but the law proved an ineffective remedy for surviving kin seeking recovery for manifest damages resulting from the deaths, and few bothered to bring any suit at all.”⁵⁶ On August 18, 1846, legislation was passed that finally abolished the institution of deodand.⁵⁷ Although deodand itself was abolished, its remedial purpose continues as a justification for civil forfeiture.⁵⁸

3. Forfeiture by statute

The final type of forfeiture law practiced in England, which survives today, was forfeiture by statute.⁵⁹ These statutes, most notably the Navigation Act of 1660,⁶⁰ provided for the forfeiture “of offending objects used in violation of the customs and revenue laws—likely a product of the confluence and merger of the deodand tradition and

55. *Id.* at 172.

56. *Id.* Finkelstein also notes that “[t]he life insurance industry, which today absorbs the largest part of the economic costs of such contingencies, was then in its infancy, and recovery at common law was shut off. Only the deodand was available as a legal ‘remedy’” *Id.*

57. *Id.* at 170. A few days later the “Act for Compensating the Families of Persons Killed by Accidents,” known as “Lord Campbell’s Act” was enacted. *Id.* at 170-71. Although the deodand was not available as a private right of action, it was viewed as protecting private individuals by providing a disincentive to negligence by property owners. *Id.* at 171-73. For this reason, Lord Campbell advocated that the act abolishing deodands be enacted together with Lord Campbell’s Act:

The two bills might go on together because, objectionable as the system of deodands was, he [i.e. Lord Campbell] would not abolish it, having regard to public safety, unless the right action was given, in order to make railroad directors and stage coach proprietors cautious of the lives and limbs of Her Majesty’s subjects.

Id. at 171 (citing 77 HANSARD, PARLIAMENTARY DEBATES 1031 (1846)) (bracketed text in original).

58. See cases cited *supra* note 18. Civil forfeiture statutes are also used to fund the government’s so-called “war on drugs.” In 1991, President Bush acknowledged this additional purpose when

he stated that “[a]sset forfeiture laws allow us to take the ill-gotten gains of drug kingpins and use them to put more cops on the streets and more prosecutors in court.” Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 275 (1992) (citing President George Bush, *Remarks By President Bush to Attorney General’s Summit on Law Enforcement: Responses to Violent Crime*, Fed. News Serv., Mar. 5, 1991); see also Guerra, *supra* note 11, at 824-26 (describing the incentives of multi-jurisdictional cooperation and the creation of new revenues for law enforcement agencies).

59. See Kasten, *supra* note 30, at 198 & n.18.

60. An Act for the encouraging and increasing of shipping and navigation, 1660, 12 Car. 2, ch. 18 (Eng.); see *Austin v. United States*, 113 S. Ct. 2801, 2807 (1993); see also Kasten, *supra* note 30, at 198 n.18 (citing authorities).

the belief that the right to own property could be denied the wrongdoer.⁶¹ For example, the Navigation Act of 1660 provided that if the acts of individual sailors resulted in the illegal shipping of commodities, the entire ship could be forfeited.⁶² This was true even if the individual sailors acted without the knowledge of the ship's owner⁶³ because the Act, like most statutory forfeitures of the time, merely required in rem jurisdiction.⁶⁴ Thus, forfeiture by statute is essentially the deodand doctrine encoded into statute.

C. Civil Forfeiture in the United States

Of the three kinds of forfeiture recognized in the English common law, only statutory forfeiture is recognized in the United States.⁶⁵ Civil forfeiture pursuant to statute was established early in the country's history:

"[L]ong before the adoption of the Constitution the common law courts in the Colonies — and later in the states during the period of Confederation — were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes," which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws. And almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country.⁶⁶

Two of the earliest Supreme Court cases in the United States which upheld civil forfeiture statutes were *The Palmyra*⁶⁷ and *Harmony v. United States*⁶⁸ ("*Malek Adhel*"). In *The Palmyra*, decided in 1827, a ship had been used to commit numerous acts of piracy against other ships. The Court upheld the forfeiture of the ship under a federal customs forfeiture law⁶⁹ despite acknowledging that its owner was blameless.

61. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974).

62. Navigation Act, 1660, 12 Car. 2, ch. 18 § I(3); see *Austin*, 113 S. Ct. at 2807.

63. *Austin*, 113 S. Ct. at 2807.

64. *Pearson Yacht*, 416 U.S. at 682.

65. *Austin*, 113 S. Ct. at 2807.

66. *Pearson Yacht*, 416 U.S. at 683 (bracketed text in original) (citations omitted).

67. 25 U.S. (12 Wheat.) 1 (1827).

68. 43 U.S. (2 How.) 210 (1844) [hereinafter *Malek Adhel*].

69. The forfeiture of the ship was based on a federal statute, the second section of which authorized the President to do the following:

to instruct the commanders of public armed vessels of the United States, to seize, subdue and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel.

The Court reasoned that the culpability of the owner of the ship was not relevant because “[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.”⁷⁰ Thus, very early in this country’s history, in rem proceedings stood “independent of, and wholly unaffected by, any criminal proceeding *in personam*.”⁷¹ More ominously, the fiction that property could be tainted with guilt was resurrected.

In *Malek Adhel*,⁷² decided in 1844, the insane captain of the ship had fired at numerous other ships that his ship encountered during the voyage.⁷³ Despite the conceded innocence of the ship’s owners,⁷⁴ the Court stated that:

the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . Nor is there any thing new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.⁷⁵

Malek Adhel illustrates the reasoning other courts would follow in years to come.⁷⁶ First, the Court repeated the common law fiction that guilt can attach to property apart from the guilt or innocence of the

The fourth section provided:

that whenever any vessel or boat from which any piratical aggression, search, restraint, depredation or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

The *Palmyra*, 25 U.S. (12 Wheat.) 1, 8 (1927) (quoting Act of Mar. 3, 1819, ch. 75).

70. *Id.* at 14.

71. *Id.* at 15.

72. The same federal customs statute was involved as was in *The Palmyra*. *Malek Adhel*, 43 U.S. (2 How.) 210, 229 (1844).

73. *Id.* at 228-29.

74. “It was fully admitted in the court below, that the owners of the brig and cargo never contemplated or authorized the acts complained of.” *Id.* at 230.

75. *Id.* at 233.

76. *See supra* note 18 and accompanying text.

owner.⁷⁷ Second, the Court justified its reliance on this fiction by pointing to its historical acceptance.⁷⁸ Finally, the Court pointed to the legislative intent behind the law, explaining that it was “the only adequate means of suppressing the offence or wrong.”⁷⁹

After the Civil War, civil forfeiture statutes continued to be used in civil in rem proceedings to uphold the forfeiture of property in cases involving tax revenue violations.⁸⁰ In *Dobbins’s Distillery v. United States*,⁸¹ a distillery was leased to the defendant who, unknown to the owner, had violated provisions of the Tax Revenue Act.⁸² The civil forfeiture statute provided for forfeiture despite the innocence or lack of knowledge of the owner.⁸³ Nevertheless, the Court upheld the constitutionality of the Act, ruling that the distillery itself was guilty, irrespective of any actions taken by the owner.⁸⁴ In *J.W. Goldsmith, Jr.-Grant Co. v. United States*,⁸⁵ decided forty-four years after *Dobbins’s Distillery*, the Court once again upheld the punitive use of in rem forfeitures, stating that the guilty property fiction was “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”⁸⁶ As one commentator remarked, “*Dobbins’s Distillery* and *J.W. Goldsmith* deeply entrenched the guilty property fiction and broadened the scope of punitive sanctions using civil in rem procedures.”⁸⁷

The Supreme Court has not completely neglected to apply constitutional principles to civil forfeiture statutes. In 1886 the Court, in *Coffey v. United States*,⁸⁸ held that the Fifth Amendment’s protection against double jeopardy⁸⁹ applied when a forfeiture action was attempted against a defendant previously acquitted on a criminal charge based on the same act.⁹⁰ Following *Coffey*, the Court in *Boyd v.*

77. *Malek Adhel*, 43 U.S. (2 How.) at 233.

78. *Id.*

79. *Id.* at 233.

80. *Kasten*, *supra* note 30, at 201.

81. 96 U.S. 395 (1877).

82. *Dobbin’s Distillery v. United States* 96 U.S. 395, 396-97 (1877).

83. *Id.* at 399-400.

84. *Id.* at 401. The Court also stated that, because the forfeiture was pursuant to statute, it was required to give deference to congressional intent. *Id.*

85. 254 U.S. 505 (1921).

86. *J.W. Goldsmith, Jr. Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

87. *Kasten*, *supra* note 30, at 202.

88. 116 U.S. 436 (1886).

89. The Double Jeopardy Clause provides: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb” U.S. CONST. amend. V, cl. 2.

90. *Coffey v. United States*, 116 U.S. 436, 445 (1886). In *Coffey*, the defendant had been acquitted of an in personam criminal count for defrauding the government of tax revenue. *Id.* at 442-43. The Court felt that this acquittal barred the in rem civil

United States,⁹¹ decided in the same year, held that defendants in forfeiture actions were also protected by the Fifth Amendment's prohibition against self-incrimination.⁹²

The major civil forfeiture statute employed by the federal government in recent years is the Comprehensive Drug Abuse Prevention and Control Act ("Act" or "the Act"), enacted in 1970.⁹³ The Act, in many ways, perpetuates the ancient doctrine of the deodand.⁹⁴ Actions brought pursuant to its terms are in rem proceedings against the property.⁹⁵ Because it is an in rem proceeding, the innocence of the owner will have little or no effect on the outcome of the proceeding.⁹⁶ Upon forfeiture, title to the "offending" property is automatically vested in the United States.⁹⁷ Title to the property relates back

count because it involved the same parties and the same matter and issues as in the criminal action. *Id.* at 444-45.

91. 116 U.S. 616 (1886). In *Boyd*, the government had compelled the defendant to produce an invoice for merchandise imported without the required payment of duties. *Boyd v. United States*, 116 U.S. 616, 617-18 (1886). The Court held that the order requiring production of the invoice was unconstitutional because it was equivalent to compelling the defendant to be a witness against himself, regardless of the in rem nature of the proceedings. *Id.* at 633-34.

92. *Id.* at 638. The Fifth Amendment's prohibition against self-incrimination provides that no person "shall be compelled in any criminal case to be a witness against himself" U.S.

CONST. amend. V, cl. 3. For a discussion of the Supreme Court's post-*Austin* application of the Fifth Amendment to civil forfeiture law, see *supra* note 22.

93. 21 U.S.C. § 881 (1988). For the text of the forfeiture provisions of the act, see *infra* note 141. See also Jeffrey M. Evans, "Civil" Forfeitures Under State Rico Laws: A Legislative Attempt to Circumvent the Constitution, 8 CRIM. JUST. J. 293 (1986) (discussing Florida and Oregon state forfeiture statutes modeled after 18 U.S.C. §§ 1961-1968, the federal statute known as the Racketeer Influenced and Corrupt Organizations Act ("RICO")).

94. See generally Stahl, *supra* note 58.

95. See, e.g., *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 509 (1921) (finding a car itself guilty and subject to forfeiture); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987) (stating that civil forfeiture is an in rem proceeding); *United States v. Haro*, 685 F. Supp. 1468, 1473 (E.D. Wis. 1988) (stating that the property is the defendant in a civil forfeiture proceeding).

96. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684-86 (citing multiple cases for the proposition that when property is forfeited by statute, the innocence of the owner has been uniformly rejected). The Act, unlike many forfeiture statutes, does provide for an innocent owner's defense. See 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988). However, *Pearson Yacht* also considered the innocence of the owner whose yacht was forfeited. The Court read such a defense very restrictively, implying that the owner was required to prove that it "did all that it reasonably could to avoid having its property put to an unlawful use." *Pearson Yacht*, 416 U.S. at 690; see also *Sandini*, 816 F.2d at 872 (stating that the innocence of the property owner is irrelevant in civil forfeiture cases).

97. 21 U.S.C. § 881(h) (1988).

to the time at which the criminal activity occurred.⁹⁸ The owner of the property has the burden of proof to establish the innocence of the property by a preponderance of the evidence.⁹⁹ As a result of these harsh requirements imposed on property owners, forfeiture proceedings under the Act have skyrocketed in recent years.¹⁰⁰ In 1992, \$531 million in cash and property was seized by the government under the Act.¹⁰¹ Eighty percent of those property owners were never even charged with a crime.¹⁰²

98. *Id.*; see also *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (stating that forfeiture under statute constitutes transfer of property to government at time offense is committed); *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 676 (5th Cir. 1960) (stating that property vests in government at moment illegal act is committed); *United States v. Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 195 & n.1 (C.D. Cal. 1978) (stating that government's title vests at the time of the commission of the illegal act).

99. Because of this lower burden of proof, forfeiture statutes are more likely to be successfully prosecuted. The statutes, therefore, provide a tempting alternative to criminal statutes, fueling the government's increasing likelihood of using the civil proceeding as a replacement for a criminal proceeding. See, e.g., *United States v. Four Million, Two-Hundred Fifty Thousand*, 762 F.2d 895, 907 (11th Cir.) ("[I]t is the claimant's responsibility to prove the *absence* of actual knowledge [of improper acts or omissions under 21 U.S.C. § 881]."), *cert. denied*, 474 U.S. 1056 (1985).

100. Since its inception in 1970, more than 1,600 federal cases have cited 21 U.S.C. § 881. See, e.g., *United States v. \$5,000 in U.S. Currency*, 40 F.3d 846, 847 (6th Cir. 1994); *United States v. U.S. Currency*, 39 F.3d 1039, 1040 (9th Cir. 1994); *United States v. Michelle's Lounge*, 39 F.3d 684, 687 (7th Cir. 1994); *United States v. One 1990 Chevrolet Corvette*, 37 F.3d 421 (8th Cir. 1994); *United States v. Chandler*, 36 F.3d 358, 360 (4th Cir. 1994); *United States v. Fifty-Two Thousand & Eight Hundred Dollars in U.S. Currency and Interest*, 33 F.3d 1337, 1338 (11th Cir. 1994); *United States v. One Parcel of Land*, 33 F.3d 11, 12 (5th Cir. 1994); see also Henry J. Reske, *A Law Run Wild: Conservative Lawmaker Seeks Asset Forfeiture Limits*, A.B.A. J., Oct. 1993, at 24-26. One commentator describes the potency of civil forfeiture law as follows:

Seizing a person's car, boat or land under civil forfeiture law, under the guise that it is the property which is at fault, is an extremely potent weapon for law enforcement. 'Through this statute [21 U.S.C. § 881], Congress has expanded the nation's war on drugs to every piece of real property involved in the narcotics trade.' Unlike criminal forfeiture, the property may be taken by showing merely a preponderance of evidence, (more likely than not), and is taken before any criminal proceedings are instituted, much less before any determination of guilt has been made. In criminal forfeiture proceedings . . . the standard of proof is beyond a reasonable doubt, (meaning virtual certainty), and, of course, there are numerous Constitutional safeguards to protect the defendant during the course of the proceedings. As one commentator has noted, civil forfeitures 'have the effect of punishing crime without criminal process.'

Meyer, *supra* note 7, at 867-68 (citations omitted).

101. Reske, *supra* note 100, at 24.

102. *Id.*

III. HISTORY OF THE EXCESSIVE FINES CLAUSE

Despite the limited and uncertain constitutional protections afforded persons subject to civil forfeiture statutes, the *Austin* decision suggests that it is the Excessive Fines Clause of the Eighth Amendment that will offer the best source of protection in the future. The Eighth Amendment of the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁰³ The meaning of the Excessive Fines Clause of the Eighth Amendment has been left largely uninterpreted by the Supreme Court for most of this country’s history.¹⁰⁴ When the Excessive Fines Clause was considered, it was considered only in relation to the Cruel and Unusual Punishments Clause, which is also contained in the Eighth Amendment.¹⁰⁵ Only recently was the Excessive Fines Clause considered in isolation from the rest of the Amendment.

The first extended analysis of the Clause occurred in *Browning-Ferris Industries v. Kelco Disposal, Inc.*¹⁰⁶ At issue in *Kelco* was a jury award in a state antitrust claim of six million dollars in punitive damages.¹⁰⁷ The Court found that Eighth Amendment protection has never been applied to limit awards of punitive damages between private parties.¹⁰⁸ According to the Court, the protections afforded by the Eighth Amendment are implicated only in cases concerned with criminal process or in direct actions initiated by government to inflict punishment.¹⁰⁹ The Court did not, however, decide whether the Eighth Amendment applies only to criminal cases.¹¹⁰ The Court restricted its holding to deciding only that the Eighth Amendment “does not

103. U.S. CONST. amend. VIII.

104. In the cases in which the Supreme Court has found that the Excessive Fines Clause was or may be applicable, it nevertheless rejected claims that the particular fines at issue were not excessive within the meaning of the Clause. See generally *Badders v. United States*, 240 U.S. 391 (1916); *Weems v. United States*, 217 U.S. 349 (1910); *Pervear v. Commonwealth*, 72 U.S. 475 (1866); *Ex Parte Watkins*, 32 U.S. 568 (1833); *David B. Sweet*, Annotation, *Supreme Court’s Construction and Application of Excessive Fines Clause of Federal Constitution’s Eighth Amendment*, 106 L. Ed. 2d 729 (1992).

105. *Sweet*, *supra* note 104, at 730 n.1. The Cruel and Unusual Punishments Clause of the Eighth Amendment provides: “[N]or cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. An analysis of the Cruel and Unusual Punishments Clause is beyond the scope of this Comment. For a thorough discussion of the Clause, see Anthony Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, CAL. L. REV. 839 (1969).

106. 492 U.S. 257 (1989).

107. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989).

108. *Id.* at 260.

109. *Id.*

110. *Id.* at 263-64.

constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."¹¹¹

In *Kelco*, the Supreme Court undertook an historical analysis of the purposes and concerns of the Eighth Amendment.¹¹² The Court noted that the Eighth Amendment received little attention at the time it was enacted by the First Congress.¹¹³ The Excessive Fines Clause received even less attention.¹¹⁴ In particular, the First Congress did not explain the meaning of the term "fines," nor did it discuss whether the prohibition against excessive fines should apply in the civil context.¹¹⁵ Despite this lack of direct evidence of what Congress intended the meaning and purpose of the Clause to be, the Court concluded that there was sufficient evidence that the Clause was not applicable to an award of punitive damages.¹¹⁶

The *Kelco* Court based its conclusion on the historical distinction between criminal fines and civil damages. The Eighth Amendment was derived from Article I, section nine of the Virginia Declaration of

111. *Id.* at 264.

112. *Id.* at 262-276. "The same basic mode of inquiry should be applied in considering the scope of the Excessive Fines Clause as is proper in other Eighth Amendment contexts. We look to the origins of the Clause and the purposes which directed its Framers." *Id.* at 264 n.4.

113. *Id.* at 264.

114. *Id.*

115. *Id.* at 265. The discussion of the Eighth Amendment by the First Congress was limited to legislators expressing their concern that the Amendment was unnecessary and imprecise. The Supreme Court in *Weems v. United States*, primarily concerning itself with the Cruel and Unusual Punishments Clause, recounted the limited debate occasioned by the Amendment:

Mr. Smith of South Carolina "objected to the words 'nor cruel and unusual punishment,' the import of them being to indefinite." Mr. Livermore opposed the adoption of the clause, saying:

"The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

The question was put on the clause, and it was agreed to by a considerable majority. *Weems v. United States*, 217 U.S. 349, 368-69 (1910).

116. *Kelco*, 492 U.S. at 265.

Rights.¹¹⁷ The Virginia Declaration was a verbatim adoption of the English Bill of Rights,¹¹⁸ and the English Bill of Rights was adopted in 1689 as a reaction against the excessive fines imposed by English judges during the 1680s.¹¹⁹ Reasoning that the First Congress was aware of the history of the English Bill of Rights, the Court determined that “the primary focus of the Eighth Amendment was the potential for governmental abuse of its ‘prosecutorial’ power, not concern with the extent or purposes of civil damages.”¹²⁰ Therefore, “the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”¹²¹

The Supreme Court in *Kelco* specifically left open the question whether the Excessive Fines Clause should be applied to cases where

117. *Id.* at 266 (citing *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983)).

118. “Section 10 of the English Bill of Rights of 1689 . . . states that ‘excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.’” *Id.* (citing 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. 440, 441 (1689)).

119. *Id.* at 267.

120. *Id.* at 266.

121. *Id.* at 268. The Petitioners argued unsuccessfully that the history of the Eighth Amendment should be traced back even further to the time prior to the Magna Carta. *Id.* at 268-69. The Magna Carta provided:

A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment; (2) and a Merchant likewise, saving to him his Merchandise; (3) and any other’s villain than ours shall be likewise amerced, saving his wainage, if he falls into our mercy. (4) And none of the said amerciaments [sic] shall be assessed, but by the oath of honest and lawful men of the vicinage. (5) Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. (6) No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offence.

Id. at 270 n.14 (citing Magna Charta, 9 Hen. III, ch. 14 (1225)); see also *id.* at 288 (O’Connor, J., concurring in part and dissenting in part).

“Amercements were payments to the Crown, and were required of individuals who were ‘in the King’s mercy,’ because of some act offensive to the Crown.” *Id.* at 269. The Petitioners argued that because ameracements were civil in nature and the Magna Carta was a forerunner to the Eighth Amendment, the Eighth Amendment must therefore be read as applicable to punitive damages. *Id.* at 268. The Supreme Court disagreed with the Petitioners’ interpretation of the Magna Carta:

[The Magna Carta is] aimed at putting limits on the power of the King, on the “tyrannical extortions, under the name of ameracements, with which John had oppressed his people,” whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use. These concerns are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery.

Id. at 271-72 (citations omitted). Cf. *id.* at 288 (O’Connor, J., concurring in part and dissenting in part).

the government has prosecuted the action or has a right to a share of the proceeds.¹²² The Court did, however, provide a framework to guide future courts in analyzing the scope of the Excessive Fines Clause. The primary consideration emphasized by the Court was an inquiry into the historical purposes and concerns of the Eighth Amendment to determine the intentions of the Framers of the Bill of Rights.¹²³ Such an inquiry led the Court to conclude that the purpose of the Eighth Amendment was to limit the government's power to punish.¹²⁴ Because *Kelco* did not involve the government directly, the Court found it unnecessary to decide what constituted punishment for purposes of the Eighth Amendment.¹²⁵

What constituted punishment was addressed by the United States Supreme Court in *United States v. Halper*.¹²⁶ At issue in that case was whether a civil penalty imposed for filing a false claim with the government, after a criminal conviction for the same offense, constituted a second punishment in violation of the Double Jeopardy Clause of the Fifth Amendment.¹²⁷ The United States argued that punishment can be meted out only in criminal proceedings.¹²⁸ In rejecting this argument, the Court held that whether the proceedings are criminal or civil is not dispositive.¹²⁹ Instead, the relevant inquiry is whether the civil sanction serves only a remedial function, as opposed to a deterrent or retributive function.¹³⁰ A sanction is not remedial if, as a matter of statutory construction, the civil sanction can

122. *Id.* at 263-64. The Supreme Court also left open the question of whether the Clause applies to *qui tam* actions where a private party brings an action on behalf of the government and is entitled to share in the proceeds. *Id.* at 275-76 & 276 n.21.

123. *Id.* at 264 n.4.

124. *Id.* at 266 (stating that the "focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power").

125. *See id.* at 276-77.

126. 490 U.S. 435 (1989).

127. *United States v. Halper*, 490 U.S. 435, 440-41 (1989).

128. *Id.* at 441.

129. *Id.* at 442-43.

130. *Id.* at 448-49. The Court did not articulate a bright line test for determining whether a civil sanction served a remedial function or a deterrent or retributive function. However, the Court conceded that the trial court's judgment may be arbitrary:

While the trial court's judgment in these matters often may amount to no more than an approximation, even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment.

Id. at 450.

only be construed as partly serving a retributive or deterrent purpose.¹³¹ If it did, then it “is punishment, as we have come to understand the term.”¹³² As a result the Court held that “under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.”¹³³

Civil forfeiture statutes provided the opportunity for the Supreme Court to address issues left unresolved by the *Halper* and *Kelco* decisions; specifically, whether the Excessive Fines Clause should be applied to civil damages awarded to the government, and, if so, whether damages imposed under civil forfeiture statutes partially serve to punish the property owner. The opportunity to resolve both of these issues was presented to the Court in *Austin v. United States*.¹³⁴

IV. AUSTIN V. UNITED STATES

A. The Facts

On June 13, 1990, Richard Austin sold Keith Engebretson two grams of cocaine at Austin’s auto body shop.¹³⁵ Prior to the sale Austin had stopped at his mobile home, presumably to procure the cocaine.¹³⁶ Austin subsequently was indicted on four counts of violating South Dakota’s drug laws.¹³⁷ He pleaded guilty to a single count of possessing cocaine with intent to distribute¹³⁸ and was sentenced to seven years imprisonment.¹³⁹

One month after being sentenced, the United States filed a civil forfeiture proceeding in federal district court against Austin’s auto body shop and mobile home.¹⁴⁰ The government proceeded under the Comprehensive Drug Abuse Prevention and Control Act.¹⁴¹ The

131. *Id.* at 448.

132. *Id.*

133. *Id.* at 448-49.

134. 113 S. Ct. 2801 (1993).

135. *United States v. 508 Depot Street*, 964 F.2d 814, 815 (8th Cir. 1992).

136. *Id.*

137. *Id.* at 816.

138. *Id.*

139. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

140. *Id.*

141. *See supra* notes 93-102 and accompanying text (describing the Act’s connection with the deodand doctrine). The Act, also known as the Controlled Substances Act, was enacted in 1978 because of the perceived ineffectiveness of the forfeiture provisions of earlier statutes. *See McClure, supra* note 12, at 423. The forfeiture provisions of the Act read as follows:

§ 881. FORFEITURES

Act provided for the forfeiture of personal property and real estate used in the commission of certain drug-related crimes.¹⁴² The government moved for summary judgment on the forfeiture, which

(a) **SUBJECT PROPERTY**

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) [or] (2)

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), [or] (2)

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) 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, except that no property shall be forfeited under this paragraph, to the extent of the 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.

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

21 U.S.C. § 881(a) (1988 & Supp. I 1989 & Supp. III 1991).

142. 21 U.S.C. § 881(a).

the district court granted.¹⁴³ Austin appealed to the United States Court of Appeals for the Eighth Circuit.

Austin argued that the seizure of his business and home by the government violated the Excessive Fines Clause of the Eighth Amendment on the grounds that “the value of the property forfeited was ‘grossly disproportionate’ to the illegal drugs located, and the illegal activity occurring, on the property.”¹⁴⁴ The Eighth Circuit Court, feeling itself constrained by well-established precedent, disagreed, holding that the Eighth Amendment did not apply to civil forfeitures.¹⁴⁵ The court justified its holding, and prior precedent, by referring to the *in rem* nature of civil forfeitures.¹⁴⁶ Since Austin’s guilt or innocence was not constitutionally relevant in an *in rem* proceeding, “the constitution hardly requires proportionality review.”¹⁴⁷ As such, whether Austin’s punishment was excessive in light of the severity of the illegal conduct was irrelevant to the court.¹⁴⁸

Despite the Eighth Circuit’s refusal to engage in a proportionality analysis, it made clear its displeasure for the consequences faced by individuals based on “[l]egal niceties such as *in rem* and *in personam*.”¹⁴⁹ Although the court did not condone drug-related criminal activities, it was “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

143. *Austin*, 113 S. Ct. at 2803. The Court described the sequence of events that led to the trial court’s entry of summary judgment as follows:

On February 4, 1991, the United States made a motion, supported by an affidavit from Sioux Falls Police Officer Donald Satterlee, for summary judgment. According to Satterlee’s affidavit, Austin met Keith Engebretson at Austin’s body shop on June 13, 1990, and agreed to sell cocaine to Engebretson. Austin left the shop, went to his mobile home, and returned to the shop with two grams of cocaine which he sold to Engebretson. State authorities executed a search warrant on the body shop and mobile home the following day. They discovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately \$4,700 in cash. In opposing summary judgment, Austin argued that forfeiture of the properties would violate the Eighth Amendment. The District Court rejected this argument and entered summary judgment for the United States.

Id.

144. *United States v. 508 Depot Street*, 964 F.2d 814, 817 (8th Cir. 1992).

145. *Id.*

146. *Id.* at 817-18.

147. *Id.* at 817 (citing *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)).

148. *Id.*

149. *Id.* at 818. For a discussion of *in rem* and *in personam* jurisdiction, see *supra* Part II.A.

past criminal record, engages in a single drug transaction."¹⁵⁰ The court went on to say:

In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding *in personam* and *in rem* actions, together with the clear court decisions that the Constitution does not require proportionality — at least, not in civil proceedings for the forfeiture of property.¹⁵¹

The court concluded by calling on Congress to incorporate proportionality safeguards into the Act.¹⁵² Austin appealed and the United States Supreme Court granted certiorari.¹⁵³

B. *The Supreme Court's Holding and Analysis*

The Supreme Court rejected the government's contention that the question was whether the forfeiture was civil or criminal.¹⁵⁴ Proceeding from *Kelco* and *Halper*, the Court held first, that the Excessive Fines Clause can apply to a civil *in rem* proceeding,¹⁵⁵ and second, that civil forfeiture statutes can serve to punish owners of property.¹⁵⁶ Accordingly, a unanimous Supreme Court¹⁵⁷ reversed the judgment of the Eighth Circuit, holding that the Excessive Fines Clause of the Eighth Amendment does apply to civil forfeitures.¹⁵⁸

In determining that the Eighth Amendment was intended by the Framers of the Constitution to apply to civil proceedings, the Court reasoned that, unlike some provisions of the Bill of Rights, the language of the Eighth Amendment is not expressly limited to criminal proceedings.¹⁵⁹ To illustrate, the Court contrasted the Eighth and Fifth Amendments. For example, the Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be

150. *Id.* at 818.

151. *Id.*

152. *Id.*

153. *Austin v. United States*, 113 S. Ct. 2801 (1993). Prior to *Austin*, only the Second Circuit recognized the Eighth Amendment as applying to *in rem* civil forfeitures. *Id.* at 2804. The other circuits interpreted prior Supreme Court decisions as indicating that the Amendment did not apply. *Id.* The Supreme Court granted certiorari because of this apparent conflict with its prior decisions. *Id.*

154. *Id.* at 2806.

155. *Id.* at 2812.

156. *Id.* at 2813-14.

157. There were two concurring opinions. Justice Scalia concurred in part and concurred in the judgment. *Id.* at 2812 (Scalia, J., concurring). Justice Kennedy, with whom Chief Justice Rehnquist and Justice Thomas joined, concurred in part and concurred in the judgment. *Id.* at 2815 (Kennedy, J., concurring).

158. *Id.* at 2812.

159. *Id.* at 2804-05.

compelled in any criminal case to be a witness against himself.”¹⁶⁰ Furthermore, the Eighth Amendment’s history suggests that it was not intended to apply only to criminal proceedings.¹⁶¹ The Court noted:

“Consideration of the Eighth Amendment immediately followed consideration of the Fifth Amendment. After 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” Section 10 of the English Bill of Rights of 1689 is not expressly limited to criminal cases either. The original draft of § 10 as introduced in the House of Commons did contain such a restriction, but only with respect to the bail clause: “The requiring excessive Bail of Persons committed in criminal Cases, and imposing excessive Fines, and illegal Punishments, to be prevented.” The absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases. In the final version, even the reference to criminal cases in the bail clause was omitted.¹⁶²

Based on these observations, the Court concluded that the Eighth Amendment did apply to civil in rem proceedings.¹⁶³

Relying on *Halper*,¹⁶⁴ the Supreme Court then addressed the question of whether the particular forfeiture at issue was punishment.¹⁶⁵ More specifically, the Court inquired into the history of forfeiture to determine “whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and whether forfeiture under §§ 881(a)(4) and (a)(7) [of the Act] should be so understood today.”¹⁶⁶ The Court concluded that civil forfeiture statutes in the United States have historically been enacted,

160. U.S. CONST. amend. V. The Court also referred to the Sixth Amendment, stating that its provisions “are explicitly confined to ‘criminal prosecutions.’” *Austin*, 113 S. Ct. at 2804. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

161. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989); *Solem v. Helm*, 463 U.S. 277, 289-92 (1983); *Ingraham v. Wright*, 430 U.S. 651, 668 (1977); *Weems v. United States*, 217 U.S. 349, 382 (1910).

162. *Austin*, 113 S. Ct. at 2805 (citations omitted).

163. *Id.* at 2806.

164. *United States v. Halper*, 490 U.S. 435 (1989).

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

166. *Id.*

at least in part, to punish the property owner.¹⁶⁷ The Court based this conclusion on its analysis of forfeiture law as it existed in England at the time the Eighth Amendment was ratified.¹⁶⁸ The doctrine of the deodand was partially justified as punishment for negligence.¹⁶⁹ Escheat upon attainder was specifically addressed to criminal violations.¹⁷⁰ Finally, statutory forfeiture contained aspects of deodand and escheat upon attainder and was understood as penal.¹⁷¹ Therefore, the Court concluded that the common law doctrines of deodand, escheat upon attainder, and statutory forfeiture were all “understood, at least in part, as imposing punishment.”¹⁷² The Court similarly concluded that civil forfeiture in the United States has historically been recognized as imposing punishment.¹⁷³

167. *Id.* at 2809-10.

168. *Id.* at 2806.

169. *Id.*

170. *Id.* at 2806-07.

171. *Id.* at 2807.

172. *Id.* at 2806.

173. In particular, the Court referred to laws passed by the First Congress, stating that such laws suggested the First Congress understood forfeiture to be punishment. *Id.* at 2807. Specifically, the Court referred to a law passed by the First Congress in 1789, which provided:

[A]nd if the master or commander of any ship or vessel shall suffer or permit the same, such master and commander, and every other person who shall be aiding or assisting in landing, removing, housing, or otherwise securing the same, shall forfeit and pay the sum of four hundred dollars for every offence; shall moreover be disabled from holding any office of trust or profit under the United States, for a term not exceeding seven years; and it shall be the duty of the collector of the district, to advertise the names of all such persons in the public gazette of the State in which he resides, within twenty days after each respective conviction. And all goods, wares and merchandise, so landed or discharged, shall become forfeited, and may be seized by any officer of the customs; and where the value thereof shall amount to four hundred dollars, the vessel, tackle, apparel and furniture, shall be subject to like forfeiture and seizure.

Id. at 2807-08 (citing 1 Stat. 39 § 12 (1789)). The Court found significant the statute’s inclusion of forfeiture with the other provisions of punishment, such as the \$400 fine (the statute employs the word forfeit instead of fine), the disability from holding office, and public advertisement of the offense. *Id.* at 2808. The Court inferred from this that the First Congress considered forfeiture to be a method of punishment. *Id.* Also found significant by the Court was the statute’s use of forfeit in the same sense that fine is used modernly. *Id.* The Court noted that dictionaries at the time used the words forfeit and fine interchangeably. *Id.* at 2808 n.7.

Less persuasive was the Court’s analysis of prior Supreme Court decisions which addressed whether civil in rem forfeiture statutes imposed punishment. The Court concluded that its prior cases “recognized that statutory in rem forfeiture imposes punishment.” *Id.* at 2808. The Court glossed over its prior cases’ reliance on the guilty property fiction by stating that those cases recognized a dual justification of forfeiture

The Court then turned to consider whether forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7) were punitive in nature.¹⁷⁴ The Court answered in the affirmative. In support of this decision, the Court cited three reasons. First, the Act expressly provided for an innocent owner's defense.¹⁷⁵ Such a defense, the Court reasoned, "serve[s] to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less."¹⁷⁶ Secondly, the Court concluded that civil forfeitures under the Act were punishment because of the direct connection between the forfeiture and a criminal drug offense.¹⁷⁷ Finally, the Court examined the legislative history of the Act.¹⁷⁸ The Court found that Congress enacted the Drug Control Act because traditional criminal measures were not providing sufficient deterrence.¹⁷⁹

The United States attempted to argue that the Act's provisions were remedial instead of punitive.¹⁸⁰ The Court rejected the government's arguments. Even if the sections at issue were construed as partially serving a remedial purpose, the Court asserted, but also served some

statutes — "that the property itself is 'guilty' of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property." *Id.* Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence. *Id.* The Court neglected to explain why it had consistently refused to extend Eighth Amendment protection to statutory in rem forfeitures prior to *Austin*.

174. *Id.* at 2810.

175. *Id.* Section 881(a)(4)(C) provides that "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(C) (1988). Section 881(a)(7) provides that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *Id.* § 881(a)(7).

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

177. *Id.* at 2811. The Court based its conclusion that forfeiture under the Act was conditioned on a direct tie to a commission of drug offenses by referring to §§ 881(a)(4) and 881(a)(7). *See supra* note 173.

178. *Id.* at 2811.

179. *Id.*

180. *Id.* Specifically, the government argued that the Act's provisions are remedial. The Court was not persuaded, reasoning as follows:

First they remove the "instruments" of the drug trade "thereby protecting the community from the threat of continued drug dealing." Second, the forfeited assets serve to compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade.

Id. (citations omitted); *see also infra* notes 185-86 and accompanying text (discussing the implications of the Supreme Court's rejection of the above argument).

retributive or deterrent purposes, then it "is punishment, as we have come to understand the term."¹⁸¹

The majority concluded its opinion by declining Austin's request to establish a multi-factor test to determine when a forfeiture is unconstitutionally excessive under the Eighth Amendment.¹⁸² Instead, the Court left for the lower courts "to consider that question in the first instance."¹⁸³

V. ANALYSIS

A. Criticism of Austin

The *Austin* decision provides a unique opportunity to correct the abuses which are currently inherent in civil forfeiture statutes while maintaining the underlying remedial objective of removing the economic incentive of pursuing certain highly lucrative criminal activity. Civil forfeiture statutes are abused when they are used against individuals in situations where the value of the property forfeited is vastly greater than the severity of the injury inflicted by the criminal activity or of the costs incurred by the government in enforcing the statute.¹⁸⁴ This situation is perpetuated, if not created, by focusing on the culpability of the property.

The major fault with the *Austin* decision is that the Court partially relied on precedents with common law roots which are no longer valid. For example, the Court disingenuously argued that its previous decisions had implicitly recognized that the guilty property fiction was implemented, at least in part, as a means to punish property owners.¹⁸⁵ This approach encourages the lower courts to avoid under-

181. *Austin*, 113 S. Ct. at 2812 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)); see also *supra* notes 126-33 and accompanying text (discussing the Supreme Court's analysis of the Excessive Fines Clause in *Halper*).

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

183. *Id.*

184. See Kasten, *supra* note 30, at 197. Kasten argues:

To the extent that the monetary value of property forfeited through civil proceedings does not bear a rational relationship to the government's pecuniary losses incurred in enforcing criminal laws, and to the extent that a forfeiture does not serve the remedial goal of depriving criminal offenders of the proceeds of their activities, the forfeiture serves as a punishment. When a civil forfeiture punishes, constitutionally established criminal procedures and safeguards should govern the forfeiture proceeding.

Id.

185. See *supra* notes 168-73 and accompanying text (discussing this aspect of the *Austin* decision); see also Justice Scalia's concurring opinion in *Austin*. Justice Scalia took issue with the majority's conclusion that previous Supreme Court decisions recognized the punitive aspects of in rem forfeiture statutes. *Austin*, 113 S. Ct. at 2814

taking the proper legal analysis.¹⁸⁶ A more direct and honest approach would have dismissed outright the deodand tradition of treating property as capable of guilt.

Austin can also be criticized for its refusal to formulate a test to determine the constitutionality of civil forfeiture statutes. Nevertheless, the essential framework necessary to formulate such a test is provided in the opinion.

B. A Proposed Constitutional Test

The first step in fashioning a modern constitutional test for determining whether a forfeiture is excessive is to acknowledge the futility of maintaining the fiction that property can be capable of guilt. It should be acknowledged that even though civil forfeiture laws are defended because they “are often viewed as the only adequate means to protect against a particular offense,”¹⁸⁷ it is only by resorting to the *in rem* fiction that these statutes have survived constitutional

(Scalia, J., concurring). In his concurrence, Justice Scalia wrote:

In my view . . . the caseload is far more ambiguous than the Court acknowledges. We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures A prominent 19th-century treatise explains statutory *in rem* forfeitures solely by reference to the fiction that the property is guilty, strictly separating them from forfeitures that require a personal offense of the owner If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture. Well-established common-law distinction should not be swept away by bits of dicta. Moreover, if some degree of personal culpability on the part of the property owner always exists for *in rem* forfeitures, . . . then it is hard to understand why this Court has kept reserving the (therefore academic) question whether personal culpability is constitutionally required.

Id. (citations omitted).

186. The Supreme Court’s reasoning in *Austin* illustrates the difficulty encountered when an attempt is made to reconcile out-dated common law principles with current conditions. As one commentator has noted:

The historical justifications for the personification fiction of civil forfeiture have been reviewed and appear irrelevant to modern society. Current justifications for the doctrine similarly ring hollow. The arguments put forth by the courts on this issue are weak and singularly unconvincing. “The modern doctrine of the offending *res* . . . is a deliberate subterfuge — a judicial fiction, by resort to which the sovereign, with the sanction of the courts, can impose a punishment on a blameless individual who is thereby deliberately left without recourse to his constitutional rights of due process.”

Piety, *supra* note 32, at 977.

187. *State v. 1979 Pontiac Trans Am*, 487 A.2d 722, 725 (N.J. 1985).

scrutiny.¹⁸⁸ Moreover, subjecting civil forfeiture statutes to a constitutional analysis under the Excessive Fines Clause is not incompatible with the statute's traditional objective of deterring certain lucrative crimes, such as drug trafficking. The deodand doctrine and its progeny should be discarded entirely and future courts should focus only on that part of the *Austin* decision which addresses the issue of whether a civil forfeiture statute violates the Excessive Fines Clause of the Eighth Amendment.

Although the *Austin* Court declined to explicitly formulate a test to determine whether a forfeiture is constitutional under the Excessive Fines Clause, the opinion lays all of the necessary groundwork. The Court made clear that civil forfeiture statutes are unconstitutional if they impose punitive fines; only remedial sanctions are permitted.¹⁸⁹ The Court chose to adopt a restrictive definition of what constitutes a remedial sanction. The Court essentially held that forfeitures are remedial if the property forfeited can be characterized as contraband.¹⁹⁰ The Court reasoned that seizures of the contraband itself are remedial, and not punitive, because such seizures "remove[] dangerous or illegal items from society."¹⁹¹ Thus, civil forfeitures of contraband are remedial in nature, as opposed to punitive, and are constitutional under the Excessive Fines Clause.

The Court flatly rejected the government's argument to expand the definition of remedial to include seizures of the instrumentalities of criminal activity.¹⁹² The government unsuccessfully argued that the defendant's mobil home and auto body shop should be subject to forfeiture because it was an "instrument" of his illegal drug activity. In dismissing this argument, the Court analogized to *One 1958*

188. See, e.g., Finkelstein, *supra* note 39, at 258. Finkelstein remarks that: the doctrine that the sovereign is authorized to impose forfeitures and confiscations on "guilty things" without regard to the interests of the innocent owners of those things, is about as irrational and unjust a proposition as a sober mind can concoct, for all that it has a history of thousands of years behind it, and has been solemnized by the United States Supreme Court. But one cannot hope to have such doctrines abandoned or their inequities remedied until the demon is tracked down through history to its original contextual "lair" where it may finally be confronted, identified by its original name, and only then, effectively exorcised. All else is not much more than tinkering with the machinery or treating symptoms.

Id. Although the courts have consistently and repeatedly tracked the "demon" to its "lair," the exorcism has yet to be performed.

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

190. Such a conclusion follows from the Court's rejection of the government's "instrumentalities" argument. *Id.* at 2811.

191. *Id.*

192. *Id.* at 2811-12.

Plymouth Sedan v. Pennsylvania,¹⁹³ where the state's seizure of an automobile was rejected because "[t]here is nothing even remotely criminal in possessing an automobile."¹⁹⁴ The *Austin* Court's holding and its reliance on *One 1958 Plymouth Sedan* establish that forfeitures of conveyances and real property used or intended for use to facilitate the commission of a crime will not survive a constitutional analysis under the Excessive Fines Clause.¹⁹⁵ However, instrumentalities of manufacturing and distribution of illegal items, which are themselves illegal, should still be subject to forfeiture.

Austin should also not be interpreted as prohibiting the seizure of assets acquired from the proceeds of activity specifically targeted by a civil forfeiture statute. The test as articulated by the Supreme Court in *Austin* is whether a forfeiture "removes dangerous or illegal items from society,"¹⁹⁶ and whether possession of the item is criminal.¹⁹⁷ Such a test would be rendered meaningless if the reach of forfeiture statutes were restricted to only the contraband itself, and not the illegally obtained proceeds of the contraband.¹⁹⁸ Also, by subjecting to forfeiture funds that are traceable proceeds of illegal activity, civil forfeiture statutes will continue to be an effective weapon in attacking the profit incentive that makes certain crimes less amenable to traditional criminal sanctions.

Finally, the *Austin* Court appears to have rejected civil forfeitures used to compensate the "[g]overnment for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from" criminal activity.¹⁹⁹ The Court found the government's

193. 380 U.S. 693 (1965).

194. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

195. The holding thus substantially invalidated two provisions of 21 U.S.C. § 881. Section 881(a)(4) generally provides that a conveyance is forfeitable if it is used to, or intended for use to, facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them. 21 U.S.C. § 881(a)(4) (1988 & Supp. I 1989 & Supp. II 1991). Section 881(a)(7) subjects real property to forfeiture if it is used, or intended for use to, facilitate the commission of a drug-related crime punishable by more than one year's imprisonment. *Id.* § 881(a)(7).

196. *Austin*, 113 S. Ct. at 2811; see also *supra* notes 130-33 and accompanying text (discussing the Court's requirement that civil forfeiture statutes be remedial and not punitive).

197. *Austin*, 113 S. Ct. at 2811.

198. See Guerra, *supra* note 11, at 841-42. The author argues that "[a]s a matter of necessity as well as principle, civil forfeitures of traceable proceeds should be permitted." *Id.* at 241. The author also advocates the creation of safeguards to protect against the extreme hardship caused by the seizure of essential assets purchased with proceeds, such as real property and conveyances. *Id.* at 242.

199. *Austin*, 113 S. Ct. at 2811.

proportionality argument unpersuasive due to the “dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7).”²⁰⁰ The Court’s argument is convincing because restricting forfeitures to seizures of contraband, and the proceeds of contraband, intrinsically provides a method of compensating the government. In many cases the value of the confiscated assets will be greater than the cost of enforcement, thus providing the government with a windfall. In those cases where the forfeited property is insufficient to cover governmental enforcement expenditures, the additional fines could only be recovered through additional forfeiture of assets that are not contraband, which would, under the Court’s reasoning, be punitive rather than remedial.

Proceeding from the foregoing analysis of the *Austin* decision, a test to determine whether a civil forfeiture is constitutional under the Eighth Amendment can be formulated. Under this test, only contraband and assets obtained from the proceeds of contraband would be subject to civil forfeiture. This simple test does not rely on the guilty property fiction, but is based solely on the *Austin* Court’s conclusion that the Excessive Fines Clause does not permit civil forfeiture statutes to impose punishment. The only exception to this rule would apply in circumstances in which in personam jurisdiction is impracticable or impossible.²⁰¹ Under these rare circumstances, civil forfeiture of property by means of in rem jurisdiction is the only feasible means of enforcing compliance with criminal statutes. Civil forfeiture under these circumstances would be consistent with the

200. *Id.* at 2812.

201. *See, e.g., Austin*, 113 S. Ct. at 2808 n.9 (explaining that the fictions of in rem forfeiture were developed to expand the reach of the courts where in personam jurisdiction over the owner of the property may have been available); *United States v. 66 Pieces of Jade and Gold Jewelry*, 760 F.2d 970, 973 (9th Cir. 1985) (noting that a court proceeding in a forfeiture action without in personam jurisdiction would be unable to effectuate a remedy if it lost control of the property because it lacks the power to order the property owner to return it); *United States v. \$3,000,000 Obligation of Qatar Nat’l Bank*, 810 F. Supp. 116, 117 (S.D.N.Y. 1993) (describing the state trial court’s use of in rem jurisdiction to deny the defendant’s motion to dismiss for lack of in personam jurisdiction); *United States v. Parcel I, Beginning at a Stake*, 731 F. Supp. 1348, 1351 (S.D. Ill. 1990) (dismissing summarily the argument that the court could not proceed in a forfeiture action without in personam jurisdiction); *Sanders v. Wiltemp Corp.*, 465 F. Supp. 71, 75 (S.D.N.Y. 1979) (dismissing the complaint for lack of in personam jurisdiction, but granting the plaintiff’s motion for attachment in order to gain quasi-in-rem jurisdiction); *Merrill Lynch Gov’t Sec. v. Fidelity Mut. Savs. Bank*, 396 F. Supp. 318, 320 (S.D.N.Y. 1975) (noting that it was necessary for the plaintiff to acquire quasi-in-rem jurisdiction because the defendant resided in personam jurisdiction); *Rivera v. New Jersey Bell Tel. Co.*, 55 F.R.D. 166, 167 (E.D.N.Y. 1972) (noting the availability of in rem jurisdiction to deny the defendant’s motion to dismiss for lack of in personam jurisdiction).

legitimate historical purpose of in rem jurisdiction. It would also be consistent with the purpose of the Excessive Fines Clause of the Eighth Amendment to limit the government's power to punish.

C. Application of Test to *Austin* and *Pearson Yacht*

Application of the proposed constitutional test will eliminate the abuses which have plagued the enforcement of civil forfeiture statutes. If the test had been applied to the facts of *Pearson Yacht*, the forfeiture of the yacht would have been ruled unconstitutional because the yacht clearly was not either contraband or obtained from the proceeds of contraband. The government's attempt to seize the defendant's mobile home and auto body shop in *Austin* would have been unconstitutional for the same reason. Both cases illustrate the governmental misuse of civil forfeiture statutes to exact punishment in violation of the Excessive Fines Clause of the Eighth Amendment.

VI. CONCLUSION

Civil forfeiture statutes, analyzed free of the shackles imposed by abandoned common law principles, should be justified, if at all, on the basis of contemporary constitutional principles. Such an analysis leads to the inescapable conclusion that any government action taken against property has direct and inevitable consequences for the owner.

Criminal forfeiture's continued survival rests on both a practical and theoretical underpinning, both of which are flawed. As a practical matter, proponents of civil forfeiture argue that its admittedly harsh sanctions are necessary to combat certain intractable social problems that have proven immune to traditional measures.²⁰² But crimes traditionally targeted by civil forfeiture laws can be effectively attacked without offending the Constitution.

Civil forfeiture statutes will still allow government prosecution of criminals who derive the most financial benefit from the illicit drug trade and for whom criminal statutes have proven the least effective. For the more mundane instances of illicit drug activities, however, criminal statutes provide sufficient deterrence.

Common law distinctions between arcane legal doctrines such as in personam and in rem jurisdiction continue to exist despite the

202. See McClure, *supra* note 12, at 419. The author argues that the magnitude of the drug problem "outweigh[s] the few toes on which the civil forfeiture of assets will inevitably and harshly step." *Id.* at 447. Although civil forfeiture of assets which target drug related offenses have received the most publicity, state and federal statutes also target other criminally related activity. See *supra* note 5; see also Evans, *supra* note 93; Jay A. Rosenberg, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390 (1988).

disappearance of the grounds which originally justified the doctrine.²⁰³ This is regrettable, particularly when these distinctions are used as a prop to sanction governmental infringement of individual constitutional rights.²⁰⁴ Civil forfeiture and the Eighth Amendment is a particularly compelling modern example.

It is clear that civil forfeiture laws are used to circumvent the constitutional rights of property owners.²⁰⁵ Simply stated, civil forfeiture statutes are designed to punish the individual property owner without resort to cumbersome criminal procedures mandated by the Constitution.²⁰⁶ Under the guise of the *in rem* legal fiction that inanimate property is capable of committing crime, civil forfeiture statutes allow prosecutors to circumvent the constitutional rights ordinarily due the individual by proceeding directly against the property. But as common sense dictates, and as to which the individuals affected would surely testify, it is the individual and not the property who is affected. As stated in *Austin*, a court should decide whether a civil forfeiture statute implicates Eighth Amendment protection by looking at the substance of the statute to determine whether its effect is to punish the individual.

Stripped of its common law baggage, it is obvious that civil forfeiture inevitably serves to punish the individual owner.²⁰⁷ Once the veil of

203. See *supra* part II.B.

204. See *supra* notes 59-66 and accompanying text.

205. See generally *Piety*, *supra* note 32.

206. See *Stahl*, *supra* note 58. With regard to § 881, Stahl writes:

Section 881 affords defendants substantially less procedural protections than traditional criminal prosecutions. Particularly striking is the contrast in burdens of proof. In order to impose criminal sanctions, the government must prove its case beyond a reasonable doubt. A civil forfeiture action brought under the Act, however, places the burden of proof on the defendant. Once a court finds probable cause to believe that property was involved in a drug crime, the claimant must prove by a preponderance of the evidence that the property was not involved in any illegal activities. Currency, buildings, land, automobiles, airplanes, ships and other significant pieces of property have been taken by the government. Homes and even public housing leaseholds have been forfeited. Section 881 produces devastating consequences based upon minimal proof.

Id. at 278-79 (citations omitted). Stahl proceeds to argue convincingly that § 881's allocation of the burden of proof violates the Due Process Clause. See generally *id.* at 279-337.

207. See *Meyer*, *supra* note 7, at 853. The author argues:

Regardless of the remedial purposes that may be served by civil forfeiture, the end result is punishment. "Forfeiture is considered a punitive sanction when it is used without regard to actual damage caused, particularly when the property forfeited is not contraband, but an asset which the defendant has a legal right to possess," wrote Kenneth Mann, an expert on white-collar law. When citizens forfeit

the guilty property fiction is removed, civil forfeiture's constitutional deficiencies are self evident. More importantly, these deficiencies can be attacked directly, without device to tortuous arguments which only serve to prolong the existence of legal doctrines that have long since outlived their usefulness.

clothes, cars, boats and homes, they are losing assets which are rightfully and legally theirs.
Id. at 859-60 (citations omitted).

