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## How Much is Too Much? Civil Forfeitures and the Excessive Fines Clause After *Austin v. United States*

M. Lynette Eaddy

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HOW MUCH IS TOO MUCH? CIVIL FORFEITURES AND  
THE EXCESSIVE FINES CLAUSE AFTER  
*AUSTIN V. UNITED STATES*

*M. Lynette Eaddy\**

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I. INTRODUCTION

In 1970, Congress passed sweeping legislation to address the escalating problem of illegal drug use in the United States—the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Controlled Substances Act).<sup>1</sup> While the Controlled Substances Act touched on a variety of legal areas,<sup>2</sup> its strongest reforms were in the area of law enforcement. Specifically, section 511 of the Act, later codified at 21 U.S.C. § 881, amended the Federal Criminal Code to authorize the civil forfeiture of any contra-

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\* To my parents and family for their continued support of everything I do.

1. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (1988 & Supp. IV 1992)).

2. See H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1 (1970), reprinted in 1970 U.S.C.C.A.N. 4566. Congress originally designed the Controlled Substances Act to increase research for the understanding of drug abuse, expand rehabilitative care for drug abusers, and strengthen law enforcement's capabilities in the area of drug abuse. *Id.*

band or property used or acquired in violation of federal narcotics laws.<sup>3</sup> Congress intended civil forfeiture to provide “the ideal weapon for breaking the backs of sophisticated narcotics operations.”<sup>4</sup> The provisions were designed to cripple drug offenders and organizations by stripping them of their economic power.<sup>5</sup>

Fourteen years after the passage of the Controlled Substances Act, Congress expressed dissatisfaction over the extent and success of federal law enforcement agencies’ use of the Act’s forfeiture provisions.<sup>6</sup> Noting that the original Controlled Substances Act contained limitations and ambiguities that impeded the full realization of forfeiture’s potential,<sup>7</sup> Congress passed the Comprehensive Crime Control Act of 1984.<sup>8</sup> This Act’s most important revision of the Controlled Substances Act was its inclusion of real property within the scope of civil forfeiture.<sup>9</sup> Under the new provision, section 881(a)(7),<sup>10</sup> federal agents could seize all real property which was used in any manner or part to facilitate any violation of federal narcotics law punishable by more than one year’s imprisonment.<sup>11</sup> This addition to the existing law gave law enforcement agencies the power to take virtually everything drug offenders owned—their money, cars and boats, and even the property on which they lived.<sup>12</sup>

3. 21 U.S.C. § 881 (1988 & Supp. IV 1992).

4. S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

5. *Id.*

6. *See id.* Congress recognized that the federal government’s record in attacking the profitability of drug trafficking through the Controlled Substances Act fell far below congressional expectations. *Id.* Congress also cited to a report released by the General Accounting Office which concluded that one reason for the forfeiture provisions’ failure was that federal law enforcement agencies were not pursuing forfeiture aggressively enough. *Id.*

7. *Id.*

8. Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3381.

9. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 191, 192 (1988), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3375. This amendment of the Controlled Substances Act closed what was considered an important loophole in the forfeiture provisions. *See id.* at 195. Formerly, for example, any boat or car used to transport narcotics would be subject to forfeiture, but a barn used to store illicit drugs would not, even though its use was an integral part of the drug offense. *Id.*

10. 21 U.S.C. § 881(a)(7) (1988). Specifically, the new provision stated that the following property was subject to forfeiture:

(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, except 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.*

11. *Id.*

12. *See* 21 U.S.C. § 881 (1988 & Supp. IV 1992). Today, § 881 provides for the forfeiture of all

In its ongoing war against drugs,<sup>13</sup> civil forfeiture has perhaps been the federal government's most favored weapon. In the last four years alone, the federal government has collected more than \$2.2 billion in forfeited assets.<sup>14</sup> A recent Supreme Court decision, however, may curtail the widespread use of civil forfeiture. In *Austin v. United States*,<sup>15</sup> the Supreme Court finally gave claimants a new avenue through which to fight forfeiture proceedings brought by the government.<sup>16</sup> In a unanimous decision, the Court held that the Excessive Fines Clause of the Eighth Amendment restricts civil in rem forfeiture proceedings of conveyances and real property brought under subsections 881(a)(4) and (7) of the Controlled Substances Act.<sup>17</sup>

The Court did not go so far, however, as to outline a test which would determine what forfeitures were constitutionally excessive under the Eighth Amendment.<sup>18</sup> Because very few cases have considered the application of the Excessive Fines Clause, the lower courts have been left with very limited direction in formulating a test for excessiveness.<sup>19</sup> This note offers some guidance as to how to analyze in rem civil forfeitures under the Excessive Fines Clause. Part II of the note briefly summarizes the origination of civil forfeiture in the United States and its use in modern drug legislation. Part III of the note examines the Eighth Amendment and its traditional role in civil forfeitures. In Part IV, the note explores the recent Supreme Court decision of *Austin*. Finally, Part V of the note examines various possible analyses under the Eighth Amendment and proposes a single test for determining when civil forfeitures are constitutionally excessive.

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illegal controlled substances; raw materials used to manufacture and distribute controlled substances; property used as a container for controlled substances; conveyances used to traffic drugs; books, research and records used in drug trafficking; assets furnished by or used in the drug trade; real property involved in drug law violations; drug manufacturing equipment; drug paraphernalia; and firearms involved in the drug trade. *Id.*

13. Richard Grant, *Drugs in America: Zero Tolerance*, THE INDEPENDENT, June 20, 1993, at 14, available in LEXIS, Nexis Library, INDPNT file. In 1989, President Bush reaffirmed the nation's war on drugs. *Id.* President Bush addressed the nation's drug crisis in his first televised presidential address and characterized crack as "the gravest threat facing our nation today." *Id.*

14. Steven L. Kessler, *Forfeiture and the Eighth Amendment*, N.Y. L.J., July 26, 1993, at 1.

15. 113 S. Ct. 2801 (1993).

16. *See id.* at 2803.

17. *Id.* at 2812.

18. *Id.*

19. *See id.*

## II. ORIGATION AND PRESENT USE OF CIVIL FORFEITURE

### A. *The Origins of Civil Forfeiture*

Civil forfeiture has a long history in both common law and American jurisprudence.<sup>20</sup> By the early eighteenth century, three different kinds of forfeiture were firmly established in English common law: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture.<sup>21</sup> The law of deodands called for the forfeiture to the Crown of any object directly or indirectly involved in the death of a subject of the King.<sup>22</sup> Englishmen believed that the King would either use the value of the forfeited property to fund Masses for the deadman's soul, or put the property to some charitable use.<sup>23</sup> The second type of forfeiture resulted from convictions for felonies and treason.<sup>24</sup> A convicted felon lost his personal property to the Crown and his real property to his lord.<sup>25</sup> A convicted traitor lost both his real and personal property to the Crown.<sup>26</sup> These forfeitures compensated for the "offense to the King's peace" caused by the convicts' criminal offenses.<sup>27</sup> Finally, statutory forfeitures provided for the removal of offending objects used to violate the customs and revenue laws.<sup>28</sup> This type of forfeiture, which probably grew out of the confluence and merger of the two former types of forfeiture, was usually enforced through in rem proceedings.<sup>29</sup>

Of the three types of English forfeiture in existence only one took hold in the United States—statutory forfeiture.<sup>30</sup> Colonial courts exercised in rem jurisdiction of English and local forfeiture statutes as did courts during the period of Confederation.<sup>31</sup> Generally, however, early forfeiture

20. See generally *id.* at 2806-10 (summarizing the history of forfeiture in England and the United States).

21. *Id.* at 2806.

22. *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 680-82 (1974). The word deodand is derived from the Latin phrase *Deo dandum* which means "to be 'given to God.'" *Id.* at 681 n.16.

23. *Id.* at 681. Later in history the deodand became solely a source of Crown revenue. *Id.* The continuance of the tradition was justified, however, as a penalty for carelessness. *Id.*

24. *Id.* at 682. Forfeitures for the conviction of felonies and treason were known as forfeitures of estate. *Austin*, 113 S. Ct. at 2806-07.

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

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The Court of Exchequer used in rem proceedings "to forfeit the property of felons." *Id.*

30. *Austin*, 113 S. Ct. at 2807. Forfeiture by treason is specifically disallowed by the Constitution "except during the Life of the Person attainted." U.S. CONST. art. III, § 3, cl. 2. The First Congress abolished forfeiture of estate as a punishment for felons. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 117. Common law courts in the colonies and courts during the period of Confederation, however, frequently heard in rem civil forfeiture proceedings. *Calero-Toledo*, 416 U.S. at 683.

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

statutes in the United States were restricted to maritime law.<sup>32</sup>

The theory of civil forfeiture rests on the legal fiction that it is the property, not the owner of the property, which has committed the wrong and against which actions are being taken.<sup>33</sup> Because of this fiction, the actual culpability of the property owner is irrelevant in a civil forfeiture proceeding.<sup>34</sup> The primary reason for the development of this fiction was “to expand the reach of the courts and to furnish remedies for aggrieved parties.”<sup>35</sup> By allowing in rem forfeiture, courts could acquire proper jurisdiction even if in personam jurisdiction over a property owner was impossible—as was often the case in admiralty proceedings.<sup>36</sup>

### B. Modern Civil Forfeiture

Today, civil forfeiture is an integral part of the federal law. Approximately one hundred different statutes currently provide for civil forfeiture in a variety of criminal contexts.<sup>37</sup> Forfeiture is an appealing tool in the government’s efforts to halt the illicit drug trade for several reasons.<sup>38</sup> Because the Controlled Substances Act’s forfeiture proceedings are in rem proceedings, assets may be seized before, or even without, the filing of any criminal charges.<sup>39</sup> Furthermore, the civil nature of the proceedings requires the government to meet a lower burden of proof than in criminal proceedings.<sup>40</sup> Under section 881(b)(4) the government need only prove that “the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter” in order to take property.<sup>41</sup> Finally, the Controlled Substances Act allows the federal govern-

32. Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government’s War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 220 (1992).

33. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-11 (1921).

34. *See Dobbin’s Distillery v. United States*, 96 U.S. 395, 401 (1878).

35. *Republic Nat’l Bank v. United States*, 113 S. Ct. 554, 559 (1992).

36. *Austin*, 113 S. Ct. at 2808-09 n.9.

37. Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 194-95 (1991).

38. *United States v. Two Tracts of Real Property*, 998 F.2d 204, 213 (4th Cir. 1993). Even American colonial judges believed that forfeiture could serve as a great deterrent to crime. *Id.* For this reason, colonial judges applied common law forfeitures and parliamentary statute forfeitures during the period before the ratification of the Federal Constitution. *Id.*

39. *See* 21 U.S.C. § 881(b)(4) (1988) (requiring probable cause before property may be seized).

40. *See id.* Many of the constitutional protections afforded criminal defendants are not applicable to civil forfeiture proceedings. Ron Champoux, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247, 251-53 (1992). Some examples are: the Double Jeopardy Clause, the Ex Post Facto Clause, and the constitutional provision against forfeitures to the government. *Id.* at 251 n.38.

41. 21 U.S.C. § 881(b)(4) (1988). Once the government has demonstrated probable cause, the burden of proof shifts to the defendant to prove either that no criminal activities involving the property occurred or that the criminal activities occurred without the property owner’s knowledge. *United States*

ment to keep all profits derived from the forfeiture provisions,<sup>42</sup> resulting in a powerful revenue raising tool for the federal government.<sup>43</sup>

While the ability of the Controlled Substances Act's forfeiture provisions to cripple drug trafficking operations has drawn praise, its ability to injure innocent citizens has engendered considerable criticism.<sup>44</sup> Widely publicized stories illustrating abuse of the forfeiture statutes fuel these cries.<sup>45</sup> For example, a Tennessee man who owned a plant nursery had \$9,600 in cash seized merely because he fit the profile of a drug courier; he had bought a one way airline ticket on the day of departure and was travelling with a large amount of cash.<sup>46</sup> The claimant's explanation, supported by documents, that he was making his semi-annual trip to Houston to buy shrubbery from growers who required cash payments did not prevent the agents from taking his money.<sup>47</sup> Similarly, in Malibu, California, a ranch owner was shot and killed when federal agents raided his home.<sup>48</sup> The federal government stated the raid was conducted because the property was being used to grow marijuana. No evidence of marijuana growing was ever found, but a local district attorney blamed the raid on "a desire to seize and forfeit the ranch for the government."<sup>49</sup>

v. 200 Pennsylvania Ave., 786 F. Supp. 400, 404 (D. Del. 1992).

42. 21 U.S.C. § 881(e)(1)-(2) (1988 & Supp. IV 1992). The government has many options in the disposition of forfeited property. *See id.* For example, forfeited property may be retained for official use. 21 U.S.C. § 881(e)(1)(A) (1988 & Supp. IV 1992). It may also be given to states or foreign governments that participated directly in the seizure or forfeiture of the property. 21 U.S.C. § 881(e)(1)(A), (e)(1)(E) (1988 & Supp. IV 1992). Forfeiture proceeds may even be used to reward persons who provide original information which leads to the arrest and conviction of a person who kills or kidnaps a federal drug law enforcement agent. 21 U.S.C. § 881(e)(2)(A)(ii) (1988).

43. *See supra* note 14 and accompanying text. In *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), Justice Scalia noted the danger of abuse inherent in a government's power to impose fines. *Id.* at 2693 n.9 (plurality opinion). Justice Scalia wrote,

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. . . . [Therefore,] it makes sense to scrutinize governmental action more closely when the State stands to benefit.

*Id.* (plurality opinion).

44. *See, e.g.,* Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES, July 5, 1993, at 1.

45. Grant, *supra* note 13, at 14 (discussing harsh drug penalties in the United States); Kessler, *supra* note 14, at 1 (discussing Eighth Amendment limits on asset forfeiture); Richard Minitier, *Property Seizures on Trial*, INSIGHT, Feb. 22, 1993, at 10, available in WESTLAW, MAG-ASAP Database (discussing fairness of police seizures of property where police stand to benefit financially); *Police Seizures Should Be Restrained*, ATLANTA CONST., July 5, 1993, at A6 (criticizing unfair results under forfeiture statutes and discussing possible reform).

46. Minitier, *supra* note 45, at 10.

47. *Id.*

48. *Police Seizures Should Be Restrained*, *supra* note 45, at A6.

49. *Id.*

In recent congressional hearings, a couple related their forfeiture troubles which started when they sold their \$289,000 house to a man who was later convicted on drug charges.<sup>50</sup> The house was forfeited to the government under section 881 despite the fact that the unpaid mortgage qualified the couple as the legal owner of the house.<sup>51</sup> Only after a court battle leaving the couple bankrupt did they recover their home which was by that time heavily damaged.<sup>52</sup>

In assessing whether there has been abuse of civil forfeiture provisions, the numbers are convincing. In the last four years, the federal government has collected more than \$2.2 billion through forfeiture statutes.<sup>53</sup> As of July 1993, the federal government held more than 31,698 pieces of real and personal property worth an estimated \$1.8 billion.<sup>54</sup> An estimated eighty percent of people who lose their property to the federal government are never charged with a crime.<sup>55</sup> Finally, most of the items seized under forfeiture statutes are not items such as speedboats or luxury cars belonging to drug lords, but items worth less than \$50,000.<sup>56</sup> These items are often ordinary people's homes, cars, and savings accounts.<sup>57</sup>

Courts, too, have taken judicial notice of the federal government's aggressive use of forfeiture statutes. In *United States v. \$31,990 in U.S. Currency*,<sup>58</sup> the Second Circuit stated, "While we recognize the formidable task faced by the government in its war on drugs, we decline to condone the abuse of civil forfeiture as a means to winning that war."<sup>59</sup> The Eighth Circuit also expressed concern when it reluctantly allowed sweeping section 881 forfeitures:

We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction.<sup>60</sup>

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50. John Enders, *Forfeiture Law Casts a Shadow on Presumption of Innocence*, L.A. TIMES (Bulldog ed.), Apr. 18, 1993, at B3, available in LEXIS, Nexis Library, LAT file.

51. *Id.*

52. *Id.*

53. Kessler, *supra* note 14, at 1.

54. *Id.*

55. Minitzer, *supra* note 45, at 10 (relying on the information in a three-part series on civil forfeiture run in the *Pittsburgh Press* in August 1991).

56. *Id.*

57. *See id.*

58. 982 F.2d 851 (2d Cir. 1993).

59. *Id.* at 856.

60. *United States v. 508 Depot St.*, 964 F.2d 814, 818 (8th Cir. 1992), *rev'd sub nom. United*



While civil forfeiture provisions were hailed at the time of their passage as the all powerful weapon in the war on drugs, recent outrage over the provisions' broad scope has led to demands that some limitations be implemented.<sup>61</sup> In recent years, many defense attorneys have argued that the Eighth Amendment restricts the breadth of civil forfeitures.<sup>62</sup> For reasons discussed below, the courts traditionally have not been receptive to this argument.

### III. THE EIGHTH AMENDMENT AND CIVIL FORFEITURE

Even though statutory forfeiture has always been understood, at least in part, to be punishment,<sup>63</sup> it has not been traditionally subjected to the restrictions of the Eighth Amendment.<sup>64</sup> This is because the Eighth Amendment has generally been thought to only apply to criminal proceed-

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

61. See Bendavid, *supra* note 44, at 20 (discussing proposed reforms). Civil forfeiture reform is now advocated by both ends of the political spectrum. *Id.* Currently, two members of the United States House of Representatives have proposed bills calling for restrictions on civil forfeiture. *Id.* Representative Henry Hyde, a conservative Republican from Illinois, has introduced for consideration the Civil Asset Forfeiture Reform Act which proposes changes in the Controlled Substances Act including a heavier burden of proof for the government in forfeiture proceedings. H.R. 2417, 103d Cong., 1st Sess. § 4 (1993). The bill calls for clear and convincing evidence that the property is subject to forfeiture. *Id.* Other changes include a longer period for filing claims in certain in rem proceedings and a provision for the release of seized property upon a showing of substantial hardship. *Id.* § 3. To date, Representative Hyde's bill is being cosponsored by 17 Democrats and 24 Republicans and has the support of the presidents of the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. Bendavid, *supra* note 44, at 20. The Democrat Bill is being sponsored by Representative John Conyers from Michigan. *Id.* Representative Conyers' bill calls for even more sweeping civil forfeiture reform. *Id.* Interestingly, the passage of the 1984 Crime Control Act, which strengthened the very provision under attack, also was passed with strong support from both the Republican and Democrat Parties. See S. REP. NO. 225, 98th Cong., 2d Sess 193 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3376.

62. See cases cited *infra* note 64.

63. *Austin*, 113 S. Ct. at 2808. The understanding of in rem forfeiture as punishment is evident in the line of cases which reject the innocence of the property owner as a common law defense to forfeiture. *Id.* In these cases, courts have historically justified in rem forfeiture on the theory that the owner had been negligent in allowing his property to be misused and that such negligence was properly punished. *Id.* at 2808-09.

64. See, e.g., *United States v. One Parcel of Real Property*, 960 F.2d 200, 207 (1st Cir. 1992) (concluding that the proportionality analysis under the Eighth Amendment does not apply to civil forfeiture proceedings); *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 727 (7th Cir. 1991) ("[C]ourts uniformly have held that the Eighth Amendment does not apply to civil *in rem* actions, since they are remedial in nature and not punishments for crimes."); *United States v. 2097 S.W. 111th Ave.*, 921 F.2d 1551, 1556 (11th Cir. 1991) (holding that the Eighth Amendment's Excessive Fines Clause does not apply to civil in rem forfeiture proceedings); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 401 (3d Cir. 1990) (concluding § 881(a)(7) forfeiture did not violate the Eighth Amendment); *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989) (declining to extend Eighth Amendment protections to § 881(a)(7)); *United States v. Tax Lot 1500*, 861 F.2d 232, 235 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1990) (concluding Eighth Amendment proportionality review is not applicable to in rem actions).

ings.<sup>65</sup> Therefore, in rem forfeitures, being civil in nature, were beyond its scope.

Restricting application of the Eighth Amendment to criminal proceedings did not come from the text of the amendment. The Eighth Amendment reads only that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>66</sup> Rather, the amendment's restriction to criminal proceedings might have come from the content of the amendment. The three subjects of the Eighth Amendment—bail, fines and punishments—have traditionally only been associated with the criminal process.<sup>67</sup> Furthermore, the amendment was generally understood to restrain only the prosecutorial power of the government,<sup>68</sup> and such power is normally only exercised in criminal proceedings.<sup>69</sup>

Moreover, while the Supreme Court has never explicitly ruled that the Eighth Amendment applies only to criminal proceedings, in the past the amendment has generally been used to invalidate government actions in that context alone.<sup>70</sup> Thus, many courts have repeatedly declined to hear the defense that civil in rem forfeitures under section 881 of the Controlled Substances Act violate the Eighth Amendment.<sup>71</sup> Prior to 1993, only one of the country's twelve federal circuits, the Second Circuit, had found that the Eighth Amendment applied to in rem forfeiture under section 881.<sup>72</sup> The majority's interpretation that the Eighth Amendment did not apply to civil forfeiture was, however, recently overruled in *Austin*.<sup>73</sup>

#### IV. AUSTIN V. UNITED STATES

The issue in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applied to the forfeiture of conveyances and real property under subsections 881(a)(4) and (7) of the Controlled Substances Act, respectively.<sup>74</sup> The Court held that the clause did restrain such forfei-

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65. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 262 (1989) (explaining that case law has long understood the Eighth Amendment to apply "primarily, and perhaps exclusively" to criminal prosecutions and punishments); *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("[T]he text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government.").

66. U.S. CONST. amend. VIII.

67. *Ingraham*, 430 U.S. at 664.

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

69. *Id.*

70. See *supra* notes 63-69 and accompanying text.

71. See cases cited *supra* note 64.

72. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35 (2d Cir.) (finding that the civil sanction of forfeiture may be classified as punitive in nature, thus triggering the protections of the Eighth Amendment), *cert. denied sub nom. Levin v. United States*, 113 S. Ct. 55 (1992).

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

74. *Id.* at 2803. See *supra* note 10 for a restatement of paragraph (a)(7). Paragraph (a)(4) states

tures.<sup>75</sup> In reaching its conclusion, the Court held first that the Eighth Amendment is not limited to criminal proceedings.<sup>76</sup> The Court explained that the purpose of the Eighth Amendment was to limit the government's power to punish<sup>77</sup> and that the notion of punishment is not confined to criminal cases.<sup>78</sup> The Court next examined the nature of forfeiture and whether it served as punishment, thereby demanding the restraints of the Eighth Amendment.<sup>79</sup> The Court noted that early forfeiture laws passed by the First Congress suggested that forfeiture was viewed as punishment.<sup>80</sup> The Court also pointed out that the theory underlying the legal fiction on which forfeiture was based, that the thing was the offender, rested on the understanding that the owner had been negligent in allowing his property to be misused.<sup>81</sup> The owner was therefore properly punished for that negligence.<sup>82</sup> With these factors in mind, the Court held that civil forfeitures could only be explained as serving in part to punish.<sup>83</sup>

Finally, the Court addressed whether forfeitures under the relevant parts of the Controlled Substances Act were properly considered punishment.<sup>84</sup> The Court first turned to the forfeiture provisions' express innocent owner defenses<sup>85</sup> and concluded that the inclusion of such defenses revealed a congressional intent to punish persons involved in criminal drug

that the following property is subject to civil forfeiture: "All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" controlled substances, their raw material, and chemicals and equipment used in their manufacture and distribution. 21 U.S.C. § 881(a)(4) (1988).

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

76. *Id.* at 2805-06.

77. *Id.* at 2805. The Court relied on Justice O'Connor's discussion of the Excessive Fines Clause in *Browning-Ferris*. *Austin*, 113 S. Ct. at 2804 (citing *Browning Ferris*, 492 U.S. at 25) (holding that the Eighth Amendment does not restrict punitive damage awards in civil cases). In *Browning-Ferris*, Justice O'Connor, writing for the majority, noted that both the Eighth Amendment and § 10 of the English Bill of Rights of 1689 from which it derives, were intended to prevent the government from abusing its powers to punish. *Browning-Ferris*, 492 U.S. at 268.

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

79. *Id.* at 2806.

80. *Id.* at 2807. The Court cited for support the Act of July 31, 1789, § 12, 1 Stat. 39. *Austin*, 113 S. Ct. at 2807. That Act prohibited the unloading of ships except during the day and with a permit. *Id.* The penalty for violation of the act, listed alongside other punishment provisions, was forfeiture of the goods and vessel. *Id.* at 2808.

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

82. *Id.*

83. *Id.* at 2810.

84. *Id.*

85. 21 U.S.C. § 881(a)(4)(B)-(C), (a)(7) (1988). Under § 881, a conveyance is not forfeitable if, at the time of the drug violation, the conveyance was unlawfully in the possession of someone other than the owner, or if the conveyance was involved in a drug violation "without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(4)(B)-(C) (1988). Real property is not forfeitable if the drug violation in which it was involved was committed "without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7) (1988).

trafficking.<sup>86</sup> Furthermore, the Court highlighted Congress' characterization of the forfeiture of real property as " 'a powerful deterrent' " to drug offenses.<sup>87</sup> For these reasons, the Court held that forfeiture under subsections 881(a)(4) and (7) was properly considered punishment and, as such, fell within the scope of the Eighth Amendment's limitations.<sup>88</sup>

After deciding that the Eighth Amendment did limit civil forfeitures of conveyances and real property under the Controlled Substances Act, the Court declined the invitation to establish a multifactor test for determining when a forfeiture was "constitutionally excessive."<sup>89</sup> The Court stated that the lower courts must consider the question of what constitutes excessiveness in the first instance and, therefore, remanded the case for further consideration on that issue.<sup>90</sup>

#### V. DETERMINING CONSTITUTIONAL EXCESSIVENESS IN FORFEITURE PROCEEDINGS

In determining which civil forfeitures are constitutionally excessive, the lower courts have been left with relatively little guidance. Prior to *Austin*, only the Second Circuit had ever found the Eighth Amendment applicable to civil forfeitures and that court never detailed an analysis for reviewing forfeitures under the Excessive Fines Clause.<sup>91</sup> The Supreme Court has on occasion interpreted the Eighth Amendment, but it has only once considered the application of the Excessive Fines Clause.<sup>92</sup> Thus, courts will undoubtedly encounter difficulty in reviewing civil forfeitures under the Excessive Fines Clause. This part of the note examines various analyses under the Eighth Amendment and proposes a single test for deter-

86. *Austin*, 113 S. Ct. at 2811. Prior to the 1984 amendments, "Congress recognized that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." *Id.* (quoting S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3374).

87. *Id.*

88. *Id.* at 2812.

89. *Id.* Justice Scalia, in a concurring opinion, was the only Justice to outline a test for constitutional excessiveness analysis. *See id.* at 2814-15 (Scalia, J., concurring). Justice Scalia's test is discussed *infra* note 106 and accompanying text.

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

91. *38 Whalers Cove*, 954 F.2d at 38-39 (holding that the civil sanction of forfeiture can be punitive in nature, and thus trigger the protection of the Eighth Amendment). The Second Circuit did not apply any explicit excessiveness test. *Id.* at 39. The court merely stated that wherever the line for excessiveness could be drawn, the forfeiture at issue would be proper. *Id.* Based on the United States' laws, the court concluded that "a fine of many thousands of dollars for a minor drug offense is not beyond the pale." *Id.*

92. *Browning-Ferris*, 492 U.S. at 259 (holding that the Excessive Fines Clause does not apply to civil jury awards of punitive damages); *see also 38 Whalers Cove*, 954 F.2d at 39 ("As to the Excessive Fines Clause, the Supreme Court has provided no guidance, except to observe that fines must be closely scrutinized because they benefit the government.").

mining when civil forfeitures are constitutionally excessive.

### A. Proportionality Under the Eighth Amendment

The few Supreme Court cases that have determined whether a certain punishment is proscribed by the Eighth Amendment generally considered the meaning of the Cruel and Unusual Punishments Clause with respect to criminal sentencing.<sup>93</sup> A central debate within this line of cases has been whether the Eighth Amendment contains a proportionality guarantee.<sup>94</sup> In its most recent decision on the subject, *Harmelin v. Michigan*,<sup>95</sup> the Court was unable to establish a clear answer on the proportionality question.

After a lengthy exploration of the history of the Eighth Amendment, the intention of the Framers, and prior Supreme Court decisions on the subject, Justice Scalia, joined by Chief Justice Rehnquist, strongly stated that the Eighth Amendment contains no proportionality guarantee.<sup>96</sup> In an opinion concurring in part, Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment does include a narrow proportionality guarantee.<sup>97</sup> The four dissenting Justices, Justices White, Blackmun, Stevens, and Marshall, all concluded that the Eighth Amendment encompasses a proportionality principle much broader than the one acknowledged by Justice Kennedy.<sup>98</sup>

Consequently, the existence of a proportionality guarantee under the Eighth Amendment may seem questionable after *Harmelin*. One must remember, however, that in *Harmelin* and in the cases preceding *Harmelin*, the Court reviewed criminal sentences under the Cruel and Unusual Pun-

93. See, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701 (1991) (holding that the imposition of a mandatory sentence of life imprisonment without possibility of parole without any consideration of mitigating factors did not constitute cruel and unusual punishment); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding that the Eighth Amendment may proscribe a life sentence without possibility of parole for a seventh nonviolent felony); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (concluding that a mandatory life sentence with possibility of parole for the commission of a third felony did not violate the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (finding that a sentence of death for the crime of rape violates the Eighth Amendment); *Weems v. United States*, 217 U.S. 349, 382 (1910) (finding that a sentence of 15 years imprisonment with hard labor accompanied by a permanent deprivation of civil rights for falsifying a public document violated the Eighth Amendment).

94. Compare *Solem*, 463 U.S. at 284 ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.") and *Weems*, 217 U.S. at 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.") with *Harmelin*, 111 S. Ct. at 2686 (plurality opinion) ("[T]he Eighth Amendment contains no proportionality guarantee."). The proportionality principle has had its most extensive application in death penalty cases. *Id.* at 2702 (Kennedy, J., concurring).

95. 111 S. Ct. 2680 (1991).

96. *Id.* at 2686 (plurality opinion).

97. *Id.* at 2702 (Kennedy, J., concurring).

98. See *id.* at 2709 (White, J., dissenting); *id.* at 2719 (Marshall, J., dissenting); *id.* (Stevens, J., dissenting).

ishments Clause.<sup>99</sup> The meaning of the Excessive Fines Clause is not necessarily the same as that of the Cruel and Unusual Punishments Clause.<sup>100</sup>

This view is supported by the Court's recent decision in *Alexander v. United States*.<sup>101</sup> In *Alexander*, petitioner argued that the criminal forfeiture of his wholesale and retail businesses under the Racketeer Influenced and Corrupt Organizations (RICO) Act, when considered atop his six-year prison term and \$100,000 fine, was disproportionate to the gravity of his racketeering offense and, therefore, violated the Eighth Amendment's Cruel and Unusual Punishments Clause and Excessive Fines Clause.<sup>102</sup> The court of appeals rejected petitioner's argument, finding that the Eighth Amendment requires no proportionality review of a sentence less than life imprisonment without the possibility of parole.<sup>103</sup> The Supreme Court corrected the court of appeal's interpretation of the Eighth Amendment holding that the court of appeals' statement concerning proportionality "has relevance only to the Eighth Amendment's prohibition against cruel and unusual punishments."<sup>104</sup> The Court then remanded the case for determination of whether the fine was excessive.<sup>105</sup> In doing so, the Court appeared to reject the use of the case law developed under the Cruel and Unusual Punishments Clause to determine the meaning of the Excessive Fines Clause.

A close reading of *Alexander*, however, reveals that the Court did not explicitly endorse the existence of a proportionality principle under the Excessive Fines Clause.<sup>106</sup> Rather, it remanded the case for determination of whether the fine was excessive.<sup>107</sup> Other convincing arguments for the

99. See *id.* at 2684-86 (plurality opinion).

100. See *Browning-Ferris*, 492 U.S. at 263 n.3 (stating that an Eighth Amendment case involving the Cruel and Unusual Punishments Clause is not directly controlling in an Excessive Fines Clause case). Admittedly, the Court has stated that the Eighth Amendment subjects bail, fines and punishment to parallel limitations. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). Such a statement does not, however, preclude there being a proportionality guarantee within one clause but not another. The parallel limitation may be understood as a parallel limitation of the government's power to punish. See *id.* (explaining that the amendment was intended to limit the prosecutorial power of the government).

101. 113 S. Ct. 2766 (1993).

102. *Id.* at 2775.

103. *Id.*

104. *Id.*

105. *Id.* at 2776.

106. See *id.* One may easily question whether a proportionality guarantee exists under the Excessive Fines Clause in light of *Austin*. In *Austin*, Justice Scalia proposed a test for determining when civil forfeitures violate the Excessive Fines Clause. *Austin*, 113 S. Ct. at 2814-15 (Scalia, J., concurring). In that test, Justice Scalia focused on whether the property subject to forfeiture could "properly be regarded as an instrumentality of the offense." *Id.* at 2815 (Scalia, J., concurring). Justice Scalia made no reference to an additional proportionality analysis. See *id.* at 2814-15 (Scalia, J., concurring).

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

existence of a proportionality principle, however, may be made. As Justice White has argued, the Framers' use of the word excessive in itself "suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed."<sup>108</sup> Furthermore, in his argument against a constitutional requirement of proportional criminal sentencing Justice Scalia relied heavily upon the drafters' choice of words in the Cruel and Unusual Punishments Clause. Justice Scalia stated that "the drafters of the Declaration of Rights did not explicitly prohibit 'disproportionate' or 'excessive' punishments. Instead, they prohibited punishments that were 'cruell and unusuall [sic].'"<sup>109</sup> One may conclude then that a proportionality principle was intended by the drafters when they chose the word excessive to describe prohibited fines.

The Court also endorsed, albeit indirectly, a proportionality principle under the Excessive Fines Clause in *Solem v. Helm*.<sup>110</sup> In *Solem*, while determining whether the Constitution required proportionality in prison sentences, the Court stated, "It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."<sup>111</sup> In making this statement, the Court presumed that a proportionality principle exists under the Excessive Fines Clause.

The Court's interpretation of the Excessive Bail Clause, which uses language identical to that of the Excessive Fines Clause, also suggests that the latter clause encompasses a proportionality guarantee. In *United States v. Salerno*,<sup>112</sup> the Court held that "to determine whether the Government's response [in setting conditions of release of detention] is excessive, we must compare that response against the interest the Government seeks to protect by means of that response."<sup>113</sup> The Court held that bail must be set at an amount to protect the government's interest and no more.<sup>114</sup> Thus, the Court defined excessive bail as disproportionate bail.<sup>115</sup> Logically then, an excessive fine is a disproportionate fine. In summary, the existence of a proportionality guarantee under the Cruel and Unusual Punishments Clause may be debated, but the existence of such a guarantee under the Excessive Fines Clause seems fairly clear.

Assuming that the Excessive Fines Clause demands a proportionality

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108. *Harmelin*, 111 S. Ct. at 2709 (White, J., dissenting).

109. *Id.* at 2687 (plurality opinion).

110. 463 U.S. 277 (1983).

111. *Id.* at 289.

112. 481 U.S. 739 (1987).

113. *Id.* at 754.

114. *Id.*

115. *See id.*

analysis, the factors which a court must consider in conducting such an analysis remain unarticulated. Some guidance may be gleaned, however, from the proportionality test outlined in *Solem*.<sup>116</sup> The *Solem* Court was faced with the question of whether a criminal sentence violated the Cruel and Unusual Punishments Clause.<sup>117</sup> The Court stated,

[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.<sup>118</sup>

In the context of civil forfeitures under subsections 881(a)(4) and (7) of the Controlled Substances Act, however, these same factors may be difficult to objectively consider.

The first factor of the *Solem* test, comparison of the gravity of the offense with the harshness of the penalty, may seem an appropriately objective factor to consider at first glance. The difficulty of the comparison, however, lies in determining the gravity of a single drug offense. The Court has on many occasions noted the serious threats to individuals and society from the drug trade.<sup>119</sup> In *Harmelin*, Justice Kennedy considered the gravity of a drug offense in light of the fact that "[p]ossession, use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.'"<sup>120</sup> But, under a proportionality analysis, comparison between a single drug offense and the harm inflicted by the entire drug trade of the United States is inappropriate.<sup>121</sup> Such a comparison would be a mere formality on the part of the Court because virtually any forfeiture could be justified by the inestimable societal damage caused by drug dealers and abusers alike.

The first factor of the *Solem* test is meaningful only if comparing the

116. *Solem*, 463 U.S. at 277.

117. *Id.* at 279.

118. *Id.* at 292.

119. See, e.g., *United States v. Johnson*, 944 F.2d 396, 409 (8th Cir. 1991) ("Congress has reasonably determined that offenses involving the distribution of cocaine base 'are at the root of some of the gravest problems facing our country.'"); *People v. Broadie*, 332 N.E.2d 338, 343 (N.Y. 1975) (noting that narcotics addicts commit a significant number of violent crimes as well as crimes against property and stating that "[d]rug addiction degrades and impoverishes those whom it enslaves," debilitates men, and disrupts families).

120. *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989)).

121. See *38 Whalers Cove*, 954 F.2d at 37 (rejecting the placement of "full responsibility for the 'war on drugs' on the shoulders of every individual claimant").



value of the controlled substances involved in the underlying statutory violation (gravity of the offense) and the value of the property seized (harshness of the penalty imposed).<sup>122</sup> Such a comparison would allow heavy fines for true drug traffickers—who arguably are more responsible for the total societal harm of illegal drugs—but strike down heavy penalties for offenders not directly involved in the sale and distribution of drugs.<sup>123</sup>

Furthermore, for the analysis to be at all effective the penalty considered in the comparison must be the total punishment imposed for the underlying offense.<sup>124</sup> Despite the legal fiction that the property is the offender, the property owner is the one punished for the underlying drug offense.<sup>125</sup> Under the Eighth Amendment, the property owner's punishment, whether labeled civil or criminal, may not be excessive in comparison to the offense committed.<sup>126</sup>

The remaining factors of the *Solem* test call for a comparison of criminal sentences within and between jurisdictions.<sup>127</sup> These factors are especially problematic when transferred to the civil forfeiture context because the claimant in a forfeiture proceeding typically has not been found guilty of any criminal offense.<sup>128</sup> Thus, at best a court can only examine the possible punishments which could have been imposed had the claimant been convicted of the statutory violation.<sup>129</sup>

Other complications in the comparison also arise. For example, is the proper comparison between “the possible *fine* which could be imposed and the punitive nature of the forfeiture; or . . . between the total monetary

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122. See Brief for Petitioner, *Austin*, 113 S. Ct. at 2801 (No. 92-6073), available in LEXIS, Genfed Library, BRIEFS file (stating that when a substantial amount of a controlled substance is involved or the seized property is a small proportion of a owner's assets such a comparison would reduce the necessity for further inquiry). The Second Circuit used a similar comparison in *38 Whalers Cove* to determine whether a civil forfeiture was punitive in nature. *38 Whalers Cove*, 954 F.2d at 36. That court compared the total value of the property seized to the value of the controlled substances involved in the statutory violation. *Id.* If such a comparison illustrates the punishment inherent in the forfeiture, then under a proportionality analysis, that degree of punishment must be proportional to the offense involved in the forfeiture.

123. This would also comport with the congressional intent behind the Controlled Substances Act as defined in *Austin*: “The inclusion of innocent-owner defenses in §§ 881(a)(4) and (a)(7) reveals a . . . congressional intent to punish only those involved in drug trafficking.” *Austin*, 113 S. Ct. at 2811.

124. *United States v. Busher*, 817 F.2d 1409, 1415 n.10 (1987).

125. See *supra* text accompanying notes 33-36.

126. *Austin*, 113 S. Ct. at 2804. The consideration of civil forfeiture as punishment opens up interesting questions in regard to the application of the Fifth Amendment's Double Jeopardy Clause. The *Austin* Court suggests that the Double Jeopardy Clause may be applicable in civil forfeiture cases that are punitive, not purely remedial, in nature. *Id.* at 2804 n.4.

127. *Solem*, 463 U.S. at 292.

128. See *supra* note 39 and accompanying text.

129. *United States v. 835 Seventh St. Rensselaer*, 820 F. Supp. 688, 693 (N.D.N.Y. 1993).

value of the possible *sentence* which could be imposed (fine plus cost of incarceration) and the punitive nature of the forfeiture”<sup>130</sup> Such an analysis is simply too hypothetical and fraught with uncertainty to provide an instructive, objective factor for consideration.<sup>131</sup> As the Second Circuit stated when faced with the task of making such a comparison, “[t]he comparison between the ‘sentences imposed’ and the punitive nature of the forfeiture is the proverbial comparison of apples [sic] to oranges.”<sup>132</sup> For these reasons, this note does not propose that the second and third objective factors outlined in *Solem* be given much weight when determining whether a civil forfeiture is excessive. The factors are simply too difficult to apply in the civil forfeiture context and do not provide a court with any helpful criteria with which to judge the constitutionality of a civil forfeiture.

A court’s proportionality analysis under the Excessive Fines Clause cannot end, however, upon a comparison of the gravity of the offense and the harshness of the penalty. The *Solem* analysis fails to take into account the unique ability of a fine to have drastically different impacts on dissimilar property owners.<sup>133</sup> When determining whether capital punishment or imprisonment for a term of years is disproportionate to a crime, courts need not consider any unique characteristics of the defendant.<sup>134</sup> Even though individuals may place a different value on life and liberty, the deprivation of life or liberty is sufficiently overpowering for all people that proportionality may be assessed without reference to the particular characteristics of the defendant involved.<sup>135</sup> However, the same may not be said of forfeiture penalties. The loss of \$50,000 in property may mean nothing to a millionaire, but that same fine may mean the loss of everything for a less prosperous property owner.<sup>136</sup> Thus, some consideration of a claimant’s financial position seems necessary for an accurate proportionality test. Such a consideration is not without precedent.<sup>137</sup> When imposing a sentence in the form of a fine, courts are instructed to consider the defendant’s income, earning capacity, financial resources, and the burden that the fine will impose upon the defendant.<sup>138</sup> Presumably courts could

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130. *Id.* (footnote omitted).

131. *See id.*

132. *Id.*

133. *See* Brief of Amicus Curiae of the American Civil Liberties Union in Support of Petitioner, *Austin*, 113 S. Ct. at 2801 (No. 92-6073), available in LEXIS, Genfed Library, BRIEFS file.

134. *See id.*

135. *See id.*

136. *See id.*

137. *See* 18 U.S.C. § 3572 (1988 & Supp. IV 1992).

138. 18 U.S.C. § 3572 (a)(1)-(2) (1988). Specifically, the paragraphs state:

(a) FACTORS TO BE CONSIDERED.—In determining whether to impose a fine, and the

just as easily consider these factors in the context of forfeiture.

### B. *The Guilty Property Analysis*

One difficulty in considering only proportionality when applying the Excessive Fines Clause to civil in rem forfeiture is that such an approach fails to take into account the unique characteristics of civil in rem forfeiture proceedings.<sup>139</sup> In rem forfeiture is an action against the property, not against the property owner.<sup>140</sup> As discussed above, in rem forfeiture rests upon the two hundred year old legal fiction that “the thing is primarily considered the offender.”<sup>141</sup> Thus, the guilt or innocence of the claimant is technically irrelevant for in rem forfeiture proceedings.<sup>142</sup> It would appear contradictory, then, to invalidate a forfeiture because of a disproportionate relationship between the forfeiture and the underlying offense by the property owner.<sup>143</sup>

Justice Scalia gave significant weight to this unique feature of in rem forfeitures in his concurring opinion in *Austin*.<sup>144</sup> Unlike the majority in *Austin*, Justice Scalia did outline an excessiveness analysis for determining when in rem forfeiture violated the Excessive Fines Clause.<sup>145</sup> In explaining his analysis, Justice Scalia stated that because the offense of the claimant is irrelevant to the forfeiture proceeding, “the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures.”<sup>146</sup> Justice Scalia noted that, traditionally, statutory in rem forfeitures have been fixed by determining “what property ha[d] been ‘tainted’ by unlawful use.”<sup>147</sup> In determining the forfeiture,

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amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

- (1) the defendant’s income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose.

*Id.*

139. *See supra* text accompanying notes 33-36.

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

141. *Id.*

142. *Id.*; *supra* text accompanying notes 33-34.

143. *See supra* note 39 and accompanying text.

144. *See Austin*, 113 S. Ct. at 2814-15 (Scalia, J., concurring). Justice Scalia concurred in part and concurred in the judgment. *Id.* at 2812 (Scalia, J., concurring). Justice Scalia disagreed with the majority’s conclusion that culpability of the owner is essential to in rem forfeiture. *Id.* at 2814 (Scalia, J., concurring). To conclude so, Justice Scalia remarks, is to equate in rem forfeiture with in personam forfeiture. *Id.* (Scalia, J., concurring).

145. *Id.* at 2814-15 (Scalia, J., concurring).

146. *Id.* at 2814 (Scalia, J., concurring).

147. *Id.* at 2815 (Scalia, J., concurring).

the value of the property was irrelevant as long as it had a close enough relationship to the unlawful conduct.<sup>148</sup> Under Justice Scalia's analysis, in rem forfeiture runs afoul of the Eighth Amendment only when property is forfeited "that cannot properly be regarded as an instrumentality of the offense."<sup>149</sup> The relevant inquiry in Justice Scalia's analysis is not the worth of the forfeited property but the relationship of the property to the offense.<sup>150</sup>

In light of the majority's opinion in *Austin*, however, Justice Scalia's analysis seems to rely too heavily on the legal fiction of the property being the offender. The Court explicitly held in *Austin* that the purpose of in rem forfeiture, at least in part, has always been to punish.<sup>151</sup> Consequently, the culpability of a claimant must be at least somewhat relevant in determining whether a forfeiture is excessive. The majority recognized that in rem proceedings are different in nature than in personam proceedings, but cautioned against relying too heavily on the technical distinction,<sup>152</sup> which Justice Scalia seems to do in considering only the relative guilt of the property in his excessiveness analysis.<sup>153</sup>

However, while the majority refused to rely exclusively on the technical differences between in rem and civil proceedings, it did not dispose entirely of the guilty-property legal fiction.<sup>154</sup> The Court found that in rem forfeiture served in part to punish and that other purposes could also be served by in rem forfeiture.<sup>155</sup> Furthermore, the Court again declined to finally answer whether the forfeiture of property of a truly innocent owner would comport with due process.<sup>156</sup> In doing so, the Court, at least for the moment, preserved the legitimacy of the legal fiction of the guilty property. Thus, the guilty property fiction, as it is applied in Justice Scalia's analysis, should still have a role to play when determining whether an in rem forfeiture is excessive.

### C. Proposed Analysis—A Combination Test

Because the Court has recognized that in rem forfeitures serve at least in part to punish,<sup>157</sup> an excessiveness test cannot end with a guilty property analysis. Neither, however, should an excessiveness analysis consider

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148. *Id.* (Scalia, J., concurring).

149. *Id.* (Scalia, J., concurring).

150. *Id.* (Scalia, J., concurring).

151. *Id.* at 2810.

152. *Id.* at 2808 n.9.

153. *See id.* at 2814-15 (Scalia, J., concurring).

154. *See id.* at 2809 n.10.

155. *See id.* at 2809.

156. *Id.* at 2809 n.10.

157. *See id.* at 2809.

only proportionality, thereby disregarding the unique characteristics of civil in rem proceedings. For these reasons, the best analysis for identifying excessive forfeitures of conveyances and real property under subsections 881(a)(4) and (7) is a combination of the proportionality analysis and the guilty property analysis.<sup>158</sup>

In light of the above discussion, this note proposes the following analysis for determining whether a forfeiture is excessive under the Eighth Amendment.

1. *Claimant must make a prima facie showing that the forfeiture is excessive. Such a showing shall be established if the value of the forfeited property is excessive when compared to the value of the controlled substances involved in the statutory violation.*<sup>159</sup>

Because of the structure of the statute at issue, the claimant must bear the initial burden of showing excessiveness. Under section 881, the government may initiate forfeiture proceedings solely upon probable cause that the property is forfeitable under federal narcotics law.<sup>160</sup> The statute does not require any showing of proportionality, nor any proof that the property is guilty.<sup>161</sup> Thus, the burden of mitigating an excessive forfeiture must fall on the claimant.<sup>162</sup>

Furthermore, placing the initial excessiveness burden on the defendant will reduce the need for further analysis when the value of the controlled substances found is substantial. As is proper, an excessiveness showing will be much more difficult when large quantities of narcotics are found, resulting in the claimants being unlikely to recover their forfeited property. Such a result comports with the legislative purpose of disabling sophisticated drug trafficking operations—which presumably will be the primary parties involved whenever substantial quantities of narcotics are found.<sup>163</sup>

158. Although this note discusses the test for excessiveness in the context of the Controlled Substances Act, it may easily be applied to the many state civil forfeiture statutes now in effect. *See, e.g.*, FLA. STAT. § 893.12 (1993); GA. CODE ANN. § 16-13-49 (Michie Supp. 1994); N.H. REV. STAT. ANN. § 318-B:17-b (Supp. 1993); OHIO REV. CODE ANN. § 2925.43 (Anderson 1993); TENN. CODE ANN. § 53-11-452 (1991).

159. *See supra* notes 119-32 and accompanying text.

160. 21 U.S.C. § 881(b)(4) (1988).

161. *See id.*

162. *See United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993). Such a threshold requirement preserves the original shifting of the burden of proof. *Id.* The *Sarbello* court held that a proportionality analysis is required upon a defendant's prima facie showing that a forfeiture under § 1963(a)(2) of the RICO Act is grossly disproportionate to the underlying crime. *Id.* The court noted that the initial showing of excessiveness must be borne by the defendant because the statute only mandates that forfeiture be based upon a finding of criminal guilt. *Id.* "Thus the burden of mitigating a draconian forfeiture verdict rests with the defendant." *Id.*

163. *See supra* notes 4-5 and accompanying text.

2. Upon establishing a *prima facie* case, the burden of proof shifts to the government to show that the forfeiture is not excessive within the meaning of the Eighth Amendment. In determining excessiveness, the courts should, at a minimum, take the following factors into consideration:

a. The total punishment (criminal sentence plus forfeiture) imposed on a property owner found guilty of a crime related to the forfeiture.<sup>164</sup>

Even though the forfeiture proceedings are civil in nature, they at least partially constitute a punishment.<sup>165</sup> Thus, when determining whether a forfeiture is excessive a court should give some consideration to the punishment already inflicted upon the claimant under criminal proceedings. As stated in *Solem*, "The principle that a punishment should be proportionate to the crime is deeply rooted . . . in common-law jurisprudence."<sup>166</sup> Only when the total punishment is considered may a court accurately decide whether additional punishment in the form of a civil forfeiture fine would be constitutionally excessive.<sup>167</sup>

b. The financial position of the property owner and the impact of the forfeiture upon that position.<sup>168</sup>

This factor recognizes the uniqueness of fines in that they can have varying impact on differently positioned claimants.<sup>169</sup> As discussed above, the value to claimants of their forfeited property is directly related to their personal financial position. Consequently, a forfeiture which may only lightly punish a millionaire may completely impoverish someone less well off.

When considering the claimant's financial position, courts must also examine whether the forfeiture will deprive a claimant of his or her livelihood.<sup>170</sup> Clearly, the forfeiture of a claimant's livelihood would impose

164. See *supra* notes 124-26 and accompanying text.

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

166. *Solem*, 463 U.S. at 284.

167. Cf. *id.* at 314 (Burger, C.J., dissenting) (attacking the majority's review of a punishment's excessiveness). Chief Justice Burger explains that the judiciary should not impose its own moral views over the decisions of state legislatures regarding the proper severity of punishment for specific offenses. *Id.* This same argument is not valid in the case of reviewing civil forfeitures because legislatures in the latter have not determined the extent of forfeiture applicable for individual crimes. Rather, the extent of forfeiture rests solely on the location and means of the underlying drug offense. See, e.g., *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989). In *Santoro*, the court upheld the forfeiture of a drug offender's home even though the forfeiture would leave him and his family homeless. *Id.* Surely homelessness was not the punishment Congress intended to inflict on the claimant, but that was the result under the general forfeiture laws.

168. See *supra* notes 133-38 and accompanying text.

169. See *supra* notes 133-38 and accompanying text.

170. See *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part). The Magna Carta's amercement clause repeatedly stressed that an individual should not be deprived of his livelihood. *Id.* at 288-89 (O'Connor, J., concurring in part

an extremely harsh penalty upon that claimant. Such a severe punishment must be justified by the gravity of the underlying statutory offense.

*c. The degree that the property has been tainted by unlawful use.*<sup>171</sup>

This factor incorporates Justice Scalia's guilty-property test into the analysis and partly preserves the legal fiction on which in rem forfeitures is based—that the property is the offender.<sup>172</sup> This factor also protects any remedial interest the government may have in removing true tools of the drug trade from society.<sup>173</sup> The guilty property analysis would, for example, allow the forfeiture of vehicles specifically equipped for the drug trade and of storage or manufacturing facilities specifically designed for drug operations. These items would be subject to forfeiture regardless of the property's worth in comparison to the controlled substances involved.<sup>174</sup>

*3. Upon consideration of these factors, a court must have leave to tailor the forfeiture order so as to avoid unconstitutional results.*

Under a strict reading of section 881, the court is left with no room to restrain the scope of a forfeiture order. However, the Supreme Court's holding that the Eighth Amendment applies to civil forfeitures pursuant to section 881 erases this disability.<sup>175</sup> As stated by the court in *United States v. Busher*,<sup>176</sup> "Even though the statute provides no discretion, the district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds."<sup>177</sup>

The above test represents the minimum amount of analysis a court should undergo when determining whether forfeitures under subsections 881(a)(4) and (7) are constitutionally excessive. The list of factors to consider is not intended to be exclusive. Other considerations have been proposed which would greatly sophisticate a court's analysis.<sup>178</sup> For ex-

and dissenting in part). This amendment clause was the forerunner of the English Bill of Rights, on which the First Congress modeled the Eighth Amendment. *Id.* at 290-93 (O'Connor, J., concurring in part and dissenting in part).

171. *See supra* notes 139-56 and accompanying text.

172. *Austin*, 113 S. Ct. at 2814 (Scalia, J., concurring).

173. *See id.* at 2811.

174. *See supra* notes 147-50 and accompanying text. It is unlikely, however, that such a comparison would reveal excessiveness. Any vehicle or property specifically designed for drug transportation or drug manufacture will undoubtedly be connected with a substantial amount of controlled substances, for such property would only be needed by large scale drug traffickers.

175. *See Austin*, 113 S. Ct. at 2801.

176. 817 F.2d 1409 (9th Cir. 1987).

177. *Id.* at 1415.

178. *See, e.g.*, Brief for Petitioner, *Austin*, 113 S. Ct. at 2801 (No. 92-6073), available in LEXIS, Genfed Library, BRIEFS file. The petitioner in *Austin* proposed the following test for analyzing ex-

ample, a court may consider whether or not the property subject to forfeiture is the claimant's homestead.<sup>179</sup> Federal bankruptcy law extends some protection to homestead property and many states jealously safeguard homestead rights.<sup>180</sup> For these reasons, courts may decide to rigorously protect the family home for the benefit of both the family and society. Such an additional factor only enhances the accuracy and fairness of an excessiveness analysis.

## VI. CONCLUSION

In deciding the appropriate test for excessiveness under the Eighth Amendment, courts cannot implement a rigid, structured analysis. As stated by the Court of Appeals for the Ninth Circuit, "[T]he eighth amendment . . . embodies fluid concepts that vary in application with the circumstances of each case."<sup>181</sup> Consequently, courts must consider both the

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cessiveness:

A prima facie or threshold determination that the forfeiture is excessive shall be established if:

1. the value of the property seized is excessive compared to the value of the controlled substances involved in the statutory violation; and,
2. the value of the property seized is excessive relative to the financial condition of the owner. . . .

Once a prima facie or threshold finding of excessiveness is made, the government must then show that the property ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Excessive Fines Clause of the Eighth Amendment. In determining whether the forfeiture is grossly disproportionate under that clause, the court should take the following factors into consideration:

1. Whether the property seized constitutes the owner's livelihood or means to earn a living.
2. Whether the property seized is the owner's homestead.
3. The degree to which the owner's property has been involved in drug activity, and whether the property has been purchased or obtained through the proceeds of drug activity.
4. Whether or not the owner has been convicted of a crime related to the forfeiture, the severity of the crime, and the severity of the criminal sentence imposed upon the owner of the property—i.e. the total punishment imposed on the owner, including the forfeiture.
5. The extent of the criminal behavior of the owner of the property and the need for deterrence.
6. The extent to which the government necessarily expended its funds to interdict drug activity involving this property.

*Id.*

179. See *United States v. \$12,585 in U.S. Currency*, 669 F. Supp. 939, 943 (D. Minn. 1987) ("[C]ourts have traditionally drawn a distinction between one's personal property and one's home, according the latter far greater protection under the law.").

180. See, e.g., *Butterworth v. Caggiano*, 605 So. 2d 56, 59-61 (Fla. 1992) (holding that Florida's constitution prohibited forced sale under the RICO statute of homestead property, even though the homestead property was used for racketeering).

181. *Busher*, 817 F.2d at 1415. Following the reasoning of the *Solem* Court, the *Busher* court held



degree that property subject to civil forfeiture is tainted by illegal use and the proportionality between the underlying drug offense and the punishment imposed by the forfeiture. Only then will a court succeed in doing what it has sworn to do, uphold the constitutional rights of all Americans—the average citizen and the drug offender alike.

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that no punishment is per se constitutional. *Id.* However, constitutionality depends upon the factors of each individual case. *See id.*