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Applying the Eighth Amendment to Civil Forfeiture After *Austin v. United States*: Excessiveness and Proportionality

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NOTES

APPLYING THE EIGHTH AMENDMENT TO CIVIL FORFEITURE AFTER *AUSTIN v. UNITED STATES*: EXCESSIVENESS AND PROPORTIONALITY

On February 20, 1986, Paul F. Born III gave his home telephone number to John Mueller, an undercover law enforcement official, during the discussion of a drug transaction.¹ Mueller called Born twice, and they agreed that Born would sell two ounces of cocaine to Mueller for \$3200.² Born was not present when the transaction took place at a local bar,³ but he was convicted of federal criminal narcotics violations.⁴ The United States then instituted a civil action under 21 U.S.C. § 881(a)(7) to forfeit Born's one-third interest in his house.⁵ The government offered Born's parents, who owned the remaining two-thirds interest in the house, a chance to purchase Born's interest or receive two-thirds of the proceeds from a forfeiture sale.⁶ The Seventh Circuit Court of Appeals affirmed the forfeiture action.⁷

The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance. . . .⁸

1. *United States v. 916 Douglas Ave.*, 903 F.2d 490, 491 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).

2. *Id.*

3. *Id.*

4. *Id.* at 492.

5. *Id.* at 491-92.

6. *Id.* at 492 n.3.

7. *Id.* at 495.

8. *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 44 (1st Cir. 1989).

Civil asset forfeiture proceedings in general, and specifically under the Comprehensive Drug Abuse Prevention and Control Act of 1970,⁹ have developed into an important weapon in law enforcement efforts to combat illegal drug operations.¹⁰ By one government estimate, forfeiture actions have produced over \$1 billion in cash and property since the 1986 fiscal year.¹¹ Some observers, however, charge that government authorities have abused the power to seize property used in drug-related activities.¹² Representative John Conyers, chairman of the House Legislation and National Security Subcommittee of the Committee on Government Operations, suggested that the "law designed to give cops the right to confiscate and keep the possessions of drug dealers seems to mostly ensnare the modest cars and homes and cash of ordinary, law-abiding people."¹³

In June, 1993, the Supreme Court acknowledged this concern

9. 21 U.S.C. §§ 801-971 (1988 & Supp. IV 1992).

10. See, e.g., *United States v. 1990 Toyota 4Runner*, 9 F.3d 651 (7th Cir. 1993). "[T]aking away [drug traffickers'] cars, boats, and planes, like taking away their stash houses and guns, is bound to cramp their style." *Id.* at 653. The Asset Forfeiture Fund received \$460 million under federal forfeiture statutes during fiscal year 1990. *Id.* at 655 (Cudahy, J., concurring) (citing U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM 31 (1990)); David Chernicky, *Drug Ruling Downplayed*, DAILY PRESS (Newport News, Va.), Dec. 15, 1993, at C3 (discussing \$10 million in fiscal 1993 deposits into the Asset Forfeiture Fund for the Eastern District of Virginia, which ranked 13th in the country for net deposits).

11. *Department of Justice Asset Forfeiture Program: Hearing Before the Legislation and Nat'l Sec. Subcomm. of the House Comm. on Gov't Operations*, 102d Cong., 2d Sess. 79 (1992) [hereinafter *Hearing*] (statement of Cary H. Copeland, Director and Chief Counsel, Executive Office of the Deputy Attorney General). More than 3000 state and local law enforcement agencies have shared in these gains. *Id.*

12. See, e.g., *Toyota 4Runner*, 9 F.3d at 654 (Cudahy, J., concurring) ("[I]t has become increasingly difficult to impose any principled constraints on the exercise of forfeiture powers under the drug laws."); Henry J. Reske, *A Law Run Wild*, A.B.A. J., Oct. 1993, at 24, 24 (noting that "[p]rograms to recover assets associated with crime appear to be victimizing the innocent to the point that an unusual combination of conservative politicians and defense lawyers is working to rein in the forfeiture beast."); Carl T. Rowan, *Are We Sure the Ends Justify the Means*, BALTIMORE SUN, July 14, 1993, at A13 (noting that "[b]y the end of 1992, the federal forfeiture orgy had snatched more than \$2 billion worth of property . . . [and] [f]ederal officials [had] auctioned off billions more of seized properties").

13. *Hearing*, *supra* note 11, at 1-2 (statement of Rep. Conyers).

and, in *Austin v. United States*,¹⁴ decided that such forfeitures must be considered in light of the Eighth Amendment prohibition of excessive fines.¹⁵ The Court rejected the government's argument that forfeitures of conveyances and real property serve only remedial purposes¹⁶ and declared that they are punishment.¹⁷ Forfeitures of conveyances and real property under 21 U.S.C. §§ 881(a)(4) and (a)(7),¹⁸ therefore, fall within the scope of the Excessive Fines Clause.¹⁹

Civil forfeiture actions are conducted under the guise of in rem proceedings against property, but, according to the Court, the resulting forfeitures punish the owner of the property who usually is a criminal defendant.²⁰ Despite the civil nature of such a proceeding, the punishment aspect of forfeiture mandates Eighth Amendment consideration.²¹

The Court, however, did not decide whether the forfeiture in *Austin* was excessive, nor did it set forth a specific framework for determining whether a forfeiture violates the Eighth Amendment. Rather, it remanded the case, leaving to the lower courts the responsibility of developing a method of evaluating forfeitures.²²

This Note analyzes the Supreme Court's reasoning in *Austin* that led to the ultimate decision that Eighth Amendment scrutiny applies to civil forfeiture. It then presents an overview of civil forfeiture, with a specific focus on the forfeiture provisions of 21 U.S.C. § 881, and examines the history and modern use of the Eighth Amendment. Because the Court in *Austin* refused to accept the fiction that forfeiture proceedings affect property but

14. 113 S. Ct. 2801 (1993).

15. *Id.* at 2812. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

16. *Austin*, 113 S. Ct. at 2811-12. The government argued that civil forfeiture served two remedial purposes: removing the instrumentalities of crime from the community, and compensating the government for law enforcement expenses. *Id.* at 2811.

17. *Id.* at 2812.

18. For statutory language, see *infra* note 37.

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

20. *Id.* at 2810-12.

21. *Id.* at 2812.

22. *Id.*

not the property's owner,²³ it correctly concluded that civil forfeitures under §§ 881(a)(4) and (a)(7) constitute punishment because they go beyond solely remedial purposes.²⁴ As nonremedial penalties, these forfeitures are subject to Eighth Amendment scrutiny.²⁵

Next, this Note compares three excessiveness tests currently used to analyze asset forfeiture: a "substantial connection" test,²⁶ a "substantiality-proportionality" test employed by the Second Circuit prior to *Austin*,²⁷ and the criminal forfeiture standard under the Racketeer Influenced and Corrupt Organizations Act (RICO),²⁸ and proposes a new framework for Eighth Amendment analysis of civil forfeiture.

This framework suggests that when property is used substantially for criminal activity, and when the use is essential to the success of the activity, a forfeiture of the property will not be disproportionate to the criminal culpability regardless of the property value.²⁹ Forfeiture of the proceeds of criminal activity under § 881(a) will not jeopardize Eighth Amendment rights because such forfeitures are solely remedial.³⁰ Proportionality concerns arise only when a conveyance or real property is used infrequently or incidentally in illegal activity. Property that merely "facilitates" criminal activity will fall within this category

23. *Id.* at 2808-09.

24. The Court agreed with the government that the remedial principles of removing the instrumentalities of crime from society and compensating law enforcement agencies were implicated, but concluded that they were not the sole purposes of the penalty. *Id.* at 2812; see *infra* notes 48-53 and accompanying text.

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

26. See, e.g., *United States v. 2828 N. 54th St.*, 829 F. Supp. 1071 (E.D. Wis. 1993); *United States v. 9638 Chicago Heights*, 831 F. Supp. 736 (E.D. Mo. 1993), *rev'd*, No. 93-3350, 1994 WL 259428 (8th Cir. June 15, 1994).

27. See, e.g., *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); *United States v. 835 Seventh St.*, 820 F. Supp. 688 (N.D.N.Y.), *reconsideration granted on other grounds*, 832 F. Supp. 43 (N.D.N.Y. 1993).

28. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992). See *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987).

29. See *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment) (noting that "[t]he question is not *how much* the confiscated property is worth").

30. See *United States v. \$288,930*, 838 F. Supp. 367, 370 (N.D. Ill. 1993); see also *infra* notes 80-82 and accompanying text (discussing forfeiture of proceeds).

most regularly.³¹

Finally, this Note suggests that *Austin*, while bringing the excessiveness question to public attention, will not produce dramatically different results in future asset forfeiture proceedings. Prosecutors may become slightly more selective in pursuing certain assets, but forfeitures will rarely be deemed excessive.

AUSTIN V. UNITED STATES

On June 13, 1990, Richard Lyle Austin sold two grams of cocaine to Keith Engebretson.³² Austin negotiated the sale in his auto body shop, went to his mobile home to retrieve the cocaine, and concluded the sale in the body shop.³³ The next day, state authorities searched the mobile home and body shop, finding small amounts of cocaine and marijuana, a .22 caliber revolver, drug paraphernalia (including an electronic Ohaus scale), and approximately \$4700 in cash.³⁴ Austin pleaded guilty in state court to a single count of possessing cocaine with intent to distribute.³⁵ He received a seven year prison sentence.³⁶

The United States then filed, in the District Court of South Dakota, an in rem civil forfeiture action under 21 U.S.C. §§ 881(a)(4) and (a)(7) against the mobile home and body shop.³⁷

31. See *infra* notes 83-98 and accompanying text (discussing facilitating property).

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

33. *Id.*

34. *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993); *508 Depot St.*, 964 F.2d at 815-16.

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

36. *Id.*

37. *Id.* The entirety of 21 U.S.C. § 881(a) reads:

§ 881. Forfeitures

(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), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate, the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) 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.

(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, 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.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act).

In opposition to the government motion for summary judgment, Austin argued that the Eighth Amendment prohibited the forfeiture of the properties.³⁸ The court disagreed and granted summary judgment to the United States.³⁹

The Eighth Circuit Court of Appeals affirmed the district court decision but expressed reservations.⁴⁰ Writing for the court, Judge Gibson suggested that "the principle of proportionality should be applied in civil actions that result in harsh penalties"⁴¹ and that in this case, the government was "exacting too high a penalty in relation to the offense committed."⁴² Nevertheless, the court concluded that it was constrained to rule that the Eighth Amendment did not apply to civil forfeitures.⁴³ In a final comment, however, the court expressed a hope that Congress would consider placing some type of proportionality requirement into § 881, "even though the Constitution does not mandate such a result."⁴⁴

The Supreme Court granted certiorari to resolve a circuit conflict over the applicability of the Eighth Amendment to in rem civil forfeitures.⁴⁵ In an opinion by Justice Blackmun, the Court

(11) Any firearm (as defined in section 921 of title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

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

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

39. *Id.*

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

41. *Id.*

42. *Id.* at 818.

43. *Id.* at 817. The court explained that the forfeiture was an in rem action against "offending" property where the owner's culpability was "constitutionally irrelevant." *Id.* (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)). It then remarked that "[i]f the constitution allows in rem forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures." *Id.* (quoting *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)).

44. *Id.* at 818.

45. *Austin v. United States*, 113 S. Ct. 2801, 2804 (1993). Compare *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.) (holding that Eighth Amendment Cruel and Unusual Punishments Clause applies to forfeitures under 21 U.S.C. § 881), *cert. denied*, 113 S. Ct. 55 (1992) with *508 Depot Street*, 964 F.2d 814 (holding that Eighth Amendment does not apply to forfeitures under 21 U.S.C. § 881).

reviewed the history and purposes of the Eighth Amendment and determined that in rem forfeitures had historically served punitive and deterrent purposes and therefore were considered punishment of the owner.⁴⁶

Next, the Court examined whether asset forfeitures are presently considered punishment.⁴⁷ The Court rejected the government's claims that forfeiture served only the remedial purposes of removing the "instruments" of crime from the streets and compensating law enforcement agencies for their activities.⁴⁸ Much of the property seized, such as homes and cars, was not possessed illegally and, therefore, the Court would not consider such seizures a remedial effort to remove contraband from society.⁴⁹ Similarly, the Court indicated that the compensation gained from asset forfeitures was not based on the costs incurred by law enforcement officials but rather depended solely on the value of the property seized.⁵⁰

The Court further reasoned that even if these remedial purposes were recognized, the government's argument still would have failed because "[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."⁵¹ Rejecting the fiction that the forfeiture proceeding affects only property, the Court concluded that forfeitures under §§ 881(a)(4) and (a)(7) are "payment to a sovereign as punishment for some offense" and must be examined under the Excessive Fines

46. *Austin*, 113 S. Ct. at 2806-10. "If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner." *Id.* at 2809; see also *infra* notes 99-107 and accompanying text (discussing Eighth Amendment history).

47. *Austin*, 113 S. Ct. at 2810-12.

48. *Id.* at 2811. But see *id.* at 2816 (Kennedy, J., concurring in part and concurring in the judgment) (remarking that "I would also reserve the question whether in rem forfeitures always amount to an intended punishment of the owner of forfeited property").

49. *Id.* at 2811.

50. *Id.* at 2811-12. The Court also asserted that the "forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law." *Id.* at 2812 (quoting *United States v. Ward*, 448 U.S. 242, 254 (1980)) (alteration in original).

51. *Id.* at 2812 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

Clause of the Eighth Amendment.⁵²

The Court, however, refused Austin's invitation to establish a specific "excessiveness" test.⁵³ Rather, they left this task to the lower courts, remanding the case to the court of appeals for further proceedings.⁵⁴

In an opinion concurring in part and concurring in the judgment, Justice Scalia referred to the traditional practice of allowing forfeiture of property that has been "tainted" by illegal use.⁵⁵ He then asserted that "an in rem forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense The question is . . . *whether* the confiscated property has a close enough relationship to the offense."⁵⁶

By expressly recognizing that civil forfeitures under §§ 881(a)(4) and (a)(7) serve as retribution and deterrence, the acknowledged aims of punishment,⁵⁷ the Court placed such proceedings within the scope of the Eighth Amendment. The history of both civil forfeiture and the Eighth Amendment strongly supports this conclusion.

THE HISTORICAL AND MODERN USES OF CIVIL FORFEITURE

Civil Forfeiture History

English customs and revenue statutes allowed for forfeiture of "offending objects" used to violate the law.⁵⁸ The American colo-

52. *Id.* (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

53. *Id.* Austin argued that a *prima facie* determination of excessiveness would be established if (1) the value of the seized property was excessive compared to the value of the controlled substances involved, and (2) the value of the seized property was excessive compared to the owner's financial means. Brief for Petitioner at 46-47, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073). This test, by comparing the value of the forfeiture and the value of the controlled substances, ignores the fact that the forfeiture of property used substantially and essentially for illegal purposes is not solely remedial and can rise to the level of punishment without violating the Eighth Amendment. *See Austin*, 113 S. Ct. at 2811-12.

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

55. *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment).

56. *Id.*

57. *See, e.g.*, *United States v. Halper*, 490 U.S. 435, 448 (1989).

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

nies enforced similar laws, and eventually "[t]he First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture."⁵⁹ In both countries, forfeiture was based on the fiction that the proceeding moved against property that was accused of committing an offense.⁶⁰ The use of this fiction made the guilt or innocence of the owner of the property irrelevant, as the prosecutor needed to show only that the property was connected to the wrongdoing.⁶¹ The offending property was then punished for its wrongdoing; the owner was punished only secondarily by the economic loss. This secondary effect, however, was not given judicial recognition when property owners presented arguments under the Eighth Amendment.⁶²

Forfeiture suits in the Court of Exchequer were "begun on information and were against the vessel or article to be condemned This was the established procedure certainly as early as the latter part of the seventeenth century." C.J. Hendry Co. v. Moore, 318 U.S. 133, 137-38 (1943).

59. *Austin*, 113 S. Ct. at 2807 (discussing the Act of July 31, 1789, § 12, 1 Stat. 39, which provided for the forfeiture of goods unloaded at night or without a permit).

60. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (noting that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing").

61. *See Calero-Toledo*, 416 U.S. at 683; *Dobbin's Distillery v. United States*, 96 U.S. 395, 401 (1878) (noting that "the offence . . . is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner"). *But see* 21 U.S.C. §§ 881(a)(4)(C), (a)(7) (1988 & Supp. IV 1992) (providing an "innocent owner" defense to forfeiture when the illegal acts were "committed or omitted without the knowledge, consent, or willful blindness of the owner").

62. *See United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992) ("The focus in an in rem action is the guilt or innocence of the property; the owner's culpability apparently is therefore not a factor."), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

Civil Forfeiture in the Present

Prior to the decision in *Austin*, not much had changed in civil forfeiture law.⁶³ The asset forfeiture provisions of 21 U.S.C. § 881,⁶⁴ as well as other laws,⁶⁵ are aimed supposedly at punishing "guilty" property, but in reality they inflict economic injury upon persons who engage in criminal activity.⁶⁶ By confiscating property that either has been used in the commission of the crime or purchased with illegal proceeds, law enforcement officials achieve several objectives. Forfeitures generate money and other resources for use by police, prosecutors, and other government agencies.⁶⁷ In addition, the proceedings attempt to reme-

63. *But see* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 515 (1993) (Thomas, J., concurring in part and dissenting in part); *supra* note 61 (recognizing the "innocent owner" defense). In *James Daniel Good*, Justice Thomas remarked on the breadth of § 881(a)(7):

Indeed, it is unclear whether the central theory behind in rem forfeiture, the fiction "that the thing is primarily considered the offender," can fully justify the immense scope of § 881(a)(7). . . . Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.

Id. at 515 (citation omitted).

64. *See supra* note 37.

65. Other civil asset forfeiture statutes include 18 U.S.C. § 492 (1988 & Supp. IV 1992) (counterfeiting paraphernalia), 18 U.S.C. § 1465 (1988 & Supp. IV 1992) (transportation of obscene materials), 19 U.S.C. § 1305 (1988 & Supp. IV 1992) (importation of obscene materials), and 22 U.S.C. § 401 (1988 & Supp. IV 1992) (exportation of war materials). The Uniform Controlled Substances Act of 1990 does not include forfeiture provisions because "the initial draft of the 1990 Act expanded the forfeiture sections to an extent that caused long and heated debate . . . and will be reconsidered as a separate statute at a later meeting." Richard L. Braun, *Uniform Controlled Substances Act of 1990*, 13 CAMPBELL L. REV. 365, 370 (1991).

66. *See, e.g.,* Austin v. United States, 113 S. Ct. 2801 (1993); United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); United States v. \$145,139, 803 F. Supp. 592 (E.D.N.Y. 1992), *aff'd*, 18 F.3d 73 (2d Cir. 1994).

67. Under 21 U.S.C. § 881(e), the Attorney General has broad power to disburse the property and proceeds garnered from a successful forfeiture. *See also* 19 U.S.C. § 1616(a) (1988 & Supp. IV 1992) (disposition of forfeited property); 28 U.S.C. § 524(c) (1988 & Supp. IV 1992) (funds deposited into Department of Justice Assets Forfeiture Fund to be under the control of the Attorney General); United States v. 1990 Toyota 4Runner, 9 F.3d 651, 655 (7th Cir. 1993) (Cudahy, J., concurring) (citing U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM 31 (1990) (discussing \$460 million in deposits to Asset Forfeiture

dy the crime situation by removing the instrumentalities of crime from public use.⁶⁸

The economic success of civil forfeitures has led to an increase in their use⁶⁹ and a rise in the number of state and local forfeiture laws.⁷⁰ The statutes are especially effective when a significant amount of property is seized from criminal organizations such as a drug operation⁷¹ because they enable the government to take control of large amounts of property without having to prove the extent of the criminal operation.⁷²

The popularity of forfeiture proceedings under § 881 is also a function of procedural rules.⁷³ The seizure occurs pursuant to a

Fund during fiscal 1990)). See generally EXECUTIVE OFFICE FOR ASSET FORFEITURE, OFFICE OF THE DEPUTY ATTORNEY GEN., A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (1990) (outlining procedure for receiving funds gained from forfeiture).

68. See, e.g., *United States v. 26.075 Acres, Located in Swift Creek Twp.*, 687 F. Supp. 1005, 1013 (E.D.N.C. 1988) (observing that forfeiture statute "is designed to strip the drug trade of its instrumentalities . . . and to finance government programs designed to eliminate drug trafficking"), *aff'd sub nom. United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989).

69. Reske, *supra* note 12, at 24. The federal government alone has enacted approximately 100 federal forfeiture laws. *Id.* But see David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 433 & n.36 (1993) (suggesting that some state and local laws expand forfeitures to unnecessary areas such as drunk driving and prostitution).

70. See, e.g., DEL. CODE ANN. tit. 16, §§ 4784-4785 (1983 & Supp. 1992); D.C. CODE ANN. § 33-552 (1993); MD. ANN. CODE art. 27, § 297 (1992 & Supp. 1993); 42 PA. CONS. STAT. ANN. §§ 6801-6802 (Supp. 1993); VA. CODE ANN. §§ 19.2-386.1 to .13 (Michie 1990 & Supp. 1993); W. VA. CODE §§ 60A-7-701 to 707 (1992 & Supp. 1993).

71. See, e.g., *United States v. Rural Route 1, Box 224*, 14 F.3d 864 (3d Cir. 1994) (forfeiting real property worth \$120,420); *United States v. \$288,930*, 838 F. Supp. 367 (N.D. Ill. 1993) (seizing proceeds of drug sales).

72. See, e.g., *United States v. \$4,255,000*, 762 F.2d 895, 903 (11th Cir. 1985) ("The totality of the circumstances surrounding the deposits to the SONAL account leads us to conclude that the money probably was drug-generated."), *cert. denied*, 474 U.S. 1056 (1986); *United States v. Brock*, 747 F.2d 761, 762 (D.C. Cir. 1984) (holding that recovery of 100 pieces of jewelry from same location as narcotics, paraphernalia, cash, and loaded revolver was "sufficient to warrant a conclusion that there was no other way Brock could have acquired the jewelry than in connection with or by the proceeds of the alleged narcotics violations").

73. 21 U.S.C. § 881(b) indicates that the seizure of any property is based on the Federal Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims. The actual forfeiture proceedings are governed by the "law relating

verified complaint describing the property.⁷⁴ In a court forfeiture proceeding, the government need only show probable cause that the property was used for an illegal purpose.⁷⁵ The government does not need to link the property to any specific illegal transaction, but merely to *some* illegal activity.⁷⁶ Once the government has established probable cause, the burden shifts to the claimant to the property, usually the owner, who must show sufficient interest in the seized property to establish standing to challenge the forfeiture.⁷⁷ In addition the claimant must prove by a preponderance of the evidence that the property was used without his "knowledge, consent or willful blindness" (the "innocent owner" defense),⁷⁸ or was not used in an illegal manner. Legislative attempts to increase the burden on the government have been considered,⁷⁹ but the procedural aspects of civil forfeiture remain an attractive feature.

There is little doubt that property that is a direct proceed of

to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs law." 21 U.S.C. § 881(d) (1988 & Supp. IV 1992). The customs law provides that "the burden of proof shall lie upon [the] claimant *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court" 19 U.S.C. § 1615 (1988 & Supp. IV 1992).

74. FED. R. CIV. P. Supp. Rule C(2). Process is executed, and notice of the action must be published in a local newspaper. *Id.* Supp. Rule C(4). A claimant must file a verified claim within 10 days after execution of process and serve an answer within 20 days after filing a claim. *Id.* Supp. Rule C(6).

75. Probable cause in the asset forfeiture context is defined as "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980).

76. *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986). Probable cause may be shown through hearsay evidence, *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), but "[t]he information relied on by the government [must be] adequate and sufficiently reliable" to satisfy the probable cause standard. *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983).

77. *United States v. One 1983, Fifty-Seven Foot Gulfstream Vessel, M/V Christy Lee*, 640 F. Supp. 667, 672 (S.D. Fla. 1986).

78. 21 U.S.C. § 881(a)(4)(C) (applying to conveyances); 21 U.S.C. § 881(a)(7) (applying to real property).

79. *See, e.g.*, H.R. 2417, 103d Cong., 1st Sess. § 615 (1993) (proposing, *inter alia*, that the government "establish, by clear and convincing evidence, that the property was subject to forfeiture" and that forfeiture claimants have access to court-appointed representation); S. 1655, 103d Cong., 1st Sess. § 5 (1993) (same).

illegal activity will meet the probable cause standard and can be forfeited under § 881(a)(6). Under the in rem fiction of civil forfeiture, the culpability of such property is unquestioned.⁸⁰ Even without relying on that fiction, the forfeiture of this property serves the government's remedial interests in removing contraband from public circulation.⁸¹ Forfeiture of proceeds also precludes owners from enjoying the benefits of their illegal activities.⁸²

"Facilitating" property, as opposed to proceeds, has a murkier relationship to the criminal venture.⁸³ Property is considered facilitating when "there [is] a reasonable ground for belief that the use of the [property] made the sale less difficult and allowed it to remain more or less free from obstruction or hinderance [sic]."⁸⁴ The degree of facilitation demanded by a court greatly affects the government's ability to prove probable cause and link property to illegal activity. In addition, cases in which facilitation is marginal raise questions about punishments that greatly

80. "[P]roceeds, by definition, are entirely traceable to criminal activity. Taking criminal proceeds from a culpable owner is no different than taking bank robbery proceeds from the bank robber—in each instance, the proceeds derive solely from a violation of the criminal law." Criminal Div., Asset Forfeiture Office, U.S. Dep't of Justice, Quick Release: A Monthly Survey of Federal Forfeiture Cases, June 1993, at 3 [hereinafter Quick Release].

81. See *United States v. \$45,140*, 839 F. Supp. 556, 558 (N.D. Ill. 1993) (noting that "if money constitutes the proceeds of a drug transaction, it is illegal to possess and thus is rightly considered contraband"); Quick Release, *supra* note 80, at 3 (noting that "[t]he forfeiture of proceeds is entirely remedial—it puts the culpable owner in the same precise position he or she would be in if no crime had been committed").

82. See *United States v. \$288,930*, 838 F. Supp. 367, 370 (N.D. Ill. 1993) (noting that "the forfeiture of allegedly illegally obtained property is not a punishment because the claimant does not rightfully own the forfeited property").

83. The statutory definition of facilitating property is set out at 21 U.S.C. §§ 881 (a)(4), (a)(6), (a)(7), and (a)(11). See *supra* note 37. Facilitating property usually consists of a conveyance that transports the owner to a drug transaction, *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983) (forfeiture under § 881(a)(4)), or the building in which the transaction occurs, *United States v. Schifferli*, 895 F.2d 987 (4th Cir. 1990) (forfeiture of dentist office under § 881(a)(7)), or in which the controlled substances are stored, *Austin v. United States*, 113 S. Ct. 2801 (1993) (forfeiture of mobile home under § 881(a)(7)).

84. *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir.) (quoting *United States v. One 1950 Buick Sedan*, 231 F.2d 219, 222 (3d Cir. 1956)), *cert. denied*, 454 U.S. 818 (1981).

exceed the criminal culpability of the property.

The controversy surrounding 21 U.S.C. §§ 881(a)(4) and (a)(7) arises in the judicial interpretation of how closely related facilitating property must be to the criminal activity. One view calls for a "substantial connection" between the property to be forfeited and the illegal activity.⁸⁵ Another view maintains that property connected "in any manner" to illegal conduct is subject to forfeiture.⁸⁶ The distinction between these two tests, however, is not always clear.⁸⁷

The two tests derive from differing interpretations of the forfeiture statute. The legislative history of § 881(a)(6) includes a statement that "the intent of these provisions [is] that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent."⁸⁸ The "substantial connection" test can be seen as a common sense reading of the law that seeks to remove the instrumentalities of the drug trade but not tenuously connected property.⁸⁹ Although judges often use a

85. See, e.g., *United States v. 28 Emery St.*, 914 F.2d 1 (1st Cir. 1990); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989); *United States v. One Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (noting that "[we] do not believe that the forfeiture statute was meant to support divestiture of private property based on an insubstantial connection between the vehicle and the illegal activity"); *1979 Porsche Coupe*, 709 F.2d at 1424.

86. See, e.g., *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992); *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir.), *cert. denied*, 498 U.S. 1126 (1990).

87. See *916 Douglas Ave.*, 903 F.2d at 494 ("[T]he distinction between a 'substantial connection' test and the 'in any manner, or part' language offered directly in the statute is blurry at best."). Compare *United States v. 3639 2nd. St., N.E.*, 869 F.2d 1093, 1097 (8th Cir. 1989) (allowing a forfeiture because there was a "sufficient connection" between the property and the illegal use) with *United States v. 3639 2nd. St., N.E.*, 869 F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring) (suggesting that the majority really meant that there was a "substantial connection").

88. H.R. REP. NO. 1193, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9496, 9522. Should this statement apply to 21 U.S.C. §§ (a)(4) and (a)(7)? The reference to the "underlying criminal activity which the statute seeks to prevent" suggests that it should apply. See also 1 MARY B. TROLAND, *ASSET FORFEITURE: LAW, PRACTICE, AND POLICY* 14 & n.30 (1988).

89. *Santoro*, 866 F.2d at 1542 (finding a substantial connection between criminal activity and property where four drug sales occurred). In answering the question of what constitutes a "substantial connection," one court declared: "Finding no guidance

"common sense" approach to issues of fact, one commentator has suggested that a more concrete definition is necessary so that a "substantial connection" test would support a finding of probable cause only when there is "routine, repeated, and intentional" use of the property in illegal drug activity.⁹⁰

The "in any manner" test operates differently from the "substantial connection" test. The "in any manner" language comes directly from § 881.⁹¹ Courts employing this test find probable cause for forfeiture when there is a "nexus"⁹² or a "sufficient nexus"⁹³ between the property and the unlawful activity. Other courts demand "that the property must have more than an incidental or fortuitous connection to criminal activity"⁹⁴ Courts that employ the "in any manner" test require very little for the government to prove probable cause. Whichever variation

as to the application of this term of art in the case law, th[e] court applied its own 'rule of reason'" *United States v. 835 Seventh St.*, 820 F. Supp. 688, 691 (N.D.N.Y.) (finding no substantial connection between defendant premises and drug activity that included sale of 6.8 grams of marijuana and discovery of 6 more ounces during search), *reconsideration granted on other grounds*, 832 F. Supp. 43 (N.D.N.Y. 1993).

90. Steven S. Biss, Note, *Substantial Connection and the Illusive Facilitation Elements for Civil Forfeiture of Narcoband in Drug Felony Cases*, 25 U. RICH. L. REV. 171, 173 (1990).

91. See *supra* note 37 (setting out §§ (a)(4), (a)(6), and (a)(7)); see also *supra* note 83 (defining "facilitate").

92. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 33 (2d Cir.) (rejecting requirement of "substantial connection" and finding "nexus" where house provided privacy for illegal drug activity), *cert. denied*, 113 S. Ct. 55 (1992).

93. *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500, 503 (5th Cir. 1981) (finding sufficient nexus where vehicle transported drug dealer to site of sale).

94. *United States v. 916 Douglas Ave.*, 903 F.2d 490, 493-94 (7th Cir. 1990) (finding more than "incidental or fortuitous" connection where home was location of telephone negotiations for drug sale), *cert. denied*, 498 U.S. 1126 (1991). One judge in the Seventh Circuit, however, has expressed discomfort with the weak nexus necessary to show probable cause. In *United States v. 1990 Toyota 4Runner*, 9 F.3d 651 (7th Cir. 1993), Judge Cudahy, in a concurring opinion, speculated that a "drug dealer driving alone thinking about drugs" might be sufficient to support a forfeiture of the vehicle. *Id.* at 655 (Cudahy, J., concurring).

In fact, when asked about this possibility at oral argument, the Assistant United States Attorney suggested that the only difficulty presented by this scenario would be evidentiary: "When you are dealing with thought processes, I'm not exactly sure how the United States would be able to prove such a case."

Id.

of the language a court uses, clearly, the "in any manner" standard is less stringent than the "substantial connection" test.

The government has an incentive to pursue civil forfeiture proceedings whenever possible,⁹⁵ especially in jurisdictions where the "in any manner" test is applied. In the zeal to injure criminal enterprises, however, there is a danger that prosecutors will overreach and try to seize any asset they can possibly reach. A concern about such prosecutorial power underlies the *Austin* decision.⁹⁶

The "substantial connection" standard should become an important element of an Eighth Amendment excessiveness test.⁹⁷ The "in any manner" standard is too weak to support the legitimate forfeiture goals of removing property that contributes to illegal activity. Although the "in any manner" test would certainly place more property in danger of forfeiture, such extremes cannot justify "wiping out" minor criminals such as Richard Austin who otherwise could make some contribution to society.⁹⁸

95. But see Gary M. Maveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, 30 AM. CRIM. L. REV. 35 (1992). Maveal argues that criminal forfeiture under 21 U.S.C. § 853 may be preferable to civil forfeiture because the government does not need to seize and secure the property and promptly begin forfeiture proceedings. Also, the government does not need to pursue two actions (criminal and civil) simultaneously, a problem that often arises in civil forfeitures. Finally, Maveal asserts that the procedural differences in the burdens of proof (probable cause versus proof beyond a reasonable doubt) are not great enough to "justify the government's stark adherence to the civil device." *Id.* at 38. Some courts, in fact, apply a preponderance of the evidence standard to criminal forfeitures because the "forfeiture is a sanction for conviction rather than an element of the crime." *Id.* at 92-93. Also, § 853 includes a presumption that simplifies the government's proof that property is proceeds of illegal activity. *Id.* at 93.

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

97. See *infra* notes 168-174 and accompanying text (proposed excessiveness test).

98. See *United States v. 835 Seventh St.*, 820 F. Supp. 688, 696-97 (N.D.N.Y.) (noting that "when the decision between total forfeiture and outright dismissal of the action amounts to the Hobson's choice between protecting [individual] constitutional rights . . . and overcompensating the government for enforcement, the choice is a clear one. . . . [T]he court chooses to err in protection of the claimants constitutional rights"), *reconsideration granted on other grounds*, 832 F. Supp. 43 (N.D.N.Y. 1993).

THE HISTORICAL AND MODERN USES OF THE
EIGHTH AMENDMENT

Eighth Amendment History

The Eighth Amendment⁹⁹ was adopted in 1791, directly from the English Bill of Rights of 1689,¹⁰⁰ to control abuses by the sovereign power.¹⁰¹ At the time of its adoption there was little debate regarding the amendment, especially the Excessive Fines Clause.¹⁰² Since the amendment's adoption, the Cruel and Unusual Punishments Clause has been invoked most often by criminal defendants as a limit on the government's power to impose disproportionate punishment.¹⁰³

The history of the Eighth Amendment indicates that the framers intended the entire amendment to act as a limit on the government's power to punish. Accordingly, analysis under the Excessive Fines Clause should be similar to that required by the Cruel and Unusual Punishments Clause¹⁰⁴ and the Bail

99. See *supra* note 15.

100. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

101. Most historians suggest that the English version of the Cruel and Unusual Punishments Clause developed as a reaction to the abuses of Lord Chief Justice Jeffreys during the "Bloody Assizes." *Harmelin v. Michigan*, 111 S. Ct. 2680, 2687 (1990) (Scalia, J., concurring). One commentator, however, has made a compelling argument that Jeffreys' arbitrary sentencing decision in another case led to the adoption of the provision. Granucci, *supra* note 100, at 855-60; see also *Harmelin*, 111 S. Ct. at 2688 (Scalia, J., concurring).

102. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989) (discussing Eighth Amendment history). One Congressman, however, expressed concern over the imprecise terms of the amendment.

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?

Weems v. United States, 217 U.S. 349, 369 (1910) (quoting Congressman Livermore).

103. See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (holding that life imprisonment without parole after seventh nonviolent felony violates Eighth Amendment); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding mandatory life sentence after third felony conviction); *Coker v. Georgia*, 433 U.S. 584 (1977) (concluding that death penalty for rape is forbidden by Eighth Amendment). But see *Austin v. United States*, 113 S. Ct. 2801 (1993) (applying the Eighth Amendment to civil asset forfeiture proceedings).

104. See *Solem*, 463 U.S. at 290-95 (outlining proportionality analysis under the

Clause.¹⁰⁵ Whether by the sovereign, Congress, or a prosecutor, a safeguard against government abuse of citizens is needed.¹⁰⁶ If the Excessive Fines Clause is applied to civil forfeitures, the rationale should be "that as a modicum of fairness, the principle of proportionality should be applied" to any punishment.¹⁰⁷

None of the provisions of the Eighth Amendment, however, were applied to civil proceedings until *Austin*.¹⁰⁸ Until that point, courts occasionally applied the Double Jeopardy Clause of the Fifth Amendment, which protects "humane interests" by proscribing multiple punishments, to civil penalties in limited circumstances.¹⁰⁹ In *Austin*, the Court finally recognized that a

Cruel and Unusual Punishments Clause). The basic tenant of Cruel and Unusual Punishment analysis is that the punishment must not be "grossly disproportionate" to the gravity of the crime. *Coker*, 433 U.S. at 592.

105. "[B]ail shall not be excessive in those cases where it is proper to grant bail." *Carlson v. Landon*, 342 U.S. 524, 545 (1952). As the Supreme Court stated in *Browning-Ferris*, "Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power . . ." *Browning-Ferris*, 492 U.S. at 266; see also *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (acknowledging that bail, fines, and punishment are subject to "parallel limitations").

106. "We think it clear, from . . . the language of the Excessive Fines Clause . . . that the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Browning-Ferris*, 492 U.S. at 275.

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

108. See *Browning-Ferris*, 492 U.S. at 266 (indicating that the Eighth Amendment focuses on the prosecutorial power of the government, not "the extent or purposes of civil damages"); see also *United States v. Zucker*, 161 U.S. 475, 481 (1896) (holding that Sixth Amendment Confrontation Clause does not apply to civil forfeiture). But see *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 500 (1993) (applying Fifth Amendment and Fourteenth Amendment Due Process Clauses to property seizure for purpose of forfeiture); *United States v. Halper*, 490 U.S. 435, 446-50 (1989) (applying the Fifth Amendment Double Jeopardy Clause to a nonremedial civil penalty); *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971) (applying the Fifth Amendment Self-Incrimination Clause to a civil forfeiture); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696-702 (1965) (applying Fourth Amendment Exclusionary Rule to state civil forfeiture proceeding); *Boyd v. United States*, 116 U.S. 616, 633-35 (1886) (applying the Fifth Amendment Self-Incrimination Clause to a civil forfeiture where claimant faced possibility of future criminal sanctions).

109. *Halper*, 490 U.S. at 446-50. As with the Eighth Amendment, the Double Jeopardy Clause is concerned with "sanctions imposed on the individual by the machinery of the state." *Id.* at 447.

penalty should be considered a punishment, not based on its characterization as civil or criminal, but when it serves "the twin aims of retribution and deterrence."¹¹⁰

Eighth Amendment in the Present

The concept of proportionality in punishment under the Cruel and Unusual Punishments Clause developed predominantly in the examination of the death penalty and life prison sentences.¹¹¹ Prior to *Austin*, the Supreme Court had addressed civil penalties only in an indirect fashion.¹¹² Nevertheless, the principle of proportionality, with some modification, can be adapted to analyze civil forfeiture.

The Eighth Amendment limits on governmental power to punish are satisfied as long as a punishment is not "grossly disproportionate" to the offense charged.¹¹³ At the most general level, legislatures should receive substantial deference in their power to determine appropriate punishments for crimes, and trial courts should be allowed to exercise discretion in sentencing convicted criminals.¹¹⁴ More specifically, the sentencing court must weigh the gravity of the offense against the harshness of the penalty.¹¹⁵ The court also must compare the potential penalty with those imposed on other criminals in the same jurisdiction, as well as with penalties imposed for the same crime in other jurisdictions.¹¹⁶

110. *Id.* at 448. Prior to the decision in *Austin*, some commentators had suggested that the Excessive Fines Clause should be considered the "civil arm" of the Eighth Amendment, or that forfeitures should be considered "quasi-criminal" for Eighth Amendment purposes. See generally Stone, *supra* note 69, at 446-50.

111. See *supra* note 103 (citing criminal cases applying Eighth Amendment doctrine); cf. *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., dissenting) (applying *Solem* proportionality analysis to a civil jury award of punitive damages).

112. See *Browning-Ferris*, 492 U.S. at 275 n.21 ("[O]ur opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise Eighth Amendment concerns . . .").

113. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

114. *Solem v. Helm*, 463 U.S. 277, 290 (1983). But see U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 1 (1994) (setting forth detailed guidelines for sentencing offenders convicted of federal crimes). The Guidelines, however, do not apply to civil actions.

115. *Solem*, 463 U.S. at 290-91.

116. *Id.* at 291-92.

The nature of civil forfeiture actions makes the punishments more fact-specific than criminal penalties that are based on statutes or sentencing guidelines. Nevertheless, courts can compare different forfeitures in cases with similar factual settings.

In a civil forfeiture, to establish probable cause to forfeit property, the government must prove some connection between the property and the illegal activity.¹¹⁷ The government's desire to seize as much property as possible, however, should not defeat the necessity of somehow linking culpability and punishment. Eighth Amendment analysis of civil forfeitures should reflect the general policy that a penalty should not be grossly disproportionate to the crime. When the property is used substantially for criminal acts or is essential to the criminal enterprise, the forfeiture will not be disproportionate to the criminal culpability.

THE EIGHTH AMENDMENT AND FORFEITURE

Substantial Connection Test

Following the decision in *Austin*, lower courts have begun to consider how to analyze forfeitures under the Eighth Amendment.¹¹⁸ One standard that has emerged is similar to the "substantial connection" test. When the defendant property is closely related to the illegal activity, there will be no excessiveness problem because the culpability of the property will be high, thereby allowing forfeiture.

One court within the Seventh Circuit examined the § 881(a)(7) forfeiture of property on which the owner admitted to growing marijuana.¹¹⁹ The court held that the forfeiture did not violate the Eighth Amendment because the owner "had established a

117. See *supra* notes 85-98 and accompanying text.

118. See, e.g., *United States v. Borromeo*, 1 F.3d 219, 221 (4th Cir. 1993) (remanding for comparison of the value of the property and the amount necessary for remedial purposes); *United States v. 9638 Chicago Heights*, 831 F. Supp. 736, 737 (E.D. Mo. 1993) (adopting Justice Scalia's suggested test in *Austin*), *rev'd*, No. 93-3350, 1994 WL 259428 (8th Cir. June 15, 1994) (indicating a need for broader Eighth Amendment analysis); *United States v. 2828 N. 54th St.*, 829 F. Supp. 1071, 1073 (E.D. Wis. 1993) (finding no Eighth Amendment violation because of "substantial drug manufacturing operation" located at the forfeited property).

119. *2828 N. 54th St.*, 829 F. Supp. at 1073.

substantial drug manufacturing operation at that property."¹²⁰ This forfeiture served punitive as well as remedial goals, but the punitive aspect was not grossly disproportionate to the level of criminal activity. Because the property was an integral part of the illegal activity, the government's interest in preventing future illegal activity at the site outweighed the claimant's interest in retaining the property.

The Eighth Circuit Court of Appeals, where *Austin* was remanded,¹²¹ has discussed the need to examine more than the nexus between the property and the illegal activity.¹²² In *United States v. 9638 Chicago Heights*,¹²³ the District Court for the Eastern District of Missouri adopted Justice Scalia's proposal that "[t]he relevant inquiry for an excessive forfeiture under 21 U.S.C. § 881 is the relationship of the property to the offense."¹²⁴ The § 881(a)(7) forfeiture of the property, which was valued at \$37,210, and on which the owner had stored and sold cocaine and crack cocaine, was not excessive under this test.¹²⁵ Following Justice Scalia's test, the court used essentially the same analysis in determining probable cause and conducting its Eighth Amendment analysis.¹²⁶ This analysis retains the pre-*Austin* system of controlling forfeitures by means of the probable cause determination.

The Eighth Circuit Court of Appeals reversed the lower court decision on Due Process grounds.¹²⁷ In dicta, however, the court clearly stated its view of Justice Scalia's proposed test: "the test applied by the district court is inadequate because it conflates the Eighth Amendment excessive fine analysis with the section 881(a)(7) nexus requirement."¹²⁸ The court indicat-

120. *Id.*

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

122. See *9638 Chicago Heights*, 1994 WL 259428, at *2-3 (8th Cir. June 15, 1994).

123. 831 F. Supp. 736, *rev'd*, No. 93-3350, 1994 WL 259428 (8th Cir. June 15, 1994).

124. *Id.* at 737 (citing *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring)).

125. *Id.*

126. *Id.*

127. *9638 Chicago Heights*, 1994 WL 259428, at *2.

128. *Id.* at *3; see also *United States v. Rural Route 1, Box 224*, 14 F.3d 864, 873 (3d Cir. 1994) (noting that "the district court should avoid conflating the Eighth Amendment inquiry with § 881(a)(7)'s nexus requirement, although the two share

ed that other factors were essential to Eighth Amendment analysis, including the value of the property, the extent of the illegal activity associated with the property, the residential nature of the property, and "the effect of forfeiture on innocent occupants of the residence, including children" ¹²⁹

In 9638 *Chicago Heights*, the Court of Appeals made the crucial observation that Eighth Amendment analysis must be separate from the probable cause determination. Additionally, the court highlighted the importance of the amount of criminal activity associated with the property. The analytic framework proposed in this Note combines this "extent" idea with the necessity of the property's "essentiality" to the criminal activity. ¹³⁰

The Fourth Circuit Court of Appeals also has addressed the need for proportionality analysis in civil forfeitures. ¹³¹ The court asserted that "[i]n the wake of *Austin*, an inquiry into the proportionality between the value of the instrumentality sought to be forfeited and the amount needed to effectuate the legitimate remedial purposes of the forfeiture would seem to be in order." ¹³² In *Austin*, however, the Supreme Court did not hold that forfeitures could serve *only* remedial purposes. ¹³³ On the contrary, forfeitures may punish the owner of property, but not disproportionately to the gravity of the crime. The Fourth Circuit mistakenly based its analysis on a comparison of property value and remedial interests, rather than considering the legitimate levels of punishment allowed under the Eighth Amendment.

some characteristics").

129. 9638 *Chicago Heights*, 1994 WL 259428, at *3.

130. See *infra* notes 169-82 and accompanying text (describing proposed excessiveness test).

131. *United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993).

132. *Id.* at 221. The court also suggested that, for proceeds, "a close enough connection between the property sought to be forfeited and the criminal activity might support a forfeiture regardless of proportionality." *Id.* But see *supra* note 81 (arguing that proceeds by definition should always be forfeitable as a remedial measure).

133. *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (indicating that many forfeitures will constitute punishment, but that such penalties are allowed as long as they are not excessive); see also *United States v. Cullen*, 979 F.2d 992, 995 (4th Cir. 1992) (noting that "to limit the forfeitability of assets to the costs incurred by the government in connection with a criminal case would undercut Congress' purposes in enacting the forfeiture provisions").

These results from cases decided soon after *Austin* suggest that, at the least, courts are becoming more conscious of the amounts of property forfeited. In some courts, however, the distinction between the probable cause standard and the Eighth Amendment standard is minimal.¹³⁴ Although a substantial connection to illegal activity is an important factor in Eighth Amendment forfeiture analysis, this Note proposes a further step in determining whether the seized property was essential to the success of the crime.¹³⁵ This extra step ensures that only highly culpable property will be forfeited, thereby avoiding Eighth Amendment violations.

Substantiality-Proportionality Test

Another possible Eighth Amendment standard, developed prior to *Austin*, is the "substantiality-proportionality" test employed in the Second Circuit. This test was actually developed to examine whether a civil forfeiture violated the Cruel and Unusual Punishments Clause, but it is applicable to the Eighth Amendment as a whole.¹³⁶

In *United States v. 38 Whalers Cove Drive*,¹³⁷ the Second Circuit Court of Appeals set out a multistep test for determining Eighth Amendment violations.¹³⁸ A forfeiture was presumed not to be punitive when the property had "been used substantially to accomplish illegal purposes, so that the property itself can be said to be 'culpable' or an instrumentality of crime."¹³⁹ The nonpunitive presumption also applied when the forfeiture was not overwhelmingly disproportionate to the value of the con-

134. See *United States v. 9638 Chicago Heights*, 831 F. Supp. 736 (E.D. Mo. 1993) (holding that use of the property for storage and sale of drugs provided a sufficient connection between the property and the drug offense to justify forfeiture), *rev'd*, No. 93-3350, 1994 WL 259428 (8th Cir. June 15, 1994); *United States v. 2828 N. 54th St.*, 829 F. Supp. 1071 (E.D. Wis. 1993) (stating that existence of drug manufacturing operation on the forfeited property supported findings of probable cause and constitutionality of the forfeiture).

135. See *infra* notes 169-82 and accompanying text (describing proposed excessiveness test).

136. See *supra* note 104 and accompanying text.

137. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

138. *Id.* at 36-39.

139. *Id.* at 36.

trolled substances.¹⁴⁰ The determination of proportionality was based on three factors: "(1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions."¹⁴¹ If the property was not "used substantially to accomplish illegal purposes" and the forfeiture was disproportionate, then a rebuttable presumption arose that the forfeiture was punitive.¹⁴² The government then had the burden of showing how the forfeiture served remedial goals.¹⁴³ Under this analysis, the court found that the forfeiture of a \$68,000 interest in a condominium, for the sale of \$250 worth of cocaine on the premises, was punitive, but not disproportionate.¹⁴⁴

In a supplemental opinion issued after *Austin*, the Northern District of New York, within the Second Circuit, refused to apply Justice Scalia's proposed test to the case of *United States v. 835 Seventh Street*.¹⁴⁵ The court asserted that "[t]he majority opinion in *Austin* clearly and unequivocally stated that it was for the circuit courts to fashion appropriate tests to determine whether a forfeiture is constitutionally excessive and in this Circuit *Whalers Cove* controls."¹⁴⁶

140. *Id.*

141. *Id.* at 38. The court in *Whalers Cove* held that the forfeiture of a \$68,000 condominium after the sale of \$250 of cocaine on the premises was not disproportionate. *Id.* at 39.

142. *Id.* at 36.

143. The costs of investigation certainly serve a remedial goal. See *United States v. 835 Seventh St.*, 820 F. Supp. 688, 692 (N.D.N.Y.) (limiting "legitimate civil goals" to investigative and enforcement costs), *reconsideration granted on other grounds*, 832 F. Supp. 43 (N.D.N.Y. 1993); see also *Whalers Cove*, 954 F.2d at 37 (noting that "[w]hile we are extremely sympathetic to the need to address our nation's serious narcotics problems, we do not believe that a disproportionately large forfeiture can be reasonably justified . . . by placing full responsibility for the 'war on drugs' on the shoulders of every individual claimant"). Other, less tangible goals are difficult to quantify. "These include impeding the success of the criminal enterprise by eliminating its resources and instrumentalities, [and] diminishing the efficiency and profitability of the business by increasing the costs and risks associated with it" *United States v. \$2500*, 689 F.2d 10, 13 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984).

144. *Whalers Cove*, 954 F.2d at 39.

145. 832 F. Supp. 43 (N.D.N.Y. 1993).

146. *Id.* at 48 (citation omitted).

In the original *835 Seventh Street*¹⁴⁷ opinion written prior to *Austin*, the court had used the "substantiality-proportionality" test set out in *Whalers Cove* to determine whether a house could be forfeited due to the sale of 6.82 ounces of marijuana and the discovery of six more ounces during a search of the premises.¹⁴⁸ The court first ruled that the substantial purpose of the house was residential and any illegal use was incidental and did not "consume or override the primary function."¹⁴⁹ Next, the court examined the three proportionality factors and found the forfeiture to be disproportionate to the value of the controlled substances.¹⁵⁰ Although it recognized that "[t]he serious threat to individuals and society from the attendant violence of the drug trade is beyond peradventure,"¹⁵¹ the court, by comparing the possible fines under criminal law with the punitive portion of the forfeiture, found that the forfeiture far outweighed comparable penalties.¹⁵² To determine the fines, the court examined both sentencing guidelines and proportionate amounts of statutory maximums.¹⁵³ After the government's actual investigative and enforcement costs were determined to be minimal,¹⁵⁴ the claimant was granted summary judgment because the putative forfeiture would have violated the Eighth Amendment.

The substantiality-proportionality test provides a thorough examination of the competing interests involved in civil forfei-

147. 820 F. Supp. 688.

148. *Id.* at 689-94.

149. *Id.* at 691.

150. The house had a value of \$69,778.01, the marijuana seized had a value of \$1125 (according to the government), and the marijuana sold had a value of \$45 (according to the claimant). *Id.* at 689-92; *cf.* *United States v. \$45,140*, 839 F. Supp. 556, 558 (N.D. Ill. 1993) (noting that "the mere ratio of the value of the subject property to the value of the actual transaction is, by itself, insufficient" in determining whether a particular forfeiture violates the Eighth Amendment).

151. *835 Seventh St.*, 820 F. Supp. at 692-93.

152. *Id.* at 694.

153. *Id.* at 693-94. For example, the marijuana weighed .35% of the maximum statutory amount, so the court used .35% of the maximum statutory fine of \$250,000 (\$875). *Id.* at 694. *But see* *United States v. \$145,139*, 803 F. Supp. 592, 600 (E.D.N.Y. 1992) (using statutory maximums only), *aff'd*, 18 F.3d 73 (2d Cir. 1994); *United States v. 429 S. Main St.*, 843 F. Supp. 337, 341-42 (S.D. Ohio 1993) (same). Had the court used the statutory maximum, the claimant in *835 Seventh Street* would have lost because the forfeiture was less than the statutory maximum.

154. The court acknowledged \$3600 in costs. *835 Seventh St.*, 820 F. Supp. at 692.

ture. The governmental desire to remove property used for illegal purposes is tempered by the necessity of protecting individuals from penalties that far outweigh their criminal culpability. The government is given numerous opportunities to legitimate the forfeiture, but each step is limited by a fair consideration of Eighth Amendment protections.

Nevertheless, the language used in *Whalers Cove* conflicts with *Austin*. In *Austin*, the Supreme Court clearly stated that any nonremedial penalty must be considered punishment.¹⁵⁵ The "substantiality-proportionality" test, however, declares that a forfeiture is presumed not to be punitive when the property "has been used substantially to accomplish illegal purposes" or when the forfeiture is not grossly disproportionate to the value of the controlled substances.¹⁵⁶ Under *Austin*, each of these nonremedial forfeitures would be considered punishment subject to the boundaries of the Eighth Amendment. The proportionality factors spelled out in *Whalers Cove* illustrate the importance of careful scrutiny of civil forfeitures, but the threshold test of deciding the punitive nature of a specific forfeiture does not comport with the holding in *Austin*.¹⁵⁷

Criminal Forfeiture

There also has been discussion of excessive forfeitures in the context of the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁵⁸ Under RICO, a defendant may lose his interest in property or in a business operation upon conviction. The statute mandates that once the judge or jury finds a connection between the criminal activity and the property, the property or business interest is forfeited.¹⁵⁹ Because forfeiture under RICO

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

156. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 36 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1993).

157. *See United States v. Rural Route 1, Box 224*, 14 F.3d 864, 874 (3d Cir. 1994) (suggesting that "the analysis of the court of appeals in *38 Whalers Cove Drive* is questionable" after *Austin*, but that "the factors articulated . . . may offer some help in analyzing the excessiveness issue").

158. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992).

159. 18 U.S.C. § 1963(a).

is an in personam criminal action,¹⁶⁰ the Eighth Amendment prohibition on disproportionate punishments applies. *United States v. Busher*,¹⁶¹ a Ninth Circuit case, provides an example of excessiveness analysis in the RICO forfeiture context.

In *Busher*, the defendant owned a ninety-two percent interest in a construction company.¹⁶² He used a fictitious subcontracting company as a means of receiving extra payments from the Department of Defense¹⁶³ and was convicted of numerous offenses, including RICO violations.¹⁶⁴ As a result of the conviction, he forfeited his ownership interest in the company in addition to receiving a prison sentence.¹⁶⁵

The court in *Busher* asserted that when the defendant establishes that the forfeiture may be excessive,¹⁶⁶ the court should compare the gravity of the offense to the amount forfeited to insure that it "is not so grossly disproportionate . . . as to violate the eighth amendment."¹⁶⁷ The court set out two areas to be addressed in determining the gravity of the criminal offense: the monetary and physical harm caused by the crime and the defendant's culpability, reflected by the degree to which the forfeited property or business interest was "infected by criminal conduct."¹⁶⁸

160. The RICO forfeiture provision is 18 U.S.C. § 1963.

161. 817 F.2d 1409 (9th Cir. 1987); see also *Alexander v. United States*, 113 S. Ct. 2766 (1993). *Alexander*, decided on the same day as *Austin*, involved a RICO forfeiture of the inventory of an adult book store after a jury convicted the owner for possession of four magazines and three videotapes that were obscene. *Id.* at 2769-70. The Supreme Court rejected the store owner's First Amendment argument that the nonobscene materials were protected from forfeiture, but remanded the case to determine whether the forfeiture was excessive under the Eighth Amendment. *Id.* at 2774-76.

162. *Busher*, 817 F.2d at 1410.

163. *Id.*

164. *Id.* at 1410-11. The additional charges included submitting false statements to the government, presenting false claims to the government, mail fraud, tax evasion, and submitting false income tax returns. *Id.* at 1411.

165. *Id.* at 1411.

166. *Busher's* company performed 14 defense contracts worth approximately \$27 million, only three of which, worth \$335,000, were the subject of his convictions. *Id.* at 1414. The court's "review of the relevant Supreme Court cases, particularly *Solem*, [convinced it] that *Busher* [had] raised legitimate concerns as to the constitutionality of the forfeiture" of the 92% corporate interest. *Id.*

167. *Id.* at 1415.

168. *Id.* "[I]f illegal activity accounts for all or almost all of an enterprise's activity,

In *United States v. Sarbello*,¹⁶⁹ however, the Third Circuit Court of Appeals recognized a presumption that forfeiture of 100% of the defendant's interest was proper under RICO.¹⁷⁰ The defendant could rebut the presumption by making a prima facie showing of disproportionality.¹⁷¹ Such a showing could include numerous factors, including the seriousness of the offense, the severity of the criminal sanction, the personal benefit gained by the defendant, the defendant's motive and culpability, and the extent to which the defendant's property was tainted by criminal conduct.¹⁷²

The proportionality ideas employed in RICO cases can easily be carried over to the civil forfeiture context. In a § 881 forfeiture, drug-related offenses will be considered very harmful because of the severe collateral consequences and damage to society. Criminal culpability, when considered in conjunction with Justice Scalia's comments,¹⁷³ also provides an excellent tool for analyzing excessiveness.

The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income.¹⁷⁴

In addition, the degree to which the business has been "tainted" by criminal conduct can be analogized to the civil forfeiture ideas that the property must be substantially connected and essential to the illegal activity.

When considering the forfeiture of facilitating property, the proportionality balance should focus on the amount of time the property was used in furtherance of illegal purposes and on the

or an interest in an enterprise was acquired entirely or almost entirely with ill-gotten funds, it would not normally violate the eighth amendment to order forfeiture of all of defendant's interest in that enterprise." *Id.* at 1416.

169. 985 F.2d 716 (3d Cir. 1993).

170. *Id.* at 724.

171. *Id.*

172. *Id.*

173. *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring).

174. *United States v. Busher*, 817 F.2d 1409, 1415-16 (9th Cir. 1987).

extent to which the property was "central" to the criminal activity.¹⁷⁵ Unlike RICO, which allows forfeiture of business interests, § 881 attacks specific property used in an illegal capacity. Therefore, a slight change in the RICO analysis is necessary to place the focus on the culpability of individual assets rather than the overall "taint" on the business.

A PROPOSED FRAMEWORK FOR EIGHTH AMENDMENT ANALYSIS

The Supreme Court in *Austin* correctly decided that civil forfeitures under §§ 881(a)(4) and (a)(7) were punishment imposed by the government for illegal conduct.¹⁷⁶ Many forfeitures under these sections promote interests that extend beyond remediation and act as means of retribution and deterrence. Because the forfeiture system operates so effectively, it opens the way for possible abuse by prosecutors and law enforcement officials.¹⁷⁷ Therefore, the Eighth Amendment, through either the Excessive Fines Clause or the Cruel and Unusual Punishments Clause, can serve its historic duty of controlling extreme conduct by the government.¹⁷⁸ A system that requires a close connection between the property and the criminal conduct will protect owners from having all of their assets swept away be-

175. It is unclear whether a RICO forfeiture is a fine or punishment for Eighth Amendment purposes. The court in *Sarbello* assumed "that the mode of proportionality analysis for determining whether a fine is 'excessive' would be similar or virtually identical to that employed to determine whether a punishment was 'cruel or unusual.'" *United States v. Sarbello*, 985 F.2d 716 (3d Cir. 1993); see also *supra* note 106 and accompanying text.

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

177. See Maveal, *supra* note 95, at 49.

In August, 1990, the Attorney General warned United States Attorneys that the Department [of Justice] was far short of its projection of \$470 million in forfeiture deposits with only three months remaining in fiscal year 1990:

We must significantly increase production to reach our budget target. . . . Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.

Id. at 49, n.70 (quoting Executive Office for U.S. Attorneys, U.S. Dep't of Justice, 38 U.S. ATTORNEY'S BULLETIN 180 (1990)).

178. See *supra* notes 99-107 and accompanying text.

cause of minor illegal conduct. Under such a system, forfeiture of the proceeds of criminal activity will serve remedial goals only¹⁷⁹ and therefore will fall outside of Eighth Amendment scrutiny. Facilitating property, however, will be forfeited only under certain circumstances.

An effective Eighth Amendment analysis can retain the current procedure that forces the government to establish probable cause that facilitating property was connected to criminal activity. This standard should be based on two inquiries: (1) whether the property was used substantially for illegal purposes, and (2) whether it was essential to the illegal activity. The first portion of the inquiry maintains the "substantial connection" test used prior to *Austin*,¹⁸⁰ while the second portion rejects the "in any manner" test.¹⁸¹ Because the forfeiture of property has such a great impact on the owner, a stiffer standard than "in any manner" is required to insure that property tenuously connected to criminal activity is not forfeited. The burden of proof of probable cause would remain "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion."¹⁸² The claimant could then attempt to rebut the probable cause finding or establish an innocent owner defense. If the claimant is unsuccessful, probable cause for forfeiture will be found.

The claimant then can pursue an Eighth Amendment defense. Under this defense, a large forfeiture that barely meets the probable cause standard will have difficulty satisfying the constitutional protections. A court should consider the strength of the probable cause, based on the extent to which the property was used substantially for illegal purposes and was essential to the criminal activity. This determination reflects Justice Scalia's emphasis on the property's connection to the illegal acts.¹⁸³

To help determine the strength of the claimant's defense, the

179. See *United States v. \$288,930*, 838 F. Supp. 367, 370 (N.D. Ill. 1993).

180. See *supra* notes 88-90 and accompanying text.

181. See *supra* notes 91-94 and accompanying text.

182. *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980).

183. See *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring).

three proportionality factors presented in the "substantiality-proportionality" test also would be examined: "(1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions."¹⁸⁴ If the amount of the forfeiture were grossly disproportionate to the criminal culpability of the property, then the government could retain only the portion of the forfeiture that was not excessive. In order to make the most informed assessment of excessiveness, the court should look to both statutory maximums¹⁸⁵ and percentage amounts of the maximums.¹⁸⁶

The amount of the forfeiture could exceed the purely remedial amount, as long as it was not grossly disproportionate. The substantiality of illegal use and the essentiality of the property, *not* its value, would be the crucial assessment. Nevertheless, for crimes that are not inherently grave, such as mere possession of small amounts of drugs, the proportionality of a large forfeiture might be questionable.

This proposed standard would force the government to show that the property was a material part of serious criminal activity and not just incidentally involved. Unlike the "substantiality-proportionality" test, however, this proposed forfeiture analysis would apply to all non-remedial forfeitures.¹⁸⁷

A more exacting standard should not hamper government efforts to include most property, but it should allow a closer examination of situations, such as *Austin*, involving facilitating property. The forfeiture claimant would still maintain the burden of showing that the property was not used substantially to accomplish an illegal purpose, was not essential to the criminal activity, or was used without the owner's "knowledge, consent or

184. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1993); *see also supra* text accompanying note 135.

185. *See United States v. \$145,139*, 803 F. Supp. 592, 600 (E.D.N.Y. 1992); (using statutory maximums to determine fines), *aff'd*, 18 F.3d 73 (2d Cir. 1994); *United States v. 429 S. Main St.*, 843 F. Supp. 337, 341-42 (S.D. Ohio 1993) (same).

186. *See United States v. 835 Seventh St.*, 820 F. Supp. 688, 693-94 (N.D.N.Y.) (determining fines based on sentencing guidelines and proportionate amounts of statutory maximums), *reconsideration granted on other grounds*, 832 F. Supp. 43 (N.D.N.Y. 1993).

187. *See supra* text accompanying notes 148-150.

willful blindness."¹⁸⁸

Proceeds of criminal activity would be considered remedial and, as such, not punishment subject to Eighth Amendment scrutiny. Facilitating property would be forfeitable based on the number of times it was used and the nature of the use. There will still be discretion left to judges in determining whether a connection is significant,¹⁸⁹ and evidence of the extent and frequency of the property's involvement will allow rational decision-making.¹⁹⁰ Because there must be a substantial use or a specific finding that the forfeiture is not disproportionate, the demands of the Eighth Amendment will be satisfied by the proposed framework.

CONCLUSION

The Supreme Court in *Austin* sent out an important reminder that law enforcement efforts at fighting drug activity cannot be used as an excuse to compromise individual rights. As courts implement *Austin*, regardless of the Eighth Amendment test they choose to employ, claimants such as Richard Lyle Austin will at least have their arguments heard.

The recognition that in rem forfeiture proceedings under §§ 881(a)(4) and (a)(7) inflict punishment on property owners was an important step forward in addressing forfeiture abuses. Employing the Eighth Amendment test proposed in this Note should make prosecutors take pause before attempting to swallow up all of a defendant's assets. Property that is not substantially connected to the illegal activity and essential to such activity should not be forfeited. Under such a system, defendants

188. 21 U.S.C. § 881(a)(4)(C), (a)(7) (1988 & Supp. IV 1992) (setting forth the "innocent owner" defense).

189. Cf. *Solem v. Helm*, 463 U.S. 277, 290 (1983) (remarking that "[r]eviewing courts . . . should grant substantial deference . . . to the discretion that trial courts possess in sentencing convicted criminals").

190. The Supreme Court has not discussed whether a judge or jury would decide when a forfeiture violated the Eighth Amendment. The Third Circuit Court of Appeals has suggested that, in light of the uncertainty surrounding forfeiture law, a court "might, in the interest of judicial efficiency, consider submitting the question [of excessiveness] to a jury on a special interrogatory and then alternately treating the answer as nonbinding and decide the excessiveness question itself." *United States v. Rural Route 1, Box 224*, 14 F.3d 864, 876 (3d Cir. 1994).

such as *Richard Austin* have a fighting chance of avoiding forfeiture that current law does not provide. As prosecutorial discretion is used with more care, forfeitures that border on excessiveness will be pursued less frequently. On the whole, however, the decision in *Austin* is likely to have little effect.

Prosecutors may bring fewer marginal cases that might threaten the Eighth Amendment rights of a claimant. The vast majority of forfeiture actions, however, will continue to succeed because proof of a substantial and essential relationship between the property and the crime will satisfy the probable cause standard and significantly address Eighth Amendment concerns of arbitrary punishment as well. Forfeitures still will be harsh in some instances, but harsh penalties are not necessarily excessive.

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