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EIGHTH AMENDMENT—THE EXCESSIVE FINES CLAUSE

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

I. INTRODUCTION

In *Austin v. United States*,¹ the United States Supreme Court unanimously held that civil in rem forfeitures must comply with the Excessive Fines Clause of the Eighth Amendment.² In so doing, the Court reversed a substantial body of precedent, including the rulings of several circuit courts of appeal and its own dicta. This Note argues that this result is in accord with other recent Court decisions applying Bill of Rights protections to civil contexts, and that the decision extends an important protection to defendants who face the power of the government in civil rather than criminal court. However, the Court was sharply divided on the question of whether a completely innocent owner of guilty property could be deprived of it constitutionally. Since this issue was not directly raised in *Austin*, and the disposition did not rest on it, the actual innocence issue clouds what otherwise might have been a clear affirmation of the right of civil defendants to Eighth Amendment protection when they are sued by the government.

II. BACKGROUND

Civil in rem forfeiture provides distinct advantages over traditional criminal proceedings to law enforcement officials seeking to combat drug dealing. In rem forfeiture is based on the fiction that the property sought is in some way guilty; a forfeiture proceeding is therefore directed against the property, not its owner.³ The required burden of proof is much easier to meet when the government acts as plaintiff rather than prosecutor. The initial burden on the government in an action in rem is merely to show that probable cause existed to believe that property was used or intended for illicit

¹ 113 S. Ct. 2801 (1993).

² *Id.* at 2803.

³ See *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).

purposes.⁴ If the government makes this showing, the burden shifts to the property owner to provide evidence that the property in question is not subject to forfeiture.⁵ In addition to procedural incentives, civil forfeiture actions provide tangible rewards to the government. Unlike incarceration, for instance, which is a drain on the resources of the state, forfeiture produces revenue for the government, since the government acquires title to the forfeited property.⁶

As the war on drugs has escalated, the federal government has declared asset forfeiture "one of the most powerful law enforcement weapons" available.⁷ States, with the strong encouragement of the federal government, have strengthened their own forfeiture laws, and receive a share of assets seized under federal law.⁸ However, civil forfeiture is not a new invention. Rather, it arises out of pre-revolutionary English Common Law.⁹

Common law recognized the deodand, by which the value of an inanimate object that caused an accidental death was forfeited to the crown.¹⁰ Although it originated as a form of religious expiation for causing the death of another, the deodand continued after it lost religious significance, justified as a form of punishment for negligence.¹¹ Similarly, conviction for treason at common law was grounds for forfeiture of estate.¹² The gravity of the felon's offense was held to justify stripping him of property rights.¹³ Statutory forfeitures arose out of the combined legacy of deodands and forfeiture of estate.¹⁴ This type of forfeiture made ships operating in

⁴ See *United States v. 3639-2nd St.*, 869 F.2d 1093, 1095 (8th Cir. 1983).

⁵ *Id.*

⁶ 21 U.S.C. § 881(e) (1992) (attorney general may retain, sell, or distribute forfeited property).

⁷ OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 28 (Feb. 1991).

⁸ *Id.*

⁹ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974).

¹⁰ *Id.* at 680-81.

¹¹ The Crown was to apply the proceeds of the deodand to seeing that proper prayers were said for the dead person, or other charitable uses. *Id.* at 681 (citing *Exodus* 21:28; 1 WILLIAM BLACKSTONE, COMMENTARIES *300; 1 MATTHEW HALE, PLEAS OF THE CROWN 419, 423-24 (1st Am. ed. 1847); 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 473 (2d ed. 1909); *Law of Deodands* 34 LAW MAG. 188, 189 (1845); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 182 (1973)).

¹² *Id.* at 682 (citing 3 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 68-71 (3d ed. 1927); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1909)).

¹³ *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *299).

¹⁴ *Id.*

violation of customs laws and their cargoes forfeitable.¹⁵ Although deodands and forfeiture of estate never became part of American common law, the tradition of in rem forfeitures survived. Statutory forfeitures were among the earliest acts passed by the United States.¹⁶

The guilty property fiction has historically prevented property owners from arguing their own innocence as a defense to civil forfeiture.¹⁷ In *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹⁸ the United States Supreme Court reversed a district court decision that an owner was deprived of due process when his boat was forfeited due to a drug violation in which he was not involved.¹⁹ In holding that ignorance of illegal activity that occurs on one's property does not immunize the property from forfeiture, the Court cited a long line of decisions rejecting innocent ownership as a defense to forfeiture.²⁰ Among the cases cited were *The Palmyra*²¹ and *United States v. Brig Malek Adhel*.²² In both cases ships were held forfeitable for piracy, regardless of whether their owners were aware of how the ships were used.²³ The *Pearson Yacht* Court did not, however, completely ignore the culpability of the property owner. The Court concluded that subjecting even "innocent" owners to the threat of forfeiture served legitimate government ends by encouraging these owners to monitor the use of their property.²⁴ However, if the owner could prove that the property in question was, for instance, stolen from him, the Court said that "it would be difficult to reject the [innocent owner's] constitutional claim."²⁵ Recently, the Court has held that the due process rights of innocent owners must be protected in some civil forfeitures under 21 U.S.C. § 881(a)(7) by providing all owners with pre-seizure notice.²⁶

¹⁵ *Id.* at 683 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *261-62; C.J. Hendry Co. v. Moore, 318 U.S. 133, 137-38 (1943)).

¹⁶ *Id.* at 683 (citing Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47; Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176).

¹⁷ *Id.*

¹⁸ *Id.* at 663.

¹⁹ *Id.* 676-77.

²⁰ *Id.* at 683-86.

²¹ 25 U.S. (12 Wheat.) 1 (1827).

²² 43 U.S. (2 How.) 210 (1844).

²³ *Palmyra*, 25 U.S. (12 Wheat.) at 14; *Brig Malek Adhel*, 43 U.S. (2 How.) at 237.

²⁴ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-88 (1974).

²⁵ *Id.* at 689.

²⁶ See *United States v. James Good Real Property*, No. 92-1180, 1993 U.S. LEXIS 7941, at *23-*24 (Dec. 13, 1993) (property owner who pled guilty to drug crime may have Fifth Amendment right to pre-seizure hearing; courts must weigh government necessity of immediate control of property against owner's interest in maintaining effective ownership).

Although the Eighth Amendment provides a substantive check on the sovereign power to interfere with individual liberty by prohibiting cruel and unusual punishments, the Excessive Fines Clause²⁷ prohibition has received very little attention either from the framers of the Constitution or from the Supreme Court. The first Supreme Court decision interpreting the Excessive Fines Clause involved a 1989 punitive damages case.²⁸ In *Browning-Ferris*, a garbage collection company held liable under state law for unfair trade practices argued that the six million dollar punitive damage award against it was an excessive fine, since the jury had awarded only \$51,146 in compensatory damages.²⁹ The Court denied the Eighth Amendment claim and held that interpretation of the amendment should be guided by the meaning of the amendment at the time it was adopted.³⁰ That historical meaning derived directly from the Court's interpretation of the English Bill of Rights of 1689, upon which the Eighth Amendment is patterned.³¹ The Court decided that, since the time of its adoption, the purpose of the amendment has been to limit the abuse of the government's prosecutorial power.³² While *Browning-Ferris* did not ultimately invalidate a civil penalty under the Eighth Amendment, it firmly established that the Excessive Fines provision was intended to limit government's power to punish individuals, and was not limited by the procedural form of such a punishment.

Although it did not do so in *Browning-Ferris*, the Court has applied Bill of Rights protections to defendants who were taken into civil court by the government. The punishment sought by the government in a civil matter may be so punitive as to render that proceeding a criminal prosecution for the purposes of Fifth and Sixth Amendment analysis.³³ The Court makes this determination by examining whether the purpose of the sanction is remedial—to compensate the government—or deterrent and retributive—the hallmarks of criminal punishments.³⁴

²⁷ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

²⁸ See *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

²⁹ *Id.* at 262.

³⁰ *Id.* at 264 n.4.

³¹ *Id.* at 266.

³² *Id.* at 267.

³³ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (United States cannot strip a military deserter of citizenship without affording him the protections of the Fifth and Sixth Amendments, despite the fact that the law providing this sanction is not explicitly a criminal law).

³⁴ *Id.* at 168.

More importantly, however, the Court has decided that Bill of Rights protections can apply to defendants in purely civil proceedings when the government is the plaintiff.³⁵ In *United States v. Halper*,³⁶ the defendant was convicted of making sixty-five false Medicare claims for which he was given a criminal penalty of two years imprisonment and a \$5,000 fine.³⁷ The government then sued Halper under the civil False Claims Act, under which he was liable for more than \$130,000.³⁸ Halper contended that this was a second punishment for the same act, and therefore was prohibited by the Double Jeopardy Clause of the Fifth Amendment.³⁹ The Supreme Court agreed, holding that punishment was imposed by such a civil penalty, and that the defendant could not be punished twice.⁴⁰ Although it noted that status as a criminal proceeding determined whether the Sixth Amendment's procedural safeguards applied, the Court held that the civil-criminal distinction was not especially relevant for Double Jeopardy Clause analysis, but rather that the pertinent question was whether punishment was being imposed.⁴¹ Again, the Court decided the issue of what constituted punishment by looking at the goals of the sanction and by determining whether those goals met the punitive motives of deterrence and retribution.⁴²

Although the circuit courts unanimously refrained from invalidating any forfeiture on Eighth Amendment grounds, their approach to these cases revealed disagreement over the import of *Halper* and showed the potential for inconsistent results. In *United States v. 38 Whaler's Cove Drive*,⁴³ the Court of Appeals for the Second Circuit stated that *Halper* applied to civil forfeitures but decided that the issue of whether a forfeiture was punitive under *Halper* ought to be considered on a case-by-case basis.⁴⁴ In judging what constituted punishment, the Second Circuit held that the guilty property

³⁵ See *United States v. Halper*, 490 U.S. 435 (1989).

³⁶ *Id.*

³⁷ *Id.* at 437.

³⁸ *Id.* at 438.

³⁹ *Id.*

⁴⁰ *Id.* at 448-49.

⁴¹ *Id.* at 447-48. The Sixth Amendment applies specifically to criminal prosecutions ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" U.S. CONST. amend. VI), while the Double Jeopardy Clause ("[N]or shall any person be subject to the same offence to be twice put in jeopardy of life or limb" U.S. CONST. amend. V), like the Eighth Amendment ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII) do not have such a limitation.

⁴² *Id.* at 448.

⁴³ 954 F.2d 29 (2d Cir. 1992).

⁴⁴ *Id.* at 35-38.

fiction generally served as evidence that such seizures are remedial rather than punitive, since in rem forfeitures remove an instrumentality of the crime.⁴⁵ Ultimately, the *Whaler's Cove* court decided that the forfeiture of a \$145,000 condominium where only \$250 of cocaine was sold was not sufficiently punitive to violate the Eighth Amendment, since the size of the forfeiture was not grossly different from fines imposed in other jurisdictions.⁴⁶

Although it considered similar factors in *United States v. 40 Moon Hill Road*,⁴⁷ the First Circuit reached the opposite conclusion on the applicability of *Halper*.⁴⁸ Instead of adopting a case-by-case approach, the court looked to the federal statute authorizing forfeiture of drug offenders' property and decided that, since the statute served primarily remedial goals, its forfeiture provisions were not punitive, and therefore Bill of Rights protections were not implicated.⁴⁹

In a case decided immediately before *Halper*, the Fourth Circuit also denied Eighth Amendment protection to a civil forfeiture defendant, although it used the pre-*Halper* standard by determining that civil forfeiture was not so punitive as to become a criminal proceeding.⁵⁰ The Third Circuit followed the Fourth Circuit's logic explicitly, and reached the same result in a case decided almost a year after *Halper*.⁵¹

In contrast, the approach used by the Ninth Circuit did not address the question of whether a particular sanction was criminal or civil.⁵² That court held that the Eighth Amendment did not require a proportionality review comparing the value of the forfeited property to the gravity of the offense charged.⁵³ Instead, the court held that since the innocence of the owner is not a defense to in rem forfeiture, it is not necessary, as it is in a criminal case, to weigh the

⁴⁵ *Id.* at 35.

⁴⁶ *Id.* at 31-32, 38-39. The court compared the sentences the defendant could have faced if convicted of distributing a similar amount of cocaine under various state laws. It found that he would have faced a \$50,000 fine and four months imprisonment in New York, five years and \$100,000 in Vermont, and 20 years and \$10,000 in Connecticut.

⁴⁷ 884 F.2d 41 (1st Cir. 1989).

⁴⁸ *Id.* at 43.

⁴⁹ *Id.*

⁵⁰ See *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989).

⁵¹ See *United States v. One 107.9 Acre Parcel*, 898 F.2d 396, 401 (3d Cir. 1990) (in rem forfeiture statute "is a permissible civil response by Congress. . . . In reaching our conclusions, we are supported by the decision in *Santoro*, where a similar analysis was employed, and the same result reached").

⁵² See *United States v. 300 Cove Road*, 861 F.2d 232 (9th Cir. 1988).

⁵³ *Id.* at 234-35.

degree of guilt against the size of the imposed punishment.⁵⁴ Thus, although the circuit courts of appeal were unified in refusing to invalidate any forfeiture on Eighth Amendment grounds, they approached the issue of the constitutionality of in rem forfeitures from varying, and potentially contradictory, perspectives.

III. FACTUAL AND PROCEDURAL HISTORY

On June 13, 1990, a government informant accompanied Keith Engebretson to Garretson Body Shop in Garretson, South Dakota, where Engebretson intended to buy cocaine.⁵⁵ The body shop's owner, Richard Lyle Austin, agreed to sell Engebretson two grams of cocaine for an unknown amount of money.⁵⁶ Austin then left to go to his residence, a nearby mobile home; when he returned, he sold the cocaine to Engebretson.⁵⁷ The next day, state law enforcement officials obtained and executed a warrant to search the body shop and the mobile home.⁵⁸ In the body shop, officers discovered a .22 caliber revolver, a small amount of marijuana, \$3,300 in cash, and cocaine paraphernalia.⁵⁹ The search of the mobile home disclosed an electronic scale, two small containers of cocaine, a small bag of marijuana and \$660 in cash.⁶⁰ Austin was indicted in state court on four drug-related counts.⁶¹ He pled guilty to one count of possession of a controlled drug with intent to distribute.⁶² The other charges were dismissed, and Austin was sentenced to seven years in prison.⁶³

The United States instituted a civil forfeiture action, pursuant to 21 U.S.C. § 881(a)(4) and (a)(7),⁶⁴ against Austin's body shop and mobile home, which had a combined value of approximately

⁵⁴ *Id.*

⁵⁵ Brief for The United States at 4, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073).

⁵⁶ *Id.* at 4-5.

⁵⁷ *Id.*

⁵⁸ Brief for Petitioner at 5, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073).

⁵⁹ *United States v. 508 Depot Street*, 964 F.2d 814, 815-16 (8th Cir. 1992), *rev'd sub nom.* *Austin v. United States*, 113 S. Ct. 2801 (1993).

⁶⁰ *Id.*

⁶¹ Brief for Petitioner at 5-6, *Austin* (No. 92-6073).

⁶² *Id.* at 6.

⁶³ *Id.*

⁶⁴ The civil forfeiture statute provides:

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 . . . equipment of any kind which [is] used, or intended for use, in . . .

\$37,000.⁶⁵ Supported by the affidavit of a Sioux Falls Police Officer that described the drug sale, the resulting search, and Austin's guilty plea, the government moved for summary judgment.⁶⁶ Although Austin opposed the motion on the grounds that forfeiture would constitute an excessive fine in violation of the Eighth Amendment, his affidavit did not rebut the government's factual allegations.⁶⁷ The district court granted the United States' motion for summary judgment and entered a decree of forfeiture against Austin's property.⁶⁸

Austin appealed, contending that the summary judgment was unwarranted because a material issue of fact existed.⁶⁹ He also contended that the forfeiture violated the Eighth Amendment because it was an excessive fine as well as a cruel and unusual punishment.⁷⁰ The Court of Appeals for the Eighth Circuit held that no genuine issue of material fact existed, but agreed only "reluctantly" with the

processing [or] delivering . . . any controlled substance in violation of this subchapter.

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

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

(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.

21 U.S.C. § 881(a) (1992).

⁶⁵ Brief for Petitioner at 3-4, *Austin* (No. 92-6073).

⁶⁶ *United States v. 508 Depot Street*, 964 F.2d 814, 816 (8th Cir. 1992), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

⁶⁷ *Id.* at 816-17.

⁶⁸ Brief for Petitioner at 6-7, *Austin* (No. 92-6073).

⁶⁹ *508 Depot Street*, 964 F.2d at 816-17.

⁷⁰ *Id.* at 817.

government's position that the Eighth Amendment was inapplicable to the case.⁷¹ The Eighth Circuit noted that the principle of proportionality is an integral part of the common law and that fairness requires its application in a civil context if "harsh penalties" may be imposed.⁷² Nevertheless, the court held that, because civil forfeiture actions are technically different from criminal proceedings, the prohibitions of the Eighth Amendment do not limit the government's power to seize property when it proceeds against the property itself.⁷³ Since a civil forfeiture is an action in rem rather than in personam, the court said that the relevant issue is the relationship between the property and the prohibited conduct, not the guilt or innocence of the owner.⁷⁴ Thus, the court followed the Ninth Circuit approach and concluded that, if the Constitution allows completely innocent owners to forfeit offending property, it cannot require an examination of the degree of a blameworthy actor's culpability before his property may be seized.⁷⁵

Despite its holding, the Eighth Circuit reiterated its uneasiness with the result.⁷⁶ It expressed reservations about disallowing constitutional review of such a powerful government tool solely on narrow technical grounds: "Legal niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets."⁷⁷ The court admitted being "troubled" with the idea that any property, no matter how valuable, could be subject to forfeiture because the owner commits a single drug-related crime, noting that "[i]n this case it does appear that government is exacting too high a penalty in relation to the offense committed."⁷⁸ The court suggested that Austin's position might be supported by the Supreme Court's ruling in *Browning-Ferris*, which held that the Eighth Amendment was intended to limit the "prosecutorial" power of the government.⁷⁹ Ultimately, however, the Eighth Circuit affirmed, holding that the in rem nature of the forfeiture proceeding prevented the use of the Eighth Amendment to remedy this apparent injustice.⁸⁰

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (citing *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)).

⁷⁶ *Id.* at 817-18.

⁷⁷ *Id.* at 818.

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989)).

⁸⁰ *Id.*

IV. THE SUPREME COURT OPINIONS

The United States Supreme Court granted certiorari to determine whether the Eighth Amendment's prohibition of excessive fines applies to in rem civil forfeiture actions.⁸¹

In a unanimous decision, the United States Supreme Court reversed the Court of Appeals for the Eighth Circuit, holding that the government's seizure of Austin's property was a punitive fine, subject to the Eighth Amendment's Excessive Fines Clause, despite the fact that the forfeiture was imposed in a civil, rather than a criminal, proceeding.⁸²

A. THE MAJORITY OPINION

Justice Blackmun delivered the opinion of the Court.⁸³ The Court described the purpose of the Eighth Amendment as discussed in the *Browning-Ferris* decision.⁸⁴ The determinative factor in that case, as the Court described it, was the history of the Eighth Amendment, which was designed to restrict the ability of the government to impose punishment.⁸⁵ Thus, "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."⁸⁶

The Court decided that the appropriate question was not, as the United States argued, whether a civil forfeiture is so punitive as to necessitate the constitutional protections reserved for criminal defendants.⁸⁷ Unlike the Fifth and Sixth Amendments, the text of the Eighth Amendment does not specifically limit its protection to criminal cases, and the Amendment's legislative history, although sparse, does not reveal that any such limitation was intended.⁸⁸ As the Court framed it, the threshold issue for Eighth Amendment application is not whether a penalty is criminal or civil in nature, but rather whether it is a punishment.⁸⁹

The Court reviewed the punitive aspects of the three types of forfeiture established by English law at the time the Eighth Amendment was ratified.⁹⁰ Although religious in origin, the deodand, by

⁸¹ *Austin v. United States*, 113 S. Ct. 1036 (1993).

⁸² *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993).

⁸³ Justice Blackmun was joined by Justices White, Stevens, O'Connor, and Souter.

⁸⁴ *Austin*, 113 S. Ct. at 2804 (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)).

⁸⁵ *Id.*

⁸⁶ *Id.* (quoting *Browning-Ferris*, 492 U.S. at 268).

⁸⁷ *Id.* at 2806.

⁸⁸ *Id.* at 2805.

⁸⁹ *Id.* at 2806.

⁹⁰ *Id.* at 2806-07.

which the value of property that caused an accidental death was forfeited to the crown, eventually came to be viewed as a penalty for the negligence of its owner.⁹¹ Statutory forfeiture of ships and cargo involved in violations of customs laws such as the Navigation Acts, were justified, at least in part, by the owner's culpability in not ensuring that his property was used in a lawful manner.⁹² Most clearly punitive was the forfeiture of estate, by which a convicted felon or traitor was stripped of all property.⁹³ While deodand apparently was never common in the United States, and forfeiture of estate was constitutionally and statutorily limited, the Court noted that the First Congress embraced the English practice of subjecting ships and cargoes involved in customs violations to forfeiture.⁹⁴ In support of its position, the Court cited the Act of July 31, 1789, which listed forfeiture as a punishment for illegally unloading a ship and also used the word "forfeit" as a synonym for "fine."⁹⁵

The Court held that its repeated rejection of so-called innocent ownership as a common law defense to in rem forfeiture was not inconsistent with the position that such forfeiture is a punishment. The traditional fiction that the property itself is guilty rests on an assumption that the owner has been negligent, and the Court did not read any of its cases to apply the guilty-property fiction when "the owner [has] done all that reasonably could be expected to prevent the unlawful use of his property."⁹⁶ Similarly, while it had upheld in rem forfeitures caused only by the wrongs of employees or lessees, the Court saw a punitive aspect to such vicarious liability, which sanctions an owner for irresponsibly entrusting property to an untrustworthy party.⁹⁷ The Court also pointed out that on other occasions it has explicitly reserved the question of whether the Constitution protects a truly blameless owner from forfeiting property, which would not be an issue if forfeiture was not a type of punishment.⁹⁸ Again in *Austin*, the Court specifically refrained from addressing this issue.⁹⁹ The Court concluded that the legal history of statutory in rem forfeiture reveals that it has been consistently

⁹¹ *Id.* at 2806.

⁹² *Id.* at 2807.

⁹³ *Id.* at 2806-07.

⁹⁴ *Id.* at 2807-08.

⁹⁵ *Id.* (citing the Act of July 31, 1789, § 12, 1 Stat. 39).

⁹⁶ *Id.* at 2808-09.

⁹⁷ *Id.* at 2809-10.

⁹⁸ *Id.* at 2809 (citing *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512 (1921); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)).

⁹⁹ *Id.* at 2809 n.10.

viewed as a punishment, at least in part.¹⁰⁰

The Court held that, just as forfeiture has traditionally been considered a punishment, seizures under 21 U.S.C. § 881(a)(4) and (a)(7) are punitive. In determining that the purpose of the forfeiture statute is punishment, the Court was particularly influenced by two specific aspects of the law. First, the innocent owner provisions in the section ensure that those who do not willfully participate in drug crimes are immune from forfeiture.¹⁰¹ Second, the fact that Congress explicitly linked the forfeiture provisions to drug crimes suggested to the Court that it had a punitive motive, an impression reinforced by legislative history, which revealed a desire to create both deterrence and retribution.¹⁰²

The Court also rejected the argument that the forfeiture statute can fairly be read as a remedial provision rather than as a punishment. While the Court recognized that the seizure of inherently hazardous or illegal contraband is a remedial measure that directly protects society, a motor home, like Austin's, is not dangerous in and of itself, and its forfeiture cannot be justified on these grounds.¹⁰³ The Court also decided that the forfeiture was not remedial in the sense that it compensated the government for law enforcement and other expenditures needed to combat drug trafficking and abuse.¹⁰⁴ Since there is no necessary relationship between the size of these enforcement expenditures and the value of the assets subject to forfeiture in a particular case, the Court held that this provision was not compensatory.¹⁰⁵ Thus, the Court held that the test it established in *Browning-Ferris* was met by the seizure of Austin's property.¹⁰⁶ His forfeiture was a "'payment to a sovereign as punishment for some offense,' and as such [was] subject to the limitations of the Eighth Amendment's Excessive Fines Clause."¹⁰⁷

However, the Court declined Austin's invitation to fashion a test to determine whether a fine is excessive and instead remanded the case to the district court for consideration of this issue.¹⁰⁸

¹⁰⁰ *Id.* at 2810.

¹⁰¹ *Id.* at 2810-11.

¹⁰² *Id.* at 2811 (citing S. REP. NO. 225, 98th Cong., 1st Sess. 191, 195 (1983)).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2811-12.

¹⁰⁵ *Id.* at 2812.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

¹⁰⁸ *Id.*

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia agreed with the Court that the *Browning-Ferris* test had been met, but felt that this result could have been reached without addressing, as the Court did, the question of whether innocent ownership constitutes a defense to in rem proceedings.¹⁰⁹ Justice Scalia argued that the Court's approach unnecessarily weakened the distinction between in rem and in personam actions.¹¹⁰

Justice Scalia described in personam forfeitures as "assessments, whether monetary or in-kind, to punish the property owner's criminal conduct, while [in rem forfeitures] are confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law."¹¹¹ Both are punishments, Justice Scalia argued, since they are not designed to compensate an aggrieved party, but to deprive the owner of the use of his lawful property.¹¹² He derided the lengths the Court went to in interpreting in rem forfeitures as necessarily requiring the actual culpability of the property owner.¹¹³ There is no constitutional reason, he argued, that a blameless actor is immune from in rem forfeiture.¹¹⁴ Indeed, if the culpability of the owner is a requirement for in rem forfeiture, then there is effectively no difference between in rem and in personam forfeitures.¹¹⁵ Additionally, Justice Scalia considered the question reserved by the Court regarding whether the Constitution allows an in rem forfeiture against a truly innocent owner to be nonsensical if such forfeitures are, by definition, only visited on owners who have actual culpability.¹¹⁶ In any case, the forfeiture statute at issue in this case had an innocent owner provision that required the actual blameworthiness of the owner.¹¹⁷ This, as the Court discussed, clearly makes it punitive; in Justice Scalia's view, this fact made the Court's historical discussion of forfeitures dicta.¹¹⁸

Although he agreed with the Court that the question of excessiveness must be remanded, Justice Scalia described the method of analysis he would use to determine if an in rem forfeiture is exces-

¹⁰⁹ *Id.* at 2813 (Scalia, J., concurring).

¹¹⁰ *Id.* (Scalia, J., concurring).

¹¹¹ *Id.* (Scalia, J., concurring).

¹¹² *Id.* at 2813-14 (Scalia, J., concurring).

¹¹³ *Id.* at 2814 (Scalia, J., concurring).

¹¹⁴ *Id.* (Scalia, J., concurring).

¹¹⁵ *Id.* (Scalia, J., concurring).

¹¹⁶ *Id.* (Scalia, J., concurring).

¹¹⁷ *Id.* (Scalia, J., concurring).

¹¹⁸ *Id.* (Scalia, J., concurring).

sive.¹¹⁹ He contended that the value of forfeited property is not relevant to the excessiveness inquiry, but rather that the determinative issue is the degree to which the property is involved in the commission of an unlawful act.¹²⁰ An action in rem rests, he argued, on the guilty property fiction; thus, the question ought to be how guilty is the property, not the offender.¹²¹ Under this standard, Justice Scalia would hold that any item that is a necessary instrumentality of the offense is forfeitable, while forfeiture of property that is tangential to the commission of the crime is prohibited by the Excessive Fines Clause.¹²²

C. JUSTICE KENNEDY'S CONCURRENCE

In a short concurrence, Justice Kennedy¹²³ agreed with Justice Scalia that the majority's attempt to portray forfeiture as requiring actual culpability of the owner was potentially misleading and was not necessary to reach its decision.¹²⁴

Like Justice Scalia, Justice Kennedy did not agree that the case law indicates that in rem forfeitures are necessarily based on the actual culpability of the owner.¹²⁵ While he indicated some concern that forfeiture by a truly innocent owner might be unconstitutional, Justice Kennedy criticized the historical analysis employed by the Court, arguing that actual innocence was not an issue in this case, since Austin was not an innocent owner.¹²⁶ He was equally unwilling to endorse Justice Scalia's position that all in rem forfeitures are punishments, writing that the disposition of this case did not require such a conclusion.¹²⁷

V. ANALYSIS

Although it reversed the unanimous view of the circuit courts of appeal, the Court's decision that in rem forfeiture was subject to Eighth Amendment protection was unsurprising in light of its recent decisions applying the protections of the Bill of Rights to civil contexts. Despite the fact that this result was a logical extension of its own precedents, the Court deviated from the simple, compelling ar-

¹¹⁹ *Id.* at 2814-15 (Scalia, J., concurring).

¹²⁰ *Id.* at 2815 (Scalia, J., concurring).

¹²¹ *Id.* (Scalia, J., concurring).

¹²² *Id.* (Scalia, J., concurring).

¹²³ Chief Justice Rehnquist and Justice Thomas joined in Justice Kennedy's opinion.

¹²⁴ *Id.* (Kennedy, J., concurring).

¹²⁵ *Id.* at 2815-16 (Kennedy, J., concurring).

¹²⁶ *Id.* at 2816 (Kennedy, J., concurring).

¹²⁷ *Id.* (Kennedy, J., concurring).

gument of those cases into a discussion of the basis for the in rem/in personam distinction, a digression which unnecessarily obscured the reasoning of the *Austin* decision. Although this dispute confused the Court's previously clear position on the relevance of innocence in in rem proceedings, it did provide some indication of the kind of excessiveness test the Court might establish in future Excessive Fines Clause cases.

A. THE EIGHTH AMENDMENT LIMITS GOVERNMENT'S POWER TO IMPOSE PUNITIVE IN REM FORFEITURES

The result in *Austin* was clearly foreshadowed by two other decisions authored by Justice Blackmun which held that the Bill of Rights places substantive limits on the government's power to punish, regardless of whether such punishment occurs in a criminal proceeding or a civil one. If the Court had merely followed the compelling logic of *Halper*¹²⁸ and *Browning-Ferris*,¹²⁹ the resulting decision would have been much clearer.

In *Halper*, the Court first explicitly held that the protections against arbitrary and excessive punishment embodied in the Bill of Rights must be observed even when the government chooses to proceed against an individual in a civil proceeding.¹³⁰ Previously, the Court had decided that actions taken by the government in a civil proceeding can be so punitive as to necessitate giving the defendant the constitutional protections reserved for criminal defendants.¹³¹ The *Halper* Court greatly extended the scope of Bill of Rights protections, however, by holding that they apply whenever a civil penalty constitutes a punishment, even if the punishment is not so harsh as to render it criminal in nature.¹³² This holding provides the first prong of the more straightforward ruling the Court should have made in *Austin*.

Halper offered two tests to evaluate whether a penalty was a punishment. The majority held that a civil penalty is punitive if its application in a particular case serves retributive and deterrent goals, even though it may also have a remedial purpose.¹³³ In contrast, Justice Kennedy, concurring in *Halper*, outlined a much simpler and more objective test for punishment.¹³⁴ Kennedy argued

¹²⁸ *United States v. Halper*, 490 U.S. 435 (1989).

¹²⁹ *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

¹³⁰ *Halper*, 490 U.S. at 448.

¹³¹ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

¹³² *Halper*, 490 U.S. at 448.

¹³³ *Id.*

¹³⁴ *Id.* at 452-53 (Kennedy, J., concurring).

that the determination of punishment is not a sweeping search for motivations and goals of punishment, but rather whether a civil penalty is rationally related to the size of damages incurred by the government in a particular case.¹³⁵ Although Justices Blackmun and Kennedy both stressed the limited nature of the *Halper* decision, there was nothing in the logic of the holding that restricted it to double jeopardy analysis or to cases in which the government seeks to impose fines on individuals, rather than forfeitures. Indeed, under either the majority or Justice Kennedy's analysis, the action taken against Austin constitutes a punishment, and it is not particularly relevant to either formulation whether innocent owners should be immune from forfeiture.

Instead of delving into the history of forfeiture, the Court could have limited its argument to the evidence of punitive intent it found in the legislative history of the drug-trafficking-based forfeiture laws, and especially in the innocent owner defense provision.¹³⁶ The Court rejected the government's contention that an in rem proceeding against a drug dealer is merely an attempt to recover the costs of combatting drug-related crime.¹³⁷ Both the punitive and retributive aspects of punishment are present in such an action, while the remedy the government seeks is unrelated to the damages or costs it actually incurred.¹³⁸ The innocent ownership exceptions further bolster the conclusion that forfeiture is punitive. Analyzing these factors under the standard enunciated in *Halper* would have demonstrated that the forfeiture of Austin's home and business was a punishment, without entangling the Court in the controversial actual innocence issue.

If the Court had followed this outline, the second key point of its decision could have been enunciated clearly by referring to the *Browning-Ferris* case. While the Fifth Amendment protection implicated in *Halper* prevents two punishments for the same crime, the limitation Austin sought was based on the Eighth Amendment's prohibition of excessive fines. To provide this protection, that clause must protect the kind of interest Austin argued is violated by the government's action.

In *Browning-Ferris*, the decision turned on measuring the extent to which punitive damage awards in favor of private parties are punishments inflicted by the government.¹³⁹ While disagreeing about

¹³⁵ *Id.* at 453 (Kennedy, J., concurring).

¹³⁶ *Austin v. United States*, 113 S. Ct. 2801, 2811-12 (1993).

¹³⁷ *Id.* at 2112.

¹³⁸ *Id.* at 2812.

¹³⁹ *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-64 (1989).

whether civil damage awards have ever been protected by the Eighth Amendment or its historical predecessor in the English Bill of Rights, both the majority opinion and Justice O'Connor's dissent agreed that the Excessive Fines Clause was intended to limit the government's punitive power.

It is relatively clear, especially given the way the Court read the legislative history, that civil forfeiture under 21 U.S.C. § 881 was intended to enhance the prosecutorial power of government. In arguing that excessive punitive damages are unconstitutional, Justice O'Connor analogized to the criminal law, citing the purposes of deterrence and retribution at the heart of both.¹⁴⁰ The forfeiture action in *Austin* is even more closely analogous to a criminal proceeding, resting, as it does, on Austin's criminal conviction for selling drugs. The *Browning-Ferris* Court embraced the notion that the purpose of the Eighth Amendment was to curb government's power to punish—its “prosecutorial” power.¹⁴¹ If this had been the emphasis in *Austin*, the underlying purpose of the Eighth Amendment protections could have been described more clearly.

Although dicta in *Browning-Ferris* suggested that the Eighth Amendment does not cover any civil proceeding,¹⁴² the Court reserved this question.¹⁴³ In fact, the logic of that case mandates that excessive fines protection be extended to the forfeiture proceeding against Austin. The *Browning-Ferris* Court held that “‘fine’ was understood to mean payment to a sovereign as punishment for some offense.”¹⁴⁴ Austin's forfeiture of his home and business to the state is a retributive payment, received by the state. *Browning-Ferris* limited application of the Eighth Amendment to “steps a government may take against an individual” and denied that punitive damage awards fell within this limited class because the government did not use “the civil courts to extract large payments or forfeitures for the purpose of . . . disabling some individual.”¹⁴⁵ In *Austin*, that is exactly what the government did, and no matter what status punitive damages between private parties have, the *Browning-Ferris* decision mandates that if a civil action seeks a punitive forfeiture to the government, it violates the Eighth Amendment if it is excessive.

As Justice Scalia's concurrence pointed out, the holdings in

¹⁴⁰ *Id.* at 287 (O'Connor, J., concurring).

¹⁴¹ *Id.* at 266.

¹⁴² *Id.* at 262 (“Given that the [Eighth] Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments.”).

¹⁴³ *Id.* at 263.

¹⁴⁴ *Id.* at 265.

¹⁴⁵ *Id.* at 275.

Halper and *Browning-Ferris* present a straightforward argument for the result in *Austin*.¹⁴⁶ The forfeiture at issue in *Austin* meets the definition of punishment described in *Halper*, and such a punishment, if sought by the government, is limited by the Eighth Amendment under *Browning-Ferris*. The Court, however, declined to follow this simple outline, and instead devoted much of its opinion to exploring the question of whether in rem forfeitures may be considered punishments.¹⁴⁷ The key problem for the Court is apparently the paradox that led the Eighth Circuit to decide that this case was outside the bounds of protection of the Excessive Fines Clause.¹⁴⁸ That court could not reconcile the fact that a totally blameless owner of property could constitutionally forfeit that property, while *Austin*, a convicted felon, was entitled to a balancing of his crime's seriousness against the size of the forfeiture.¹⁴⁹ Since an innocent owner's forfeiture seemed automatically excessive but was not prevented by the Eighth Amendment, a blameful owner *could not* be so protected. The Supreme Court addressed this conundrum by denying that it had ever held that a blameless owner could constitutionally be deprived of guilty property.¹⁵⁰ Instead, the Court read all of its prior decisions on in rem proceedings to assume that the owner of the property sought for forfeiture was in some way negligent—actually, presumably, or vicariously—for allowing its wrongful use.¹⁵¹ Justice Scalia argued vigorously that an in rem forfeiture is always punitive, even to an actually innocent owner.¹⁵²

While this dispute would be important for establishing a standard for excessiveness, it was irrelevant to the issues reached by the Court in the *Austin* decision. *Austin* was not an innocent owner, and the statute under which he was punished contains several defenses for innocent owners.¹⁵³ It was unnecessary to hold that all in rem forfeitures require actual culpability. The individualized standard for degree of punishment established in *Halper* requires looking at the facts of a particular government action, rather than an entire class of such actions. Since this discussion was not dispositive of an issue it actually decided, the Court should have either avoided it, as Justice Scalia argued, or explicitly made it dicta.

¹⁴⁶ *Austin v. United States*, 113 S. Ct. 2801, 2813-14 (1993) (Scalia, J., concurring).

¹⁴⁷ *Id.* at 2806-10.

¹⁴⁸ *United States v. 508 Depot Street*, 964 F.2d 814, 817 (1992), *rev'd sub nom. Austin v. United States*, 113 S. Ct. 2801 (1993).

¹⁴⁹ *Id.*

¹⁵⁰ *Austin*, 113 S. Ct. at 2809.

¹⁵¹ *Id.* at 2809-10.

¹⁵² *Id.* at 2813-14 (Scalia, J., concurring).

¹⁵³ 21 U.S.C. §§ 881(a)(4), (7) (1992). See *supra* note 64 for text of the statute.

The Court contended that Justices Scalia and Kennedy misunderstood the actual innocence discussion, which the Court argued was necessary to show that forfeiture serves, at least partially, to punish.¹⁵⁴ Justice Scalia denied this was the source of his disagreement, and argued that a forfeiture is implicitly punitive; otherwise, he asserted, a forfeiture would not constitute a fine.¹⁵⁵ Because the Justices could not agree on what it was they disagreed about, they did not make the clearest possible statement emphasizing the fundamental nature of the issues on which they agreed. While the Court is, of course, free to be as Delphic in its pronouncements as it wishes, the confusion in *Austin* was unfortunate for two reasons. The Court blurred what seemed to be established distinctions between in rem and in personam forfeitures, simultaneously sacrificing analytical clarity, to introduce an issue that was not raised by the case. Additionally, the Court discussed the important issues underlying a test for excessiveness, despite its claims that it was not addressing that question.

While the Court's decision was compelled by the well-reasoned holdings of *Halper* and *Browning-Ferris*, the concurrences were correct in noting that since the issue of innocent ownership of property forfeited in rem was not directly presented by this case, it should not have been addressed.

B. THE STANDARD FOR EXCESSIVENESS

The Court left completely open the question of how the excessiveness of an in rem forfeiture should be judged on remand.¹⁵⁶ Of the two tests that have been proposed, the Court's discussion of actual innocence of the owner in a civil forfeiture context suggests that it will choose a standard in keeping with the type of proportionality test it has used in other Eighth Amendment contexts.

Austin argued that the Court should rule his forfeiture excessive under a proportionality test like the one described in *Solem v. Helm*.¹⁵⁷ In that case, the Court described several "objective factors" to be used in evaluating whether a punishment was cruel and unusual.¹⁵⁸ These factors included the gravity of the offense, the harshness of the penalty imposed, the relative seriousness of sentences imposed on other criminals in the same jurisdiction, and

¹⁵⁴ *Id.* at 2810 n.12.

¹⁵⁵ *Id.* at 2814 n.* (Scalia, J., concurring).

¹⁵⁶ *Id.* at 2812.

¹⁵⁷ 463 U.S. 277 (1983), cited in Brief for Petitioner at 9, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073).

¹⁵⁸ *Solem*, 463 U.S. at 290.

the sentences imposed for commission of the same crime in other jurisdictions.¹⁵⁹ In her partial concurrence in the *Browning-Ferris* case, Justice O'Connor proposed that such a proportionality test should apply in a punitive damages case.¹⁶⁰ Justice O'Connor added that courts should give "substantial deference" to the legislature in determining appropriate levels of punishment.¹⁶¹ This type of test would be consistent with the Court's Eighth Amendment approach to death penalty cases in which the Court has closely tied the allowable gravity of punishment to the culpability of the individual offender.¹⁶² It necessitates a case-by-case comparison of the punishment's effects with those handed out to other individuals under similar circumstances.

In his *Austin* concurrence, Justice Scalia proposed an excessiveness test that looks at the relationship of the guilty property to the wrongful conduct, rather than at the relationship between the magnitude of punishment and the defendant's culpability.¹⁶³ This instrumentality test would hold a forfeiture excessive if the property sought to be confiscated is not sufficiently related to the commission of the prohibited conduct.¹⁶⁴ As Justice Scalia pointed out, "[s]cales used to measure out unlawful drug sales . . . are confiscable whether made of the purest gold or the basest metal."¹⁶⁵ The petitioner apparently argued for this type of test before the district court, which rejected it, saying "undisputed facts established a sufficient nexus between the two properties and petitioner's drug transactions" to defeat any Eighth Amendment claims.¹⁶⁶

Unlike a proportionality test, an instrumentality test divorces the conduct of the offender from the punishment, and instead relies on the relationship between the property and the crime to establish allowable liability. Differentiating between these types of tests illuminates what the Court and Justice Scalia were really arguing about when they addressed the actual innocence issue in *in rem* forfeiture proceedings. The disagreement in *Austin* has its roots in the Court's disagreement over the proper standard for determining the excessiveness of a non-capital criminal penalty under the Cruel and

¹⁵⁹ *Id.* at 290-92.

¹⁶⁰ *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300-01 (1989) (O'Connor, J., concurring).

¹⁶¹ *Id.* at 301 (O'Connor, J., concurring).

¹⁶² *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

¹⁶³ *Austin v. United States*, 113 S. Ct. 2801, 2814-15 (1993) (Scalia, J., concurring).

¹⁶⁴ *Id.* at 2815 (Scalia, J., concurring).

¹⁶⁵ *Id.* (Scalia, J., concurring).

¹⁶⁶ Brief for The United States at 6, *Austin v. United States*, 113 S. Ct. 2801 (1993) (No. 92-6073).

Unusual Punishment Clause of the Eighth Amendment. In *Harmelin v. Michigan*,¹⁶⁷ the Court decided that a mandatory term of life in prison for cocaine possession was not a cruel and unusual punishment, but divided sharply on the issue of proportionality.¹⁶⁸ Although Justice Scalia delivered the opinion of the Court, he was joined only by Chief Justice Rehnquist in deciding that there was no proportionality requirement embodied in the Eighth Amendment, except for the unique instance where the death penalty is to be imposed.¹⁶⁹ In contrast, the dissent argued that the individualized proportionality standard of *Solem* was appropriate to judge even non-capital cases.¹⁷⁰ Justice Kennedy's concurrence took the middle road, outlining a "narrow proportionality standard," which deferred significantly to legislative judgment to determine appropriate sentences.¹⁷¹

These three views delineate the differences among the *Austin* opinions. The argument of the *Harmelin* dissent—that proportionality is always required by the Eighth Amendment—is incompatible with the rejection of the innocent owner defense. Such a test tailors the degree of punishment to the culpability of an actor. If this test permits an owner with *no* culpability to receive some punishment, it cannot conceivably invalidate any punishment as excessive. Thus, if the proportionality test is to be the Court's method for judging excessiveness under the Eighth Amendment, it must demonstrate, at least, that it has never allowed a true innocent's property to be confiscated.

Since Justice Scalia rejected proportionality in *Harmelin*, he would have used a different concept to measure the excessiveness of a fine. Justice Scalia's proposed instrumentality standard relies heavily on the *in rem* guilty property fiction to determine the bounds of excessiveness. Thus, the erosion of the *in rem/in personam* distinction which he saw in the Court's decision threatens the very basis for the excessiveness test he proposed. Likewise, Justice Kennedy's avoidance of the actual innocence issue in *Austin* paralleled his concurrence in *Harmelin*. Because his proportionality standard is much more limited than that of the *Austin* majority, he only expressed some concern about the plight of an innocent owner, rather than seeking to read an innocent ownership defense into the

¹⁶⁷ 111 S. Ct. 2680 (1991).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2700-01.

¹⁷⁰ *Id.* at 2710-12 (White, J., dissenting).

¹⁷¹ *Id.* at 2702-05 (Kennedy, J., concurring).

precedents.¹⁷²

The fact that these differences are much more clearly presented in looking at potential formulations for an excessiveness test makes it all the more unfortunate that the Court decided to present these arguments in a case where it declined to outline such a test. What the discussion of the actual innocence issue does show, however, is that the Court is likely to prefer a proportionality test to an instrumentality standard.

VI. CONCLUSION

Because in rem forfeitures provide law enforcement officials with advantages not available to them in criminal proceedings, in *Austin v. United States* the Supreme Court took an important step in the protection of individual liberty by holding that such punishments may not be arbitrary or oppressive, despite the fact that the government does not explicitly forfeitures them as criminal sanctions. However, the Court delineated this principle much less clearly than it might have by dwelling on the contentious issue of whether actually innocent owners may forfeit guilty property, an issue which was not directly presented in this case, and a question whose implications the Court postponed addressing directly.

The dispute over this issue, however, suggests that the Court views the Excessive Fines Clause as similar in scope to the Cruel and Unusual Punishments Clause jurisprudence it has constructed in non-capital cases. While that area of law is itself somewhat unsettled, the *Austin* decision suggests that the Court will read the Excessive Fines Clause to require that the value of the forfeited property be not disproportionate to the seriousness of the crime, but will be willing to defer to legislative judgments in assessing how serious a crime is.

DAVID LIEBER

¹⁷² *Austin v. United States*, 113 S. Ct. 2801, 2815-16 (Kennedy, J., concurring).