Notes

CIVIL FORFEITURE UNDER 21 U.S.C. § 881 AND THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE

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> We are speaking of a plague that consumes an estimated $75 billion per year of public money, exacts an estimated $70 billion a year from consumers, is responsible for nearly 50 per cent of the million Americans who are today in jail, occupies an estimated 50 per cent of the trial time of our judiciary, and takes the time of 400,000 policemen—yet a plague for which no cure is at hand, nor in prospect.[1]

I. INTRODUCTION

"[T]he traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs...."[2] This reflection is indicative of the frustration in the United States Senate over the elusiveness of victory in America's "war on drugs."[3] Indeed, as illegal sales of controlled substances continue to generate billions of dollars in revenue every year, the cost of law enforcement efforts committed to fighting the "war on drugs" mounts.[4]

As the "war on drugs" escalates, the number of forfeiture cases in the United States also burgeons.[5] A potent weapon in the judicial arsenal, civil forfeiture has emerged as a favored method for imposing significant economic

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1. William F. Buckley, Jr., Address to the New York Bar Association Panel Considering the "War on Drugs" (Summer 1995), *in* NAT'L REV., Feb. 12, 1996, at 35. The "plague" to which Mr. Buckley referred is illegal drug distribution and abuse.

2. S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182. In 1984, Congress expanded the scope of 21 U.S.C. § 881, extending civil forfeiture to real property. Congress characterized the forfeiture of real property as a "powerful deterrent" against participation in illicit drug activity. *Id.* at 195.

3. The "war on drugs" seems never-ending. In fact, every administration since the 1960s has declared some type of war on drugs. Howard Kohn, *Cowboy in the Capital: Drug Czar Bill Bennett*, ROLLING STONE, Nov. 2, 1989, at 42.

4. *See* United States v. Daccarett, 6 F.3d 37, 43 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994). Ten years ago, annual expenditure in the "war on drugs" was $5 billion for *all* governments—federal, state, and local. Robert W. Sweet, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 44. In 1996, under the proposed budget, total *federal* expenditures on the drug war will exceed $17 billion. *Id.* In fact, the projected costs associated with drug prohibition in 1996 may equal 150% of the entire federal welfare budget for 1995. Steven B. Duke, *The War on Drugs is Lost*, NAT'L REV., Feb. 12, 1996, at 47.

5. United States v. All Funds on Deposit in Any Accounts, Merrill Lynch, 801 F. Supp. 984, 989 (E.D.N.Y. 1992), *aff'd sub nom.* United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993).

sanctions against narcotics traffickers and for crippling drug-trading enterprises.[6] Civil asset forfeiture has become an important law enforcement tool, wresting the spoils of crime from criminals and supplementing law enforcement budgets.[7] In fact, seizures made pursuant to federal forfeiture statutes are a significant source of financial support for the government's "war" effort. Since 1984, federal agencies have executed over 200,000 forfeitures, netting more than $3.6 billion in assets.[8]

The scope of civil forfeiture in the United States today is broad.[9] As one court articulated, "semitrailors, Indy cars, tanks, chariots, buggies, snowmobiles, riding lawn mowers and entries in a Soapbox Derby,"[10] if used in connection with illegal narcotics activity, would surely fall within the purview of the Drug Abuse Prevention and Control Act.[11] Cases abound with the forfeiture of residences,[12] farms,[13] yachts,[14] automobiles,[15] cash,[16] and anything else that might duly be classified as an instrumentality of a drug offense or traceable to such illicit activity.[17] "For better or for worse, it has become increasingly difficult to impose any principled constraints on the exercise of forfeiture powers under the drug laws."[18] Indeed, the government possesses strong financial incentive to pursue forfeiture.[19]

Concerned over the arbitrary exercise of government power in the context of civil forfeiture, the federal judiciary has become alert to constitutionally proscribed injustices imposed on individual wrongdoers.[20] Among these constitutional issues lies the Eighth Amendment's prohibition on excessive fines.[21] In 1993, the United States Supreme Court, in *Austin v. United*

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6. United States v. Daccarett, 6 F.3d 37, 46 (2d Cir. 1993) (citing United States v. 384–390 West Broadway, 964 F.2d 1244, 1248 (1st Cir. 1992)).

7. United States v. 429 South Main St., 52 F.3d 1416, 1419 (6th Cir. 1995).

8. David Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine) at 70. During the fiscal year 1990 alone, the U.S. Department of Justice Asset Forfeiture Fund received deposits of $460 million from federal forfeiture statutes. *See* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE PROGRAM ANN. REP. 31 (1990). Each year the inventory of the Department of Justice Assets Forfeiture Fund, the repository of drug-related forfeitures, grows by almost $500 million, and over $1.4 billion in property presently awaits forfeiture. Sean P. Murphy, *10 Sites Are Seized in U.S. Drug Sweep*, BOSTON GLOBE, Mar. 8, 1991, at 17; *Use Drug Profits to Treat Addicts*, NEWSDAY, Aug. 18, 1991, at 37.

9. *See* 21 U.S.C. § 881 (1988).

10. United States v. 1990 Toyota 4Runner, 9 F.3d 651, 655 (7th Cir. 1993) (Cudahy, J., concurring).

11. 21 U.S.C. §§ 801–971. The civil forfeiture provisions of the Act are codified at 21 U.S.C. § 881 (1988).

12. *See, e.g.*, United States v. 6380 Little Canyon Rd., 59 F.3d 974 (9th Cir. 1994).

13. *See, e.g.*, United States v. Chandler, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

14. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

15. *See, e.g.*, United States v. One 1982 Chevrolet Corvette, 976 F.2d 392 (8th Cir. 1992).

16. *See, e.g.*, United States v. $40,877.59 in U.S. Currency, 32 F.3d 1151 (7th Cir. 1994).

17. *See generally* 21 U.S.C. § 881(a) (1988).

18. United States v. 1990 Toyota 4Runner, 9 F.3d 651, 654 (7th Cir. 1993) (Cudahy, J., concurring).

19. *See* United States v. 6380 Little Canyon Rd., 59 F.3d 974, 984 (9th Cir. 1994). Enormous strain on federal coffers seems to require this result. *See supra* note 4 and accompanying text.

20. *6380 Little Canyon Rd.*, 59 F.3d at 984.

21. *See* Austin v. United States, 509 U.S. 602 (1993).

States, held civil forfeiture pursuant to 21 U.S.C. § 881 to be subject to the limitations of the Excessive Fines Clause.[22] The Supreme Court, however, declined to proffer a standard inquiry by which federal courts could determine the excessive nature of forfeitures, leaving the issue for lower courts to decide in the first instance.[23]

This Note surveys the approaches taken by federal courts in fashioning a test to satisfy the command of *Austin*. Part II first probes the general provisions of 21 U.S.C. § 881, the Drug Abuse Prevention and Control Act.[24] Part II then turns to the anatomy of civil in rem forfeiture proceedings, analyzing the initiation of forfeiture, probable cause, the requirement of pre-seizure notice, and the "innocent owner" defense.[25] Against this procedural backdrop of civil forfeiture, Part III explores the three principal approaches utilized by federal courts to guide their review of the excessive fines issue: "instrumentality,"[26] "proportionality,"[27] and "multifactor" tests.[28] Finally, Part IV endorses an exclusive instrumentality review for determining whether a forfeiture is excessive under the Eighth Amendment.[29]

II. CIVIL FORFEITURE UNDER THE DRUG ABUSE PREVENTION AND CONTROL ACT

A. General Provisions of 21 U.S.C. § 881

In 1970, Congress designed the Drug Abuse Prevention and Control Act[30] to be a "formidable weapon in the government's arsenal"[31] against drug trafficking. The Act is "designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States" and allows the government to remove the profits (and thus the incentive) of drug trafficking.[32] Specifically, the purpose of the statute is to "deprive drug traffickers of the principal tools of their trade, which include the drugs themselves, the equipment and raw materials for their manufacture, the firearms used to enforce contracts in an illegal business, the premises used for making and selling drugs—and the vehicles, boats, and aircraft that the traffickers use in their business."[33]

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22. *Austin*, 509 U.S. at 622. *See* U.S. CONST. amend. VIII.
23. *Austin*, 509 U.S. at 622 (1993).
24. *See* discussion *infra* notes 30–43 and accompanying text.
25. *See* discussion *infra* notes 44–119 and accompanying text.
26. *See* discussion *infra* notes 120–55 and accompanying text.
27. *See* discussion *infra* notes 156–218 and accompanying text.
28. *See* discussion *infra* notes 219–93 and accompanying text.
29. *See* discussion *infra* notes 294–315 and accompanying text.
30. *See* 21 U.S.C. §§ 801–971 (1988).
31. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1182 (7th Cir. 1995) (quoting United States v. $40,877 in U.S. Currency, 32 F.3d 1151, 1157 (7th Cir. 1994)).
32. H.R. REP. NO. 1444, 91st Cong., 1st Sess. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567.
33. United States v. 1990 Toyota 4Runner, 9 F.3d 651, 653 (7th Cir. 1993). The concept of forfeiture is not new. *See* United States v. 427 and 429 Hall St., 74 F.3d 1165 (11th Cir. 1996). In fact, some trace the roots of forfeiture to the Old Testament. *See Exodus* 21:28 (King James) ("If an ox gore a man or a woman, that they die: then the ox shall be surely

The Act authorizes the forfeiture to the United States of property used in, or intended to be used in, the commission of a violation of any drug law which is punishable by more than one year's imprisonment.[34] The forfeiture proceeding is civil in nature and relies on a nexus between the property and the illegal drug activity.[35] Property is subject to forfeiture if it is: (1) given in exchange for drugs; (2) "traceable" to a drug transaction; (3) used in committing or facilitating the commission of a drug offense; or (4) intended for such use.[36] The owner of an interest in the property may defend against forfeiture by showing that the offense involving the property did not occur or was committed without his knowledge or consent.[37] Because a forfeiture action is in rem, elements of a forfeiture claim focus principally on the property's role in the offense and not the owner's guilt.[38] The acquittal, or even non-prosecution, of the owner on criminal charges is irrelevant to the forfeitability of the property.[39]

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stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."). *See 427 and 429 Hall St.*, 74 F.3d at 1168 n.3 ("When used as an adjective, 'quit' means 'released from obligation, charge, or penalty.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1867 (1993). Thus, the ox responsible for the goring was forfeit, and its owner subject to no (other) penalty.").

History recognizes three species of forfeiture, all of which existed at the time the Bill of Rights was ratified: deodand, according to which chattel was forfeit if it caused the death of a subject; forfeiture upon conviction for a felony or treason; and "statutory forfeiture," pursuant to which an object would be forfeited if it were used in violation of the customs and revenue laws, which included, for example, the Navigation Acts of 1660. *See 427 and 429 Hall St.*, 74 F.3d at 1168 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *301; 2 WILLIAM BLACKSTONE, COMMENTARIES *267–87; Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–83 (1974); *Austin*, 509 U.S. 602, 612–13 (1993)). Of these three types of forfeiture, only statutory forfeiture was incepted into American legal tradition. *Id.* Not only did each colony enact some form of statutory forfeiture during the colonial period, so, too, did the new federal government when, in 1789, the First Congress authorized forfeiture of ships (and their cargoes) that were involved in customs offenses. *Id.* (citations omitted). *See* Act of July 31, 1789, § 12, 1 Stat. 39. *See also* Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 1 Stat. 157, 161, 163; *Austin*, 509 U.S. at 613. In the years since, Congress has authorized forfeiture to aid enforcement of many statutory schemes, including the navigation laws, food and drug laws, copyright laws, and antitrust laws. *427 and 429 Hall St.*, 74 F.3d at 1168.

34. United States v. Chandler, 36 F.3d 358, 362 (4th Cir. 1994). Of all the subsections in § 881(a), only § 881(a)(7) requires the underlying violation of a drug law to be punishable by more than one year's imprisonment. This seems commonsensical; whereas real property is often highly valuable both monetarily and socially (i.e., as one's personal or family residence or source of legitimate livelihood), other subsections of § 881(a) provide for the forfeiture of, inter alia, the controlled substances themselves, their manufacturing chemicals and equipment, containers, conveyances, books and records, money traceable to narcotics activities, firearms, and other drug paraphernalia, most of which have only rare, if any, legitimate or lawful value. One exception, however, is the forfeiture of "conveyances" pursuant to § 881(a)(4) (i.e., automobiles, planes, ships, and other vehicles) which may, and often do, have legitimate and lawful uses. Although Congress provided no minimum culpability requirement for the seizure of conveyances, § 881(a)(4) does provide for an "innocent owner" defense. *See* discussion of "innocent owner" defenses *infra* notes 100–04 and accompanying text.

35. United States v. Chandler, 36 F.3d at 362.

36. *Id.* 21 U.S.C. § 881 (1988). *See infra* note 40.

37. United States v. Chandler, 36 F.3d at 362. *See* 21 U.S.C. § 881(a)(4), (6), (7) (1988) cited *infra* note 40.

38. United States v. Chandler, 36 F.3d at 362.

39. United States v. 427 and 429 Hall St., 74 F.3d 1165, 1169 (11th Cir. 1996). Irrelevance of the owner's guilt has been the tradition in situations of in rem forfeiture. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) ("[T]he proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam."). *See also* The Brig Malek Adhel v. United States, 43 U.S. 210, 233 (1844) ("The vessel which commits the aggression is

21 U.S.C. § 881(a) provides teeth for the Act.[40] Though effective, these provisions are not without controversy, eliciting concern from both courts and

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treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."). In one respect, however, civil forfeiture under the Drug Abuse Prevention and Control Act fundamentally diverges from these roots. *427 and 429 Hall St.*, 74 F.3d at 1169. While there is no innocent owner defense at common law, Congress has specifically provided an "innocent owner" defense in the Drug Abuse Prevention and Control Act: "[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7) (1988). *See also* 21 U.S.C. § 881(a)(4), (6) (providing similar defenses); *see also infra* notes 100–04 discussing the "innocent owner" defense in civil in rem forfeiture. It has been suggested that Congress intended to punish only those persons intentionally involved in drug trafficking. *See 427 and 429 Hall St.*, 74 F.3d at 1169. *See also* Austin v. United States, 509 U.S. 602, 619 (1993). *See also* legislative history of § 881, S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1983). *See also infra* notes 105–30 and accompanying text discussing *Austin v. United States*. Weight given to the culpability an owner in civil in rem forfeiture varies among the circuits and is dependent on the excessiveness inquiry adopted. *See* discussion *infra* part III.

40. 21 U.S.C. § 881(a) provides for the forfeiture of property tainted by drug use or trafficking as follows:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
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> (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.
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> (3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).
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> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—
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> (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;
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> (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
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> (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.
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> (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.
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> (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

commentators.[41] Many are disquieted by the ease with which the government seizes property and the potential hardships caused to innocent owners who seek to recover their property once seized by the government.[42] Also troubling to some is the constantly expanding nature and application of forfeiture provisions.[43]

B. Initiation and Course of Civil Forfeiture Proceedings

The methods by which the government attaches property through forfeiture proceedings are well established.[44] The Drug Act permits three means for initiating civil forfeiture proceedings: (1) by following the procedure presented in the Supplemental Rules under § 881(b);[45] (2) by obtaining a court-ordered seizure warrant;[46] and (3) by seizing the property without judicial process "when the Attorney General has probable cause to believe that the property is subject to civil forfeiture...."[47] Regardless of which

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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 § 857 of this title).

(11) Any firearm (as defined in § 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.

41. *See* discussion *infra* parts II.B–D.

42. United States v. Daccarett, 6 F.3d 37, 46 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994).

43. *Id.*

44. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1188 (7th Cir. 1995). *See also Daccarett*, 6 F.3d at 46.

45. Section 881(b) provides, in relevant part, that seizure of "[a]ny property subject to civil forfeiture to the United States...may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property...." The Supplemental Rules for Certain Admiralty and Maritime Claims are set out in Title 28, Judiciary and Judicial Procedure.

46. The warrant must be issued pursuant to FED. R. CRIM. P. 41(c). Rule 41(c) provides in relevant part:

> A warrant...shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce....

FED. R. CRIM. P. 41(c).

47. 21 U.S.C. § 881(b)(4) (1988).

method is followed, however, probable cause[48] is always required to initiate a forfeiture action.[49]

The primary responsibility in civil forfeiture proceedings, once initiated, lies on the government; as the party seeking the forfeiture, "the government's initial burden[50] is to establish probable cause to believe that the property is subject to forfeiture."[51] Probable cause for forfeiture exists if the government demonstrates a nexus between the property at issue and illegal narcotics activity.[52] To establish such probable cause, the government must demonstrate to the court that it has "reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion."[53] In this showing, the government may rely not only on direct evidence but also on circumstantial and hearsay evidence.[54]

There is some disparity among the circuits as to the level of proof above "mere suspicion" to which probable cause must rise.[55] Courts have often required that the government show either a "nexus" or "substantial connection" between the seized property and the illegal drug activity.[56] Many courts require a nexus, without significant discussion.[57] The Second Circuit, for example, requires only proof by the government of a "nexus" between the seized property and the illegal drug activity, having declined on many occasions to adopt a "substantial connection" standard.[58] In *United States v. 38 Whalers Cove*,[59] the use of a home as the site of two sales of cocaine valued at $250 was ruled sufficient to support the requisite "nexus" between home and drug

48. "[T]he probable cause threshold in a drug forfeiture case is the same as that applicable elsewhere...." United States v. Edwards, 885 F.2d 377, 390 (7th Cir. 1989). For a more thorough explanation of probable cause in the context of civil forfeiture proceedings, see *infra* notes 50–72 and accompanying text.

49. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1188 (7th Cir. 1995).

50. As incorporated into the Drug Act pursuant to § 881(d), 19 U.S.C. § 1615 (1988) provides for the allocation of the burden of proof in forfeiture proceedings.

51. United States v. $94,000 in U.S. Currency, 2 F.3d 778, 782 (7th Cir. 1993). *See also* United States v. One Single Family Residence Located at 18755 North Bay Rd., 13 F.3d 1493, 1496 (11th Cir. 1994).

52. United States v. 6250 Ledge Rd., 943 F.2d 721, 725 (7th Cir. 1991).

53. United States v. $94,000 in U.S. Currency, 2 F.3d at 782 (quoting United States v. $364,960 in U.S. Currency, 661 F.2d 319, 322–23 (5th Cir. 1981)).

54. *Id.* The vast majority of circuits have held explicitly that the government is permitted to present hearsay evidence when proving probable cause in a forfeiture action. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1189 n.12 (7th Cir. 1995). A finding of probable cause based on hearsay from confidential informants and on circumstantial evidence may be the only proof available in cases involving bank accounts, money, or other fungible assets, in order to reveal unexplained wealth in conjunction with evidence of drug trafficking. *Id. See also* United States v. Daccarett, 6 F.3d 37, 56 (2d Cir. 1993). In addition, evidence of prior convictions for drug possession or trafficking is admissible in a probable cause determination. Where information from confidential sources is proffered as part of the basis for probable cause, the district court must decide whether that information is sufficiently reliable and adequate by considering the informant's previous "track record" and the totality of the circumstances. United States v. Edwards, 885 F.2d 377, 390 (7th Cir. 1989).

55. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d at 1189 n.13.

56. *Id. See also infra* note 261.

57. *See* United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d at 1188 n.13.

58. United States v. Daccarett, 6 F.3d at 55.

59. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

activity.[60] The Seventh Circuit agrees.[61] In *United States v. 916 Douglas Avenue*,[62] use of a home telephone for negotiations and arrangement of a drug sale was found sufficient to support the "nexus" required under § 881(a)(7).[63] Other circuits, such as the Sixth and the Fourth, have left the issue unresolved.[64]

Although there is controversy among the circuits as to the "nexus" or "substantial connection" issue, it is well settled that "a *direct* connection between the property subject to seizure and the illegal activity that renders the items forfeitable need not be shown in order to establish probable cause."[65] For example, it has been held that where a defendant's verifiable income cannot possibly account for the level of wealth displayed and where there is strong evidence that the defendant is a drug trafficker, there is probable cause to believe that the wealth is either a direct product of the illicit narcotics activity or that it is traceable to the activity as proceeds.[66] Ultimately, civil forfeiture probable cause analysis looks to the totality of circumstances surrounding the situation.[67]

Once the government establishes probable cause by demonstrating a nexus (or substantial connection) between the property subject to forfeiture and illicit drug activity, "the ultimate burden shifts to the claimant[68] to prove by a preponderance of the evidence that the property is not subject to forfeiture by demonstrating that the property was not used in connection with drug activities"[69] or that the claimant was innocent of any wrongdoing.[70] If the claimant fails to rebut the government's proof, the government's showing of probable cause will alone support a judgment of forfeiture.[71] In addition, "blanket denials" of drug trafficking activity are not effective rebuttals to an agent's affidavit used to evidence probable cause.[72]

All forfeited sums are deposited in the Department of Justice Assets Forfeiture Fund, which serves as the repository for "all amounts from the

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60. *Id.* at 32–33.
61. United States v. 6250 Ledge Rd., 943 F.2d 721, 725 (7th Cir. 1991).
62. 903 F.2d 490 (7th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991).
63. *Id.* at 494.
64. *See, e.g.*, Sixth Circuit cases (*compare* United States v. 429 South Main St., 52 F.3d 1416, 1423 (6th Cir. 1995) (nexus) *with* United States v. 16510 Ashton, 47 F.3d 1465, 1469 (6th Cir. 1995) (substantial connection)), and Fourth Circuit cases (*compare* United States v. Chandler, 36 F.3d 358, 362 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995) (nexus) *with* 36 F.3d at 368 (Wilkinson, J., concurring) (substantial connection) *and* United States v. Bizzell, 19 F.3d 1524, 1527 n.6 (4th Cir. 1994) (substantial connection)).
65. United States v. Edwards, 885 F.2d 377, 390 (7th Cir. 1989) (emphasis added).
66. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1189 (7th Cir. 1995).
67. United States v. Edwards, 885 F.2d at 390.
68. "Claimant" refers to the owner of the property subject to forfeiture. Civil forfeiture under § 881 is considered an in rem proceeding, thereby designating the property as the true defendant in the proceedings. *See supra* notes 38–39 and accompanying text.
69. United States v. All Assets and Equip. of Westside Bldg. Corp., 58 F.3d at 1189. *See also* United States v. 18755 North Bay Rd., 13 F.3d 1493, 1496 (11th Cir. 1994).
70. *See infra* notes 100–04 and accompanying text discussing the "innocent owner" defense.
71. *See* United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d at 1189.
72. United States v. One 1982 Chevrolet Corvette, 976 F.2d 392, 392–93 (8th Cir. 1992).

forfeiture of property under any law enforced or administered by the Department of Justice...."[73] Proceeds from the fund may be utilized at the discretion of the Attorney General.[74]

C. Constitutional Concerns Regarding § 881 Provisions and Civil Forfeiture Implementation

There is considerable controversy concerning the implementation of forfeiture under § 881, most notably with regard to the constitutional implications of such proceedings. Debated issues concern the property owner's due process right to pre-seizure notice,[75] safeguards for innocent property owners,[76] application of the Double Jeopardy Clause[77] to civil forfeiture,[78] and the pertinence of the Eighth Amendment's Excessive Fines Clause to civil forfeiture.[79]

1. Due Process Concerns: Pre-Seizure Notice to Property Owner and Owner's Right to Be Heard

"No person shall be...deprived of life, liberty, or property, without due process of law...."[80] Due process has been the source of heated debate since the Drug Act's inception in 1970, but more notably since 1983 when Congress amended the Act to allow for the seizure of real property.[81] This debate has centered on whether the Due Process Clause of the Fifth Amendment prohibits the government in a civil forfeiture case from seizing property without first affording the owner notice and an opportunity to be heard.[82] In 1993, the Supreme Court addressed this issue in the context of real property forfeiture under § 881(a)(7).[83]

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73. 28 U.S.C. § 524(c)(4) (1988). *See supra* note 8.
74. 28 U.S.C. § 524(c)(1) (1988).
75. *See* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (due process requires pre-seizure notice in cases of real property forfeiture). *See also infra* notes 80–99 and accompanying text.
76. *See* J. William Snyder, Jr., *Reining in Civil Forfeiture Law and Protecting Innocent Owners from Civil Asset Forfeiture:* U.S. v. 92 Buena Vista Ave., 72 N.C. L. REV. 1333 (1994). *See also* United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995). *See also infra* notes 100–04 and accompanying text.
77. U.S. CONST. amend. V provides, in relevant part, that "[n]o person...shall...be subject for the same offense to be put twice in jeopardy of life or limb."
78. *See* Gary M. Maveal, *Criminalizing Civil Forfeitures*, 74 MICH. B.J. 658 (1995). *See also* Denis M. Gravel, Casenote, Department of Revenue v. Kurte Ranch: *Double Jeopardy. A: Multiple Punishment Component. Q: What Is Confusion? Continuing Where* Halper *and* Austin *Left Off*, 15 N. ILL. U. L. REV. 433 (1995); Stephen H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (6) & (7)*, 70 NOTRE DAME L. REV. 941 (1995). The United States Supreme Court recently addressed the relationship between civil forfeiture and the Double Jeopardy Clause. *See* United States v. $405,089.23, 116 S. Ct. 2135 (1996).
79. *See* Austin v. United States, 509 U.S. 602 (1993) (holding that forfeiture under 21 U.S.C. § 881 is subject to the Eighth Amendment's Excessive Fines Clause). *See* discussion *infra* notes 105–19 and accompanying text.
80. U.S. CONST. amend. IV.
81. 21 U.S.C. § 881(a)(7) (1988).
82. *See generally* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).
83. *Id.* at 46.

In *James Daniel Good Real Property*, the government moved to forfeit the claimant's house and the four-acre parcel upon which it was situated, four and one-half years after a search warrant had uncovered nearly eighty–nine pounds of marijuana, marijuana seeds, vials containing hashish oil, and other drug paraphernalia.[84] A forfeiture action was brought in rem pursuant to § 881(a)(7), and following an ex parte proceeding, a United States magistrate judge found that the government had established probable cause to believe that the property was subject to forfeiture and issued a warrant in rem authorizing the seizure of the property.[85] Having been afforded no notice or adversarial hearing as to the forfeitability of his real property, the claimant appealed to the Ninth Circuit, asserting that the seizure deprived him of his property without due process of law.[86]

The United States Supreme Court, affirming the Ninth Circuit's opinion, held that:

> based upon the importance of the private interests at risk and the absence of countervailing Government needs,...the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."[87]

The Supreme Court exercised cautious restraint in its interpretation of the applicability of the Due Process Clause to civil forfeiture. In *James Daniel Good Real Property*, the Court limited its decision to *real property*, and allowed for exigent circumstances to extinguish the necessity of notice and pre-deprivation hearings.[88] According to the Court, exigent circumstances will excuse the necessity of a hearing only if the government can demonstrate that less restrictive alternatives are not realistic measures of protection of the government's interest in preventing sale, destruction, or continued illegal use of the real property.[89]

The notice controversy has also extended into the realm of personal property forfeiture.[90] Personal property, in contrast to real property, possesses attributes of liquidity and mobility that would make the possibility of conversion substantial if notice of impending forfeiture were compelled.[91] The distinction is clear when one compares a home with an automobile. The courts have emphasized that in evaluating a claimant's submission that he was unduly deprived of notice and opportunity to be heard, "the district court must give considerable weight to the possibility of the property disappearing if the

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84. *Id.*
85. *Id.* at 46–47.
86. *Id.* The district court ruled that the government was entitled to summary judgment and entered an order forfeiting the property. *Id.* On appeal, the Ninth Circuit decided unanimously that the seizure of the claimant's property without prior notice and a hearing violated the Due Process Clause. *Id.*
87. *Id.* at 62.
88. *Id.*
89. *Id. See also* U.S. v. All Assets & Equip., 58 F.3d 1181, 1193 (7th Cir. 1995).
90. *See generally* Calero–Toledo v Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (pre-seizure notice unnecessary to the owner of a yacht where such notice would likely have frustrated the government's attempt to retain in rem jurisdiction over the yacht).
91. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d 1181, 1192–93 (7th Cir. 1995).

government is not allowed to proceed on an *ex parte* basis."[92] In addressing the issue of notice in the context of personal property, the Supreme Court in *James Daniel Good Real Property* cited its decision in *Calero–Toledo v. Pearson Yacht Leasing Co.*[93] There the Court held that the government could seize a yacht subject to civil forfeiture without affording prior notice or hearing.[94] Central to the Court's analysis in *Calero–Toledo* was the fact that a yacht was the "sort [of property] that could be removed to another jurisdiction, destroyed or concealed, if advanced warning of confiscation were given."[95]

A related issue concerns remedies available if a constitutional deprivation of pre-seizure notice and hearing is adjudged to exist. The Supreme Court addressed the issue of available remedies for constitutional violations in *Milliken v. Bradley*.[96] In *Milliken*, the Court found that it is the responsibility of the courts to construct a remedy for a constitutional violation that is tailored to the injury caused by the violation.[97] "The scope of the remedy is determined by the nature and extent of the constitutional violation."[98] The circuits are split as to the impact of the absence of pre-deprivation notice and hearing.[99]

2. Safeguards: The "Innocent Owner" Defense

Section 881(a)(7) of Title 21 provides that a parcel of real property that has been used to commit or to facilitate the commission of a narcotics felony prohibited by subchapter 1 of Chapter 13 of 21 U.S.C. (§§ 801–904) is forfeitable to the United States, *unless the owner can establish a degree of innocence.*[100] Once the government has established probable cause to believe the property has been used to facilitate illicit narcotics activities, persons claiming to be innocent owners have the burden of "prov[ing] by a preponderance of the evidence, that the narcotics activity on the property occurred without their knowledge or, if they had knowledge of it, without their consent."[101] Willful blindness as to activities occurring on the property will not shield an owner from forfeiture.[102] Further, issues of knowledge and willful avoidance of

92. *Id.*
93. United States v. James Daniel Good Real Property, 510 U.S. 43, 52 (1993).
94. 416 U.S. 663 (1974).
95. Id. at 679.
96. 418 U.S. 717, 744 (1974).
97. *Id. See also* United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d at 1193.
98. United States v. Milliken, 418 U.S. at 744.
99. *See* United States v. 20832 Big Rock Drive, 51 F.3d 1402 (9th Cir. 1995). For example, the Eighth Circuit is of the view that *James Daniel Good Real Property* requires dismissal of the forfeiture action with leave to file a new action if the statute of limitations has not run. *See, e.g.*, United States v. 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994). The Second, Third, and Ninth circuits take the approach that the illegal seizure, alone, does not require that the property be immune from seizure. *See* United States v. 4492 South Livonia Rd., 889 F.2d 1258, 1265–66 (2d Cir. 1989); United States v. R.R. #1, Box 224, 14 F.3d 864, 869 n.5 (3d Cir. 1994); United States v. 20832 Big Rock Drive, 51 F.3d 1402, 1406 (9th Cir. 1995). According to the latter view, however, the government may be liable for any profits of which the claimant was deprived during the illegal seizure. United States v. All Assets and Equip. of W. Side Bldg. Corp., 58 F.3d at 1193.
100. United States v. Milbrand, 58 F.3d 841, 844 (2d Cir. 1995). *See* 21 U.S.C. § 881(a)(7) (1988). For the roots of the "innocent owner" defense in the context of the relevancy of claimants' culpability in excessive fines determination, see *supra* note 39.
101. United States v. Milbrand, 58 F.3d at 844 (citing United States v. 19 and 25 Castle St., 31 F.3d 35, 39 (2d Cir. 1994)).
102. *Id.* (citing United States v. 755 Forest Rd., 985 F.2d 70, 72 (2d Cir. 1993)).

knowledge are questions of fact, and the district court's findings may not be set aside unless they are clearly erroneous.[103] Nevertheless, the statutory "innocent owner" defense goes far toward assuaging Eighth Amendment concerns: an owner has an opportunity to refute the government's prima facie showing of probable cause by asserting his lack of culpability.[104]

D. Applicability of the Eighth Amendment's Excessive Fines Clause to Civil Forfeiture

The in rem nature of a forfeiture action brought under 21 U.S.C. § 881 and such forfeiture's adverse effect on the property owner raise unique questions about the proper application of the constitutional limit of excessiveness.[105] Until the United States Supreme Court decided *Austin v. United States*[106] in 1993, the circuit courts were split over whether the Eighth Amendment's Excessive Fines Clause[107] applied in a context outside criminal proceedings.[108] *Austin* held that civil in rem forfeiture proceedings are subject to the limitations of the Excessive Fines Clause.[109]

In *Austin*, the Supreme Court was confronted with the issue of whether the Excessive Fines Clause applies to civil forfeiture in the context of § 881(a)(4) and (7), "which provide for the forfeiture of, respectively, vehicles and real property used, or intended to be used, to facilitate the commission of certain drug-related crimes."[110] In addressing the issue, the Court reasoned that the determinative question is not whether forfeiture under § 881(a)(4) and (7) is civil or criminal in nature, as the Eighth Amendment's text is neither expressly limited to criminal cases, nor does its history require such a limitation.[111] The crucial question, opined the Court, was whether the forfeiture constitutes "monetary punishment, with which the Excessive Fines Clause is particularly concerned."[112] Because sanctions frequently serve more than one purpose, continued the Court, the fact that a civil forfeiture serves remedial goals will not exclude it from the purview of the Excessive Fines Clause, so long as it can be explained as serving in part to punish.[113]

Next, the Court examined whether, at the time the Eighth Amendment was ratified, forfeiture was understood at least in part as punishment and

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103. *Id. See* FED. R. CIV. P. 52(a); United States v. 5000 Palmetto Drive, 928 F.2d 373, 375 (11th Cir. 1991) ("Determination of an innocent owner claim may be reversed only if clearly erroneous.").

104. United States v. Chandler, 36 F.3d 358, 368–69 (Wilkinson, J., concurring), *cert. denied*, 115 S. Ct. 1792 (1995).

105. *Id.* at 362 (Wilkinson, J., concurring).

106. 509 U.S. 602 (1993).

107. U.S. CONST. amend. VIII (providing, in relevant part, that "[e]xcessive bail shall not be required, *nor excessive fines imposed....*" (emphasis added)).

108. United States v. Chandler, 36 F.3d at 362. Prior to *Austin*, the Second Circuit was the only Court of Appeals to hold that the Eighth Amendment potentially limited civil forfeitures. *See* United States v. 38 Whalers Cove Drive, 954 F.2d 29, 35 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992) (Eighth Amendment applies to in rem civil forfeiture). *But see* United States v. Tax Lot 1500 Township 38 South, 861 F.2d 232, 234–35 (9th Cir. 1988), *cert. denied sub nom.* Jaffee v. United States, 493 U.S. 954 (1989) (Eighth Amendment does not apply in civil proceedings).

109. *See infra* notes 110–19 and accompanying text.

110. Austin v. United States, 509 U.S. 602, 602 (1993).

111. *Id.*

112. *Id.*

113. *Id.*

whether under § 881(a)(4) and (7) forfeiture should so be understood today.[114] Upon review of English and American law before, at the time of, and following the ratification of the Eighth Amendment, the Court concluded that, historically, forfeiture generally, and statutory in rem forfeiture in particular, have been understood, at least in part, as punishment.[115] The Court held that

> in light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense" and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.[116]

The claimant in *Austin* petitioned the Court to establish a multifactor test[117] for determining whether a forfeiture is constitutionally "excessive."[118] The *Austin* Court, however, elected not to provide lower courts with a standard for the determination of Eighth Amendment excessiveness, reasoning that "prudence dictates that we allow the lower courts to consider that question in the first instance."[119]

III. COMPETING STANDARDS FOR EXCESSIVENESS DETERMINATION

Since *Austin*, courts have formulated various tests for determining the excessiveness of a civil forfeiture. Courts have come to recognize two general approaches to the excessiveness inquiry.[120] One approach utilizes the instrumentality principle proposed by Justice Scalia in his concurring opinion in *Austin*.[121] The other approach adopts a tailored version of the traditional Eighth Amendment proportionality principle articulated in *Solem v. Helm*.[122] Though some courts conduct exclusive instrumentality or proportionality inquiries in their excessiveness analyses, the overwhelming tendency of courts

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114. *Id.*
115. *Id.* at 602–03.
116. *Id.* at 621–22 (citations omitted).
117. *See infra* part III.C.
118. *Austin*, 509 U.S. at 622.
119. *Id.* at 622–23. *See also* Yee v. City of Escondido, 503 U.S. 519 (1992). Though the majority declined to establish a standard for determining the constitutional "excessiveness" of a forfeiture, Justice Scalia in his concurrence suggested that an instrumentality approach is the correct inquiry. *Austin*, 509 U.S. at 627–28. For a discussion of Justice Scalia's concurrence, see *infra* notes 124–29 and accompanying text (advocating an instrumentality approach). The same day *Austin* was decided, the Supreme Court held in a second case that criminal in personam forfeitures are subject to Excessive Fines Clause limitations. *See* United States v. Alexander, 509 U.S. 544 (1993). In *Alexander*, as in *Austin*, the Court declined to delineate a test for determining whether a particular forfeiture is constitutionally excessive.
120. United States v. One 1990 Ford Ranger Truck, 876 F. Supp. 1283, 1286–87 (N.D. Ga. 1995). *See also* United States v. 427 and 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996).
121. *See Austin*, 509 U.S. at 627–28 (Scalia, J., concurring). *See also infra* notes 124–29 and accompanying text.
122. Solem v. Helm, 463 U.S. 277 (1983). *See* discussion *infra* part III.B. *See also* United States v. Chandler, 36 F.3d 358, 363 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

today has been to "combine the principles of instrumentality and proportionality to come up with various multifactor tests."[123]

A. The Instrumentality Approach

The instrumentality approach for determining the excessiveness of a forfeiture under § 881 finds its genesis in Justice Scalia's concurrence in *Austin*.[124] Justice Scalia explained, "the relevant inquiry...is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?"[125] Under this approach, forfeiture is constitutionally permissible only if the nexus between the property and the crime is sufficiently substantial that the property may be deemed an instrumentality of the crime.[126] "The property must 'offend' *and* the owner must not be completely without fault."[127] Justice Scalia reasoned that "[u]nlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant."[128] It has been asserted that employment of a strict instrumentality test, i.e., focusing on the property's role in the commission of the illegal narcotics act, is the only way to preserve the "guilty property fiction" of traditional in rem forfeiture.[129]

After *Austin*, the Fourth Circuit largely adopted Justice Scalia's instrumentality analysis.[130] In *United States v. Chandler*,[131] the Fourth Circuit, rejecting a proportionality test,[132] articulated an instrumentality inquiry for determining whether a civil forfeiture under 21 U.S.C. § 881(a)(6) and (7) is excessive.[133] In *Chandler*, the government moved under § 881(a)(6) and (7) to forfeit a thirty-three acre farm, a property valued at approximately $569,000, based on the farm's alleged involvement in violations of federal drug laws.[134] On the basis of three principal witnesses testifying under grants of immunity, the district court found that the government had established probable cause that the property was subject to forfeiture and consequently shifted the burden to the claimant to show, by a preponderance of the evidence, that the property was not used for illegal purposes or that he did not know about the illegal use.[135] At the conclusion of the evidence, the jury found in favor of the United States, concluding that the property had been used to facilitate the commission of violations of the drug law, that the property had been improved by the proceeds of drug exchanges, and that the claimant could not claim lack of awareness as a

123. United States v. Chandler, 36 F.3d at 363. *See also* United States v. One 1990 Ford Ranger Truck, 876 F. Supp. at 1286; *infra* part III.C.
124. *See* Austin v. United States, 509 U.S. at 627–28 (Scalia, J., concurring).
125. *Id.*
126. United States v. One 1990 Ford Ranger Truck, 876 F. Supp. at 1286–87.
127. *Austin*, 509 U.S. at 626 (Scalia, J., concurring).
128. *Id.* at 627 (Scalia, J., concurring). Justice Scalia employed a persuasive example of the instrumentality approach: "Scales used to measure out unlawful drug sales....are confiscable whether made out of the purest gold or the basest metal." *Id.*
129. United States v. 427 and 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996).
130. United States v. Milbrand, 58 F.3d 841, 846 (2d Cir. 1995).
131. 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).
132. *See infra* part III.B.
133. 36 F.3d at 360, 365.
134. *Id.* at 360–61.
135. *Id.* at 361.

defense.[136] Shortly thereafter, the court entered a "decree and judgment" forfeiting the farm to the United States.[137] The claimant appealed the grant of forfeiture, contending that the forfeiture of the farm constituted an excessive fine in violation of the Eighth Amendment.[138]

Adopting Justice Scalia's instrumentality analysis, the Fourth Circuit argued that Congress, in enacting civil forfeiture laws, "did not intend to punish or fine by a particular amount or value; instead, it intended to punish by forfeiting property of whatever value which was *tainted* by the offense."[139] Reasoning further that the question of excessiveness is "tied to the 'guilt of the property' or the extent to which the property was involved in the offense, and *not* its value,"[140] the Fourth Circuit held that in an excessive fine determination of an in rem forfeiture under the Eighth Amendment,

> a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out an offense.[141]

The *Chandler* Court continued,

> [n]o one factor is dispositive but, to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of the circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.[142]

In light of its freshly articulated instrumentality test, the *Chandler* court analyzed the case before it. Addressing the nexus between the property and the offense, the court found, based on government witness testimony, that over a period of six years, the defendant property had "served as the situs for over 130 drug transactions, some involving thousands of dollars."[143] In addition, the property was an "important, if not necessary, instrument for the drug activity, in providing a secluded location."[144] Analyzing the extent to which the property was used for illegal activities, the court found that the illegal use "permeated to the basement, the kitchen, the garage, and the long driveway."[145] "Moreover,

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136. *Id.*
137. *Id.*
138. *Id.* at 362.
139. *Id.* at 364.
140. *Id.* (emphasis added). At least one state court has also accepted Justice Scalia's instrumentality rationale. *See In re* King Properties, 635 A.2d 128, 133 (1993) (arguing that the excessiveness inquiry "does not concern the value of the thing forfeited, but the relationship of the offense to the property which is forfeited").
141. *Chandler*, 36 F.3d at 365.
142. *Id.*
143. *Id.* at 366.
144. *Id.*
145. *Id.*

the property itself was maintained and improved by payments made with drugs."[146] In considering the role and culpability of the claimant as the property owner, the testimony showed that "he procured drugs, stored them on the property, paid his employees with drugs, and sold drugs to others."[147] Lastly, the court found no evidence that the property could or should be separated.[148] The court concluded:

> In short, the overwhelming evidence presented by the government showed that Little River Farm was both a substantial and meaningful instrumentality of the alleged drug offenses. We have no difficulty in concluding that the forfeiture of the 33-acre property known as Little River Farms was legal under 21 U.S.C. §§ 881(a)(6) & (a)(7) and did not violate the Excessive Fines Clause of the Eighth Amendment.[149]

Instrumentality tests, such as that expounded in *Chandler*, have found some support among commentators, at least as a threshold inquiry, largely because of its perceived ability to control judicial subjectivity.[150] "The dangers of judicial subjectivity, which provide the foundation for Justice Scalia's impulse to restrict judicial discretion, lend substantial support to the imposition of an instrumentality test."[151] Because the instrumentality approach limits a court's inquiry to the facts surrounding the defendant property's connection with the proscribed narcotics activities, it, in theory, reduces judicial discretion and leads to greater uniformity in constitutional excessiveness determination.[152]

Although Scalia's instrumentality approach is highly touted as a threshold test to a broader excessiveness inquiry, employed exclusively, the instrumentality test finds only sparse support.[153] Critics of an exclusive instrumentality test are quick to point out that the majority in *Austin* specifically refused to endorse Justice Scalia's instrumentality test as "the sole measure of an *in rem* forfeiture's excessiveness."[154] Rather, the Court suggested that other factors were also relevant: "We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive."[155]

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146. *Id.* One witness testified that he was paid in cocaine and marijuana, or a combination of drugs and money, on at least 30 to 40 occasions for cutting grass, landscaping, and doing minor carpentry work at the farm. *Id.*

147. *Id.*

148. *Id. See also infra* note 269.

149. *Chandler*, 36 F.3d at 366.

150. *See* Sarah N. Welling & Meredith L. Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture after* Austin v. United States, 83 KY. L.J. 835, 864 (1995).

151. *The Supreme Court, 1992 Term Leading Cases*, 107 HARV. L. REV. 144, 214 (1993).

152. *See* Welling & Hager, *supra* note 150, at 864 ("Theoretically, [the instrumentality] test will limit subjectivity by removing the need to consider the magnitude of the claimant's culpability.").

153. *See, e.g.*, United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995); *In re* King Properties, 635 A.2d 128, 133 (Pa. 1993). *See also infra* part IV.

154. Austin v. United States, 509 U.S. 602, 623 n.15 (1993).

155. *Id.*

B. The Traditional Eighth Amendment Proportionality Approach

In *Solem v. Helm*,[156] the Supreme Court applied the principle of proportionality to hold that the Cruel and Unusual Punishment Clause[157] of the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[158] The *Solem* case concerned an offender sentenced to life imprisonment after he was convicted of his seventh non-violent felony for "uttering a 'no account' check for $100."[159] Holding that life imprisonment constituted cruel and unusual punishment, the Supreme Court articulated a three-part test which has become standard inquiry in constitutional proportionality analysis.[160] In determining whether a punishment or fine violates the Cruel and Unusual Punishment Clause, a court must inquire into: (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.[161]

The *Solem* Court's rationale that the Cruel and Unusual Punishment Clause of the Eighth Amendment implicitly requires criminal punishments to be at least loosely proportionate to the crime of conviction,[162] and that "the Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments"[163] has been largely undermined by recent cases which question the applicability of a proportionality principle in an Eighth Amendment context.[164] In *Harmelin v. Michigan*,[165] Justice Scalia, joined by Chief Justice Rehnquist, opined that the proportionality principle did not exist in the Eighth Amendment and thus concluded that *Solem* was wrongly decided.[166] In a separate opinion, Justice Kennedy, joined by Justices O'Connor and Souter, limited the scope of *Solem*, stating that the Eighth Amendment only forbids "extreme sentences that are 'grossly disproportionate' to the crime."[167]

Despite concerns regarding *Solem's* continuing vitality,[168] most courts persist in requiring a proportionality analysis in civil forfeiture excessive fine

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156. 463 U.S. 277 (1983).

157. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

158. Solem v. Helm, 463 U.S. at 284.

159. *Id.* at 281.

160. *Id.* at 290–92.

161. *Id.*

162. *Id.* at 290.

163. *Id.* at 289 (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)); *see also* United States v. R.R. #1, Box 224, 14 F.3d 864, 875 (3d Cir. 1994).

164. United States v. 429 S. Main St., 52 F.3d 1416, 1424 n.1 (6th Cir. 1995) (Guy, J., concurring in part and dissenting in part).

165. 501 U.S. 957 (1991).

166. *Id.* at 965 (Scalia, J., joined by Rehnquist, C.J.); *see also* United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

167. *Harmelin*, 501 U.S. at 1001. *See Chandler*, 36 F.3d at 365 (acknowledging both the historical nonexistence of a proportionality principle under the Excessive Fines Clause and that 21 U.S.C. § 881(a)(7) does not limit the value of property subject to forfeiture, and rejecting the application of the proportionality principle to forfeiture analysis). *See also Chandler*, 36 F.3d at 365–66; *429 South Main St.*, 52 F.3d at 1424 (Guy, J., concurring in part and dissenting in part).

168. *See* United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (rejecting application of the *Solem* proportionality analysis for determining the excessiveness of civil forfeitures, and reasoning that the *Solem* factors are guidelines for evaluating whether a punishment violates the Cruel and Unusual Punishment Clause, not the Excessive Fines Clause; further recognizing that *Harmelin* casts doubt on *Solem's* continuing viability; and, most

determinations.[169] Of those circuits which continue to employ a proportionality analysis, nearly all do so within the context of a multifactor or hybrid approach, joining both proportionality and instrumentality inquiries. The Eleventh Circuit, however, has concluded that the appropriate excessiveness inquiry "is, and is only, a proportionality test."[170]

In *427 and 429 Hall Street*,[171] the Eleventh Circuit reviewed, in the context of the Excessive Fines Clause, an order forfeiting claimant's real property to the United States pursuant to 21 U.S.C. § 881(a)(7). The defendant property was located about 500 feet from the outdoor basketball courts of a junior high school and one-fifth of a mile from the front door of the school itself.[172] The entire defendant property was owned by the claimant and was valued at approximately $65,000.[173] On the property stood one building in which the claimant ran a grocery store from one portion and rented out another.[174]

In August 1991, an agent of the local district attorney's drug task force received a tip from a confidential informant that drugs were being sold at the grocery store.[175] Two "controlled buys" by the task force each yielded one-half of a gram of cocaine.[176] Based on this information, the task force secured a warrant that authorized a search of the grocery store and any vehicle on the premises.[177] A search of the claimant and the premises revealed $845 in cash and seven plastic one-inch square bags containing a white powder-like substance on the claimant's person, as well as $108 and some .38 caliber bullets on a shelf behind the counter.[178] Claimant's Chevrolet Blazer, parked on the premises, yielded a .38 caliber pistol and three hand-rolled cigarettes.[179] In all, a total of

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significantly, recognizing that only the first of the three *Solem* factors can be applied in the Excessive Fines context); *see also Harmelin*, 501 U.S. at 965 (Scalia, J., joined by Rehnquist, C.J.), 1001 (Kennedy, J., joined by O'Connor, and Souter, JJ., concurring in part and concurring in the judgment).

169. United States v. 11869 Westshore Drive, 70 F.3d 923, 928 (6th Cir. 1995).

> Since neither *Harmelin* nor *Solem* specifically involved the excessive fines provision of the Eighth Amendment and since the desire to overrule *Solem* is expressed by only two members of the *Harmelin* Court [Justice Scalia and Chief Justice Rehnquist], the effects of *Harmelin* on the proportionality analysis of excessive fines is unclear. Consequently, most courts have continued to include proportionality analysis as part of a hybrid test in the excessive fines inquiry.

Id.

170. United States v. 427 and 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996).

171. *Id.* (affirming the judgment of the district court (ordering the property forfeited to the government) which had applied a two-step multifactor test to measure the excessiveness of the fine at issue, a test which emphasized instrumentality analysis, but which included a proportionality review). *See* United States v. 427 and 429 Hall St., 853 F. Supp. 1389, 1399 (M.D. Ala. 1994), *aff'd on other grounds*, 74 F.3d 1165 (11th Cir. 1996); *see also infra* note 182. In affirming the judgment of the lower court, the Eleventh Circuit explained that "we do so solely on the strength of proportionality review, which is all that the Excessive Fines Clause requires." 74 F.3d at 1173.

172. *427 and 429 Hall St.*, 74 F.3d at 1167.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id*

179. *Id.*

three grams of cocaine and six-tenths of a gram of marijuana was discovered on the defendant property.[180]

In October 1991, the United States filed a civil action in rem for forfeiture of the entire parcel of real property pursuant to 21 U.S.C. § 881(a)(7).[181] After a bench trial, the district court ordered the property forfeited to the government.[182] The claimant appealed, arguing that the forfeiture constituted an excessive fine in violation of the Eighth Amendment.[183]

Confronted with the task of formulating a proper analysis for determining constitutional excessiveness of civil in rem forfeitures, the Eleventh Circuit concluded that the only appropriate inquiry with respect to the Excessive Fines Clause is a proportionality test.[184] Three arguments provided support for the Eleventh Circuit's conclusion. First, opined the court, the *Austin* Court acknowledged the punitive nature of forfeiture under § 881(a)(7);[185] "[w]hen the Eighth Amendment's Excessive Fines Clause, which constrains the power of the sovereign to punish, comes into play, it necessarily protects the person punished, i.e., the owner."[186] Because § 881 (a)(7) is designed to, and does, punish individuals involved in drug trafficking, the instrumentality test is inappropriate.[187] Second, the Excessive Fines Clause on its face prohibits fines which are "excessive"; a logical reading of the provision "necessarily implies a comparison of the amount of the fine with the acts of the individual."[188] Third, the historical antecedents of the Excessive Fines Clause required proportionality review.[189] Based upon these premises, the Eleventh

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180. *Id.*

181. *Id.*

182. *Id.* The district court had found that "in determining whether a forfeiture under 21 U.S.C. §§ 881(a)(4) & (a)(7) violates the Excessive Fines Clause a two step balancing test which emphasizes 'instrumentality' analysis but includes 'proportionality' analysis, is appropriate." United States v. 427 and 429 Hall St., 853 F. Supp. 1389, 1399 (M.D. Ala. 1994), *aff'd on other grounds*, 74 F.3d 1165 (11th Cir. 1996). The district court articulated the test: "(1) Was there a 'substantial connection' between the defendant property and the drug trafficking in question? If so, (2) Is the forfeiture of the defendant property a 'grossly disproportionate' punishment, given the nature of the drug trafficking involved?" *Id.* The first step was designed to emulate the focus of Justice Scalia's approach in *Austin*. An affirmative finding at this stage, however, resulted only in a presumption in favor of forfeiture, rather than in its conclusiveness. *Id.* at 1400. The second step focused on the nature of constitutional excessiveness, inquiring into such matters as the amount of drugs involved, their value, the length of time over which drug trafficking occurred, and the effect of distribution on individuals and the community. *Id.* Similar inquiries have been adopted in many circuits. *See infra* part III.C., discussing multifactor inquiries.

183. *427 and 429 Hall St.*, 74 F.3d at 1167.

184. *Id.* at 1170.

185. *Id. See also* Austin v. United States, 509 U.S. 602, 619 (1993).

186. *427 and 429 Hall St.*, 74 F.3d at 1171.

187. *Id.*

188. *Id. See also* Harmelin v. Michigan, 501 U.S. 957, 1009 (1991) (White, J., joined by Blackmun and Stevens, JJ., dissenting) ("The language of the Amendment does not refer to proportionality in so many words, but it does forbid 'excessive' fines, a restraint that suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed.")

189. *427 and 429 Hall St.*, 74 F.3d at 1171.

> [T]he principle that 'fines' are not to be 'excessive' (i.e. "out of proportion") was well rooted in English law when our country came of age. And of course, the Eighth Amendment 'was based directly on Art. I, § 9, of the

Circuit concluded that a court must ask: "Given the offense for which the owner is being punished, is the fine (imposed by civil forfeiture) excessive?"[190] The court continued, "[w]hile the core of proportionality review is a comparison of the severity of the fine with the seriousness of the underlying offense, it would be futile to attempt a definitive checklist of relevant factors. The relevant factors will necessarily vary from case to case."[191]

Turning to the facts of *427 and 429 Hall Street*, the Eleventh Circuit weighed the severity of the fine against the seriousness of the underlying offense. On the one hand, reasoned the court, were the claimant's clean record, defendant property's value of approximately $65,000, and the undisputed fact that the legitimate businesses claimant ran from his property were the primary sources of the claimant's livelihood.[192] On the other hand, defendant property "was forfeited on the strength of possession with the intent to distribute three grams of cocaine within five hundred feet of a junior high school."[193] Further, under United States Sentencing Guidelines, the claimant faced a possible sentence of twenty-one months in prison and a $40,000 fine.[194] Under the totality of circumstances underscoring the seriousness of the offense, the court concluded that a forfeiture of a $65,000 piece of property did not violate the Excessive Fines Clause.[195]

Like the Eleventh Circuit, the Third Circuit has also shown considerable deference to a proportionality review of civil in rem forfeitures where an issue of constitutional excessiveness has been raised. Though not explicitly adopting a proportionality analysis, the Third Circuit in an "effort to provide some guidance to the district courts" has embraced the proportionality inquiry.[196] In *United States v. R.R. #1*, evidence indicated that the claimant used a telephone located on the defendant property to arrange drug transactions.[197] Evidence also suggested that the claimant stored cocaine and scales and made distributions of cocaine on the defendant property.[198] The government sought civil forfeiture pursuant to § 881(a)(7) on the ground that the claimant used the property to facilitate cocaine distribution.[199] The district court granted summary judgment against the defendant property, which was valued at $120,420, finding that the government's established nexus was not sufficiently brought into dispute by the claimant's affidavit refuting government evidence.[200] On appeal, the claimant argued that forfeiture of the defendant property resulted in imposition of an excessive fine in violation of the Eighth Amendment.[201]

Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim language of the English Bill of Rights.'

Id. at 1172. *See also* Solem v. Helm, 463 U.S. 277, 286 n.10 (1983).

190. *427 and 429 Hall St.*, 74 F.3d at 1172.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* The court noted that in 1991, claimant's offenses would have been classified as Level 14 under the United States Sentencing Guidelines. *Id.*

195. United States v. 427 and 429 Hall St., 74 F.3d 1165, 1172–73 (11th Cir. 1996).

196. United States v. R.R. #1, Box 224, 14 F.3d 864, 873 (3d Cir. 1994).

197. *Id.* at 867.

198. *Id.*

199. *Id.* at 866.

200. *Id. See also supra* notes 68–72 and accompanying text.

201. *R.R. #1*, 14 F.3d at 868. The claimant also argued on appeal that summary judgment was inappropriate because his affidavit sufficiently produced a genuine issue of material fact as

Acknowledging that *Harmelin* called into question *Solem's* continuing vitality, the Third Circuit nevertheless stated that "*some* proportionality analysis is required upon the [claimant's] *prima facie* showing that [the forfeiture] is grossly disproportionate or bears no close relation, to the seriousness of the crime."[202] The court noted that Scalia's instrumentality inquiry in *Austin*[203] "is by no means the only possible inquiry,"[204] and reasoned that "in considering the relationship between the property and the alleged criminal offense and evaluating whether a proposed forfeiture is an unconstitutionally excessive fine,...the district court should avoid conflating the Eighth Amendment inquiry with § 881(a)(7)'s nexus requirement, although the two share some characteristics."[205] Drawing on *38 Whalers Cove Drive*,[206] *Solem*, and *Sarbello*, and determined to provide "some guidance" to the district courts, the *R.R. #1* court attempted to identify "some of the issues [courts] may have to consider in determining whether a forfeiture is excessive."[207] The court articulated a proportionality analysis:

> A district court's proportionality analysis, while it will not in every case be extensive or encompass the three factors set forth in Solem, must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the [claimant], the [claimant's] motive and culpability, and, of course, the extent that the [claimant's] interest and the enterprise itself are tainted by criminal conduct. The language of the [E]ighth Amendment demands that a constitutionally cognizable

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to the nexus issue. *Id.* at 869–70. The Third Circuit agreed and remanded the case to the district court for trial. *Id.* at 872. A discussion of the court's analysis of this issue is beyond the scope of this Note.

202. *Id.* at 875 (quoting United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)) (second alteration in original).

203. *See supra* notes 124–29 and accompanying text.

204. *R.R. #1*, 14 F.3d at 873. The court also noted that the majority in *Austin* did not "rule out the possibility that the connection between the property and the offense may be relevant" and that the decision of the majority in *Austin* "in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of...property was excessive." *Id.* (quoting Austin v. United States, 509 U.S. 602, 623 n.15 (1993)). *See also supra* notes 154–55 and accompanying text.

205. *R.R. #1*, 14 F.3d at 873. Many courts and commentators have indicated in their analyses of *R.R. #1* that the Third Circuit suggests the implementation of a multifactor test for the determination of constitutional excessiveness. *See, e.g.*, United States v. 11869 Westshore Drive, 70 F.3d 923, 929 (6th Cir. 1995) (declaring that the Third Circuit has developed a "preference for the use of a less detailed hybrid test in the excessive fines context"). However, the Third Circuit warned against "conflating the Eighth Amendment inquiry with § 881(a)(7)'s nexus requirement." *R.R. #1*, 14 F.3d at 873. Rather than employing an instrumentality analysis as an integral part of its excessiveness inquiry, the Third Circuit seeks to satisfy § 881's *statutory* requirement that there be a nexus between defendant property and illegal drug activity before proceeding to the excessiveness inquiry—a proportionality analysis. *See* discussion of probable cause *supra* notes 49–72 and accompanying text.

206. United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir.), *cert. denied* 113 S. Ct. 55 (1992). *See also infra* notes 235–43 and accompanying text.

207. *R.R. #1*, 14 F.3d at 873. The Third Circuit stated that "we too [along with the *Austin* Court] will not try to establish such a test [for excessiveness] at this time. We believe the question of whether any particular civil forfeiture constitutes an unconstitutionally 'excessive fine' is a matter which should be resolved by the district court in the first instance." *Id.*

> disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.[208]

Though *427 and 429 Hall St.* and *R.R. #1* provide strong bases for the utilization of proportionality inquiry in the context of civil forfeiture, proportionality is not without critics. A powerful rejection of proportionality *in totem* appeared in a concurring opinion in *Chandler*.[209] There, it was persuasively argued that a straight proportionality approach, in contrast to an instrumentality test, "bears little analytical relationship to a judgment of forfeiture."[210] Proportionality analyses typically require considerable inquiry into the value of the illegal drugs at issue and whether the value of the subject property overwhelms the amount involved in the drug transaction.[211] "This question does not necessarily mirror the factfinder's inquiry. It is possible that a factfinder could find a nexus between the subject property and a drug transaction sufficiently close to satisfy the statutory standards, yet the property could still be deemed non-forfeitable under a proportionality inquiry if it were, for instance, an extremely expensive home or automobile."[212] A proportionality analysis may too often serve to insulate from the forfeiture prescribed by statute those drug traffickers who have enjoyed substantial lucrativeness.[213]

Critics of proportionality's relevance in the context of civil forfeiture often rely on persuasive discourse in Justice Scalia's *Austin* concurrence:

> Scales used to measure out unlawful drug sales...are confiscable whether made of the purest gold or the basest metal. But 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 building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine. *The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.*[214]

The *Chandler* court also emphasized that value of the property subject to forfeiture is irrelevant to an excessive fines determination; rather, the question of excessiveness is tied to the "guilt of the property" or the extent to which the property was involved in the offense.[215] The court illustrated this point by comparing two hypotheticals:

> Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness, even though the property has such a high value. On the other hand, forfeiture of a row

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208. *Id.* at 875 (quoting United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)).

209. United States v. Chandler, 36 F.3d 358, 369 (4th Cir.) (Wilkinson, J., concurring), *cert. denied*, 115 S. Ct. 1792 (1994).

210. *Id.*

211. *Id. See, e.g.*, United States v. 427 and 429 Hall St., 853 F. Supp. 1389, 1400 (M.D. Ala. 1994), *aff'd on other grounds*, 74 F.3d 1165 (11th Cir. 1996) (proportionality inquiry measures "the value of the defendant property against the scope of the drug trafficking").

212. United States v. Chandler, 36 F.3d at 369 (Wilkinson, J., concurring). For a discussion comparing "substantial connection" and "nexus," see *supra* notes 50–72 and accompanying text; *see also infra* note 261.

213. *See Chandler*, 36 F.3d at 369 (Wilkinson, J., concurring).

214. Austin v. United States, 509 U.S. 602, 627–28 (1993) (Scalia, J., concurring) (emphasis added).

215. *Chandler*, 36 F.3d at 363–64.

> house, which is owned by an elderly woman and which shelters her children and grandchildren, upon discovery of a trace amount of cocaine in a grandson's room, might arguably be found to be excessive, even though the house has a relatively low value of $30,000. *In both cases, the intuitive excessiveness analysis centers on the relationship between the property and the offense—the more incidental or fortuitous the involvement of the property in the offense, the stronger the argument that its forfeiture is excessive.*[216]

In addition, many courts and commentators rejecting a proportionality test rely heavily on what they perceive to be a retreat from proportionality review in Cruel and Unusual Punishments Clause jurisprudence.[217] Most courts have nonetheless continued to inquire into proportionality in their excessive fines analyses, most often in the context of multifactor tests which combine the proportionality inquiry with an instrumentality threshold test.[218]

C. Combining the Principles of Instrumentality and Proportionality: The Various Multifactor Tests

Many courts employ a combination of instrumentality and proportionality principles to guide their analyses of the excessive fines issue. The resulting multifactor or "hybrid" tests vary widely in substance and complexity. For example, the Second and Ninth Circuits have developed rather detailed hybrid analyses of the excessive fines issue.[219] Other circuits have adopted or indicated preferences for the use of less detailed inquiries.[220] Still other circuits continue to defer to the discretion of the district court to fashion an excessiveness inquiry on a case-by-case basis.[221] Irrespective of form, however, the utilization of multifactor or hybrid tests commands broad support from commentators and courts.[222]

The Second and Ninth Circuits have devised two of the more cumbersome hybrid inquiries employed to determine whether a particular forfeiture violates the Eighth Amendment's prohibition on excessive fines. In

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216. *Id.* at 364 (emphasis added). Though the hypotheticals champion the employment of instrumentality analysis in determining constitutionally excessive fines, the *Chandler* court, at the same time, discounted the role of the property's value in such analyses.

217. *See* United States v. 427 and 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996). *See also Chandler*, 36 F.3d at 365. Relying on Alexander v. United States, 509 U.S. 544, 558–59 (1993), other courts have argued that the Cruel and Unusual Punishment Clause and the Excessive Fines Clause are distinct, and therefore, that a retreat from proportionality review in Cruel and Unusual Punishments jurisprudence supplies an inappropriate vehicle for interpretation of the Excessive Fines Clause. *See 427 and 429 Hall St.*, 74 F.3d at 1170.

218. For a discussion of multifactor tests, see *infra* part III.C.

219. *See* United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995); *see also* United States v. 6380 Little Canyon Rd., 59 F.3d 974 (9th Cir. 1995). An earlier case, United States v. 6625 Zumirez Drive, 845 F. Supp. 725 (C.D. Cal. 1994), though superseded by the Ninth Circuit's decision in *6380 Little Canyon Rd.*, is nevertheless worthy of exploration because it provides another viable test for district courts to explore in considering whether a forfeiture violates the Eighth Amendment. *See infra* notes 223–69 and accompanying text.

220. *See* United States v. 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994); *infra* notes 269–78 and accompanying text. See also earlier district court decisions within the Eleventh Circuit: for example, United States v. One 1990 Ford Ranger Truck, 876 F. Supp. 1283 (N.D. Ga. 1995).

221. *See* United States v. 11869 Westshore Drive, 70 F.3d 923 (6th Cir. 1995); *infra* notes 279–86 and accompanying text. *See also* United States v. 429 S. Main St., 52 F.3d 1416 (6th Cir. 1995).

222. *See infra* note 293 and accompanying text.

United States v. Milbrand,[223] the Second Circuit examined the Excessive Fines Clause in the context of a real property forfeiture where the property's owner was not the perpetrator of the illicit narcotics activities.[224] In 1985, the defendant property, an eighty-five-acre wooded parcel in Pembroke, New York, was purchased by the claimant's son for $26,000 cash.[225] Title to the property was transferred in 1986 to the claimant for the purchase price of one dollar, and between 1986 an 1990, a house was constructed on the property at an estimated cost of $40,000.[226] The house was not the claimant's principal place of residence, though she visited the property weekly to cook, clean, and do her son's laundry.[227]

In August 1990, a consensual search of claimant's property revealed a total of 1,362 marijuana plants growing on and around the farm, 845 of them on the property itself.[228] Use of the property in the facilitation of illicit drug trade was pervasive:

> The house was used to store seeds, guns and marijuana; the barn/greenhouse was used to dry and strip the plants, as well as house the pots in which the marijuana grew; garden hoses extended from the buildings to the marijuana fields to provide irrigation; a distinct area of the defendant property was devoted to growing 'starter plants'; larger plants were transported across the defendant property and through a path to several marijuana fields; and guard dogs kept watch over the marijuana fields.[229]

A search of the house revealed loaded weapons and additional drug paraphernalia.[230] Thereafter, claimant's son was convicted in state court, after a plea of guilty, of criminal possession of marijuana.[231] The United States then commenced an action in federal district court seeking forfeiture of the defendant property pursuant to, inter alia, 21 U.S.C. § 881(a)(7).[232] Upon petition by the claimant, the district court found neither that the claimant was innocent of any wrongdoing nor that forfeiture of the property was constitutionally excessive.[233]

On appeal, the Second Circuit rejected the claimant's contention that she was an innocent owner and proceeded to an examination of the excessive fines issue.[234] After a brief analysis of trends in excessive fines analysis,[235] the

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223. 58 F.3d 841 (2d Cir. 1995).
224. *Id.* at 842–43.
225. *Id.* at 842.
226. *Id.*
227. *Id.* at 842–43.
228. *Id.* at 843.
229. *Id.* at 844–45.
230. *Id.* at 843.
231. *Id.*
232. *Id.*
233. *Id.* at 843–44.
234. *Id.* at 844–45. The trial court did not find credible the claimant's testimony that "she never saw [her son's] substantial marijuana crop." *Id.* at 845. The Second Circuit based its conclusion, in part, on the magnitude of marijuana growing on the property, including some large plants growing within 80 feet of the house. *Id.* Also questionable was claimant's testimony that she had never seen any of her son's numerous and varied drug paraphernalia. *Id.* For a discussion of the "innocent owner" defense in general, see *supra* notes 100–04 and accompanying text.
235. In tracing the development of excessiveness inquiries of civil drug forfeitures, the court cites, inter alia, the decisions of Austin v. United States, 509 U.S. 602 (1993) (finding

Second Circuit recalled its opinion in the pre-*Austin* case of *United States v. 38 Whalers Cove Drive*.[236] In *Whalers Cove*, the Second Circuit had noted that the distribution of narcotics, even in small quantities, is a grave offense, and held that where the criminal defendant faced fines ranging from $50,000 under New York law, $100,000 under Vermont law, and $1,000,000 under federal law for his participation in drug activities, a forfeiture of $68,000 worth of equity interest was "not a grossly disproportionate punishment within the meaning of Eighth Amendment Jurisprudence."[237]

Though acknowledging that the case before it involved a claimant who was not the perpetrator of the illegal drug acts, the Second Circuit found the proportionality approach in *Whalers Cove* nonetheless instructive of excessiveness analysis.[238] The Second Circuit reasoned that "[w]here the owner of the property is not the perpetrator of the crime,...a consistent approach requires analysis of the amount of the penalty in light of the role and culpability of the owner in the illicit use of her property."[239] Thus, the Second Circuit joined "those courts that have concluded that appropriate excessiveness analysis entails a multi-factor test combining the principles of both instrumentality and proportionality."[240] The court articulated the factors to be considered by a court in determining whether a proposed in rem forfeiture violates the Excessive Fines Clause:

> (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.[241]

The Second Circuit analyzed the facts before it in light of the foregoing factors, first inquiring into the harshness of the forfeiture, then turning to the relationship between the property and the offense. Although marijuana is not normally thought to be as dangerous as cocaine, the court indicated that the large quantity of marijuana presently at issue was "sufficient to expose its possessor to very substantial penalties."[242] Further, the court found that the

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civil forfeiture subject to the Excessive Fines Clause); United States v. Chandler, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995) (adopting an instrumentality approach); Alexander v. United States, 509 U.S. 544 (1993) (holding in a criminal forfeiture context that whether or not a forfeiture was excessive must be assessed in the light of the extensive criminal activities petitioner engaged in over a substantial period of time); United States v. R.R. #1, 14 F.3d 864 (3d Cir. 1994) (indicating that some proportionality analysis is required in evaluation of excessive fines issues in the context of civil forfeiture); and United States v. 38 Whalers Cove Drive, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

236. 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992).

237. 954 F.2d at 39; *see also Milbrand*, 58 F.3d at 847 (quoting United States v. 38 Whalers Cove Drive, 954 F.2d at 39).

238. *Milbrand*, 58 F.3d at 847.

239. *Id.*

240. *Id.*

241. *Id.* at 847–48.

242. *Id.* at 848. The Second Circuit indicated that "[i]n a federal prosecution...the 1,362 marijuana plants that [claimant's son] was growing on and around the property would have been treated as at least 1,362 kilograms of marijuana and the equivalent of 5–15 kilograms of

value of the property, estimated by the court to be approximately $66,000, could not be regarded as excessive in comparison to the nature of the offense.[243] The relationship between the property and the marijuana offense was "obviously intimate and integral."[244] The court recalled language used by the district court in its opinion: "[t]his is not a case where a small amount of drugs was found in a discrete part of the defendant property on one single occasion. To the contrary, [claimant's son] used the entirety of the defendant property to further his advanced drug enterprise."[245] Finally, the Second Circuit examined the role of the claimant, finding that, although she was not prosecuted for any offense, "she had a significant degree of culpability in the criminal use of the property."[246] The court noted that the claimant would have had to have been blind not to have been aware of her son's marijuana activities, or would have had to have consciously and purposefully ignored the signs of such activities.[247] Based on these fruits of its multifactor excessiveness analysis, the Second Circuit affirmed forfeiture of the defendant property.

The Ninth Circuit has adopted a similarly involved excessiveness analysis, incorporating questions pertaining to both instrumentality and proportionality. In *6380 Little Canyon Road*,[248] the Ninth Circuit held that "[a]lthough any forfeiture must meet the instrumentality test, its potentially harsh results, when applied alone, make us hesitate to accept it as the sole test for applying the command of *Austin*."[249] Therefore, the Ninth Circuit accepted the proportionality test as a check on the instrumentality inquiry.[250]

The dispute culminating in *6380 Little Canyon Road* began in 1988 when four local sheriffs attempted to execute a search warrant on property owned by Joseph Legan.[251] Two of the officers, apparently confused by their maps, wandered onto neighboring property owned by Robert Price.[252] While on Price's property, the officers looked in the windows of a barn, which served as Price's residence.[253] At some point in their search, the officers detected an odor of marijuana emanating from the barn; later, joined by their colleagues, the officers entered the barn-residence and discovered an elaborate marijuana growing operation.[254] Price was found, arrested, and charged with cultivation of marijuana and possession of marijuana for sale under the California Health

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cocaine." *Id. See also* 1990 United States Sentencing Guidelines § 2D1.1(c)(6) & n.* (Drug Quantity Table). Further, "a person convicted of an offense involving those plants would have been subjected to a fine of at least $4 million" and even if claimant's son were convicted taking into account only those 845 plants on the property, a fine of $2 million could still be imposed. *Milbrand*, 58 F.3d at 848; *see also* 21 U.S.C. § 841(b)(1)(A)(vii) (1988).

243. *Milbrand*, 58 F.3d at 848. The *Milbrand* court indicated that two isolated sales of 2.5 grams of cocaine for $250 were sufficient in *Whalers Cove* to uphold the forfeiture of a $68,000 interest in property. *Id.* Therefore, the court had little trouble finding a quantity of marijuana equivalent to five to fifteen kilograms of cocaine sufficient to support a similarly valuable. forfeiture. *Id.*

244. *Id.* at 848.

245. *Id.* (quoting Decision at 23).

246. *Id.*

247. *Id.*

248. United States v. 6380 Little Canyon Rd., 59 F.3d 974 (9th Cir. 1994).

249. *Id.* at 983.

250. *Id.*

251. *Id.* at 978.

252. *Id.*

253. *Id.*

254. *Id.*

and Safety Code.[255] Price pleaded guilty and was sentenced to two years' imprisonment.[256]

In 1991, nearly seven months after Price's guilty plea, the United States filed a complaint in the Eastern District of California for in rem forfeiture of Price's property pursuant to 21 U.S.C. § 881(a)(7).[257] The United States was granted summary judgment and the property was adjudged forfeited.[258] Price appealed to the Ninth Circuit.[259]

Upon a lengthy and thorough examination of case law concerning the application of the Excessive Fines Clause in the civil forfeiture context, the Ninth Circuit announced a two-prong approach for determining whether a particular forfeiture of real property constitutes an excessive fine. "First, the forfeiture must be determined to have been proper. That is, the property must have been an 'instrumentality' of the crime (a 'nexus' must exist between the property and the offense)."[260] To fulfill the requirements of the threshold instrumentality test, the government must show a substantial connection between the property and the offense; otherwise, the forfeiture is invalid.[261]

The second prong of the Ninth Circuit approach requires that "the worth of the property be 'proportional' (not excessive) to the culpability of the owner."[262] "If the government succeeds in showing a 'substantial connection' between the property and the offense under the first prong, the claimant has the burden to show that the forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability."[263] According to the Ninth Circuit, therefore, proportionality includes determinations of both the harshness of the forfeiture and the culpability of the owner. The court articulated the following factors to be considered in

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255. *Id.*
256. *Id.* at 979.
257. *Id.*
258. *Id.*
259. *Id.* at 978. Price appealed on no less than five grounds: (1) the search of his premises was an illegal search in violation of the Fourth Amendment; (2) Price was afforded no pre-seizure notice; (3) forfeiture violated the Excessive Fines Clause; (4) civil forfeiture subjected him to double jeopardy; and (5) the civil forfeiture statute is unconstitutional. *Id.* What had begun as a clear-cut case quickly turned into a cornucopia of constitutional issues. *Id.* While Price's appeal was pending, both *James Daniel Good Real Property* (pre-seizure notice required by Due Process Clause) and *Austin* (forfeitures subject to the Excessive Fines Clause of the Eighth Amendment) were decided. This section is concerned only with the excessive fines analysis. However, for a discussion of *James Daniel Good Real Property* and pre-seizure notice requirements, see *supra* part II.C.1.
260. *6380 Little Canyon Rd.*, 59 F.3d at 982.
261. *Id.* at 985. The court noted that several circuits have interpreted the language of 21 U.S.C. § 881(a)(7) itself to impose an instrumentality test. The First and Eleventh Circuits have interpreted the statute to require proof of a "substantial connection" between the property and the criminal offense. *Id.* at 985 n.11. The Ninth Circuit indicated that were it to recognize the statutory "substantial connection" requirement, its instrumentality inquiry under the excessive fines analysis would be redundant. *Id.* "On its face, § 881(a)(7) requires only a showing that the real property was used 'to facilitate' the commission of an offense." *Id.* The Ninth Circuit professed its allegiance to this more expansive interpretation of the statutory language adopted by the Second, Third, Seventh, and Eighth Circuits, which have rejected the "substantial connection" requirement. *Id.* The Fourth and Sixth Circuits have left this issue unresolved. *See supra* notes 56, 64. For a broader discussion of the "nexus"/"substantial connection" issue, see notes 50–72 and accompanying text.
262. *6380 Little Canyon Rd.*, 59 F.3d at 982.
263. *Id.* at 985.

determining the former: "(1) the fair market value of the property; (2) the intangible, subjective value of the property, i.e., whether it is the family home; and (3) the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition."[264] The culpability of the owner is determined upon consideration of the following:

> (1) whether the owner was negligent or reckless in allowing the illegal use of his property; or (2) whether the owner was directly involved in the illegal activity, and to what extent; and (3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of illegal activity, and (c) the effect on the community.[265]

The court also indicated that in the event a forfeiture is considered excessive under the Eighth Amendment, the fine must be reduced.[266] Severability of the property may provide an appropriate vehicle for the reduction.[267] The Ninth Circuit then remanded the case to the district court for consideration, in light of and consistent with its two-prong approach: whether the forfeiture of Price's property was excessive under the Eighth Amendment, and, if so, whether the property is readily severable.[268]

Milbrand and *6380 Little Canyon Road* represent two of the more intricately designed multifactor inquiries utilized among the circuits. Other circuits have adopted less detailed hybrid tests for determining constitutional excessiveness. For example, one court has described the various factors in its inquiry to include: "(i) the inherent gravity of the offense compared with the harshness of the penalty; (ii) whether the property was an integral part of the commission of the crime; and (iii) whether the criminal activity involving the defendant property was extensive in terms of time and/or spatial use."[269] Another court characterized its multifactor approach as follows: "it is appropriate to compare the value of the property against the nature of the offense...[and] also appropriate to look to the nature of the relationship between

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264. *Id.*
265. *Id.* at 986.
266. *Id.*
267. *See id.* Reduction may be achieved by inquiry into the severability of claimant's property to reflect a proportional punishment for the offenses committed. "[D]ividing the property is appropriate where the property consists of two separate (and readily separable) parcels, only one of which is tainted." *Id.* at 986 n.14. The general rule is that adjacent tracts of land conveyed as a single parcel by a single deed should be treated as one, indivisible tract of land. *Id.* at 986 n.15 (citing United States v. 1215 Kelly Rd., 860 F. Supp. 764, 765 (W.D. Wash. 1994)). The owner may attempt to rebut this general presumption by showing one or more of the following: "(1) the parcels are separately described in local land records; (2) the parcels are taxed separately; (3) the parcels are located in separate municipalities; or (4) the parcels, though adjacent, are physically separated from each other, i.e., by a road or creek." *Id.* *See* United States v. 19 & 25 Castle St., 31 F.3d 35, 41 (2d Cir. 1994); United States v. Bieri, 21 F.3d 819, 825 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994); United States v. Smith, 966 F.2d 1045, 1054–55 (6th Cir. 1992). "Any such attempt to rebut the 'single parcel' rule can be frustrated if 'it is unreasonable or physically impossible to treat the property separately.'" *6380 Little Canyon Rd.*, 59 F.3d at 986 n.15 (citing United States v. 19 & 25 Castle St., 31 F.3d at 41). Price argued that his property was actually two separate parcels, only the smaller of which was involved in the marijuana operation. *Id.* at 986. The court marked this issue for consideration upon remand of the case to the district court. *Id.*
268. *6380 Little Canyon Rd.*, 59 F.3d at 987–88.
269. United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 732 (C.D. Cal. 1994).

the crime and the property in question."[270] Yet another court has put forth a two-step balancing test "which emphasizes 'instrumentality' analysis, but includes 'proportionality' analysis."[271]

These examples are meant to be illustrative and are only a sample of the possible factors which courts find fashionable to include in their excessiveness inquiries. The factually intensive nature of excessive fines claims in the context of civil forfeiture ensures endless, but valid, combinations of inquiries into multifactor approaches. *United States v. 9638 Chicago Heights*[272] exemplifies the extent to which courts often supplement mainstream instrumentality and proportionality analyses to include highly case-specific considerations. In that case, Carol Long pleaded guilty in state court to three counts of selling a controlled substance at her residence, the defendant property.[273] The total quantity of drugs involved in the transactions was approximately two grams of cocaine.[274] Long received a suspended sentence of five years and was ordered to pay restitution in an amount equal to the value of the drugs she sold, $225.[275] Thereafter, the United States instituted forfeiture proceedings against the residence pursuant to 21 U.S.C. § 881 and seized the property without notice.[276] The Eighth Circuit, dismissing the case on due process grounds, nonetheless took occasion to point out its dissatisfaction with the instrumentality approach adopted by the district court, and indicated that the Eighth Amendment requires an analysis broader than an instrumentality approach provides.[277] The court listed additional factors which the district court should have considered in its excessive fine analysis: "the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, the effect of forfeiture on innocent occupants of the residence, including children, or any other factors that an excessive fine analysis might require."[278]

At least one circuit has been reluctant to spell out an excessiveness inquiry, deferring to the district courts in the first instance. Exemplifying this reluctance, the Sixth Circuit, citing the factually intensive nature of forfeitures, has refused to articulate a single test for excessiveness to be followed in all cases.[279] In *United States v. 11869 Westshore Drive*, the Sixth Circuit reviewed a determination by an Eastern District of Michigan court that forfeiture of a residence used in the trafficking of marijuana did not violate the Excessive Fines Clause.[280] On appeal, the Sixth Circuit analyzed the constitutionality of the forfeiture first under an instrumentality test, then under a proportionality approach.[281] Concluding that the forfeiture of the residence was proper under

270. United States v. 429 S. Main St., 843 F. Supp. 337, 341 (S.D. Ohio 1993), *aff'd in part and remanded in part*, 52 F.3d 1416 (6th Cir. 1995).
271. United States v. 427 and 429 Hall St., 853 F. Supp. 1389, 1399 (M.D. Ala. 1994), *aff'd on other grounds*, 74 F.3d 1165 (11th Cir. 1996).
272. 27 F.3d 327 (8th Cir. 1994).
273. *Id.* at 328.
274. *Id.*
275. *Id.*
276. *Id.* at 328–29.
277. *Id.* at 330.
278. *Id.* at 331.
279. United States v. 11869 Westshore Drive, 70 F.3d 923, 930 (6th Cir. 1995).
280. *Id.* at 925.
281. *Id.* at 930.

either inquiry, the Sixth Circuit affirmed the judgment of the district court, but refused to articulate a standard inquiry for the circuit.[282]

> [B]ecause of the factually intensive nature of these types of [forfeiture] cases, this court chooses not to establish any one test to be applied in every case. There may be situations where the test applied by the district court in the instant case should be applied, while the facts comprising other cases may require the application of a different test to determine whether a forfeiture constitutes a violation of the Eighth Amendment.[283]

A concurring opinion in *United States v. 429 South Main Street*,[284] an earlier Sixth Circuit case, suggested an approach similar to that articulated in *11869 Westshore Drive*.[285] Rejecting the implementation of standard inquiries to be used in all cases, the concurrence advised that "the district courts continue to use a case-by-case approach applying what they deem to be the relevant factors under the facts presented."[286]

Irrespective of any specific permutations of the underlying principles of instrumentality and proportionality, most multifactor tests require, at base, two inquiries: "(1) Was there a 'substantial connection' between the defendant property and the drug trafficking in question? If so, (2) Is the forfeiture of the defendant property a 'grossly disproportionate' punishment, given the nature of the drug trafficking involved?"[287] One court analogized the two basic inquiries to a light switch:

> The first prong of this test apparently functions as an "on/off" switch: if there is not a sufficient nexus between the property and the crime, then forfeiture is an excessive fine, regardless of the harshness of the penalty or the seriousness of the offense. If there is a sufficient nexus, then the court continues to proportionality review, which functions as a "dimmer" switch: the harshness of the forfeiture should roughly match the seriousness of the offense. The amount of "dimming" needed to close the distance between these two concepts indicates whether the forfeiture is excessive.[288]

Of course, as *Milbrand*, *6380 Little Canyon Road*, *9638 Chicago Heights*, and *11869 Westshore Drive* suggest, determining what constitutes "dimming" can be a highly involved undertaking. The analogy, however, is clear. Multifactor approaches to the excessive fines issue generally utilize proportionality inquiry as a check on the potentially harsh results flowing from lone application of an instrumentality inquiry.[289]

Given the varied nature of multifactor inquiries, especially in those circuits that have encouraged case-by-case excessiveness inquiries, it is not

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282. *Id.*
283. *Id.*
284. 52 F.3d 1416 (6th Cir. 1995) (Guy, J., concurring in part and dissenting in part).
285. *Id.* at 1424 (Guy, J., concurring in part and dissenting in part).
286. *Id.*
287. *See* United States v. 427 and 429 Hall St., 853 F. Supp. 1389, 1399 (M.D. Ala. 1994), *aff'd on other grounds*, 74 F.3d 1165 (11th Cir. 1996). As indicated, the Eleventh Circuit has since adopted a pure "proportionality" inquiry in the civil forfeiture excessive fines context. *See* 74 F.3d 1165. The district court's multifactor formulation nonetheless illustrates basic inquiries underlying most detailed multifactor analyses and, thus, serves as an adequate gestalt at this juncture.
288. *See* United States v. One 1990 Ford Ranger Truck, 876 F. Supp. 1283, 1291–92 (N.D. Ga. 1995).
289. *See* United States v. 6380 Little Canyon Rd., 59 F.3d 974, 983 (9th Cir. 1994).

surprising that multifactor analyses have been criticized for lack of consistency.[290] "Any constitutional test...must be designed with an appropriate measure of judicial restraint. The results under an open-ended, multi-factor Eighth Amendment inquiry have displayed a lack of consistency and structure."[291] However, courts adopting a multifactor approach have reasoned that a combined test "would strike an appropriate balance between curbing judicial discretion and retaining the constitutional norm of proportionality."[292] At least one commentator has voiced support for multifactor approaches to the excessive fines issue:

> The dangers of judicial subjectivity, which provide the foundation for Justice Scalia's impulse to restrict judicial discretion, lend substantial support to the imposition of an instrumentality test. Such a test, although not eliminating variability altogether, would reduce judicial subjectivity by constraining the reliance on judicial determinations of the magnitude of an offense—determinations necessary in a proportionality analysis. Justice Scalia's proposed test should not stand alone, however, to give full meaning to the notion of excessiveness, punishment be graduated and proportioned to the offense. *A test that combines a threshold instrumentality test with a secondary proportionality test would strike an appropriate balance between curbing judicial discretion and retaining the constitutional norm of proportionality.*[293]

Despite concerns over judicial restraint, efficiency, and consistency stemming from the implementation of highly diversified multifactor tests, the multifactor approach continues to be the most attractive alternative to the federal judiciary.

IV. AN ACCEPTABLE STANDARD FOR EXCESSIVENESS DETERMINATION: INSTRUMENTALITY REVIEW

As this Note indicates, the tendency of many, if not most courts, has been to fashion, in some permutation, a multifactor review to guide them in excessive fines inquiries. But is this the most suitable approach? Many commentators believe so, suggesting that there is room for both instrumentality and proportionality in reviews of civil forfeiture.[294] Courts and commentators, however, are mistaken to embrace the multifactor review. Indeed, upon examination of 21 U.S.C. § 881(a), the Eighth Amendment's Excessive Fines Clause, and case law, exclusive instrumentality review proves to be the most predictable, objective, and consistent means by which to examine forfeitures challenged as excessive.

Proportionality analyses and, consequently, multifactor reviews of the excessive fines issue are problematic in many respects.[295] First, the viability of proportionality inquiry within the Eighth Amendment context has been fatally undermined. Second, proportionality review in the civil forfeiture arena is

290. United States v. Chandler, 36 F.3d 358, 369 (4th Cir. 1994) (Wilkinson, J., concurring), *cert. denied*, 115 S. Ct. 1792 (1995).

291. *Id.*

292. United States v. 427 and 429 Hall St., 853 F. Supp. 1389, 1399 n.23 (M.D. Ala. 1994), *aff'd on other grounds*, 74 F.3d 1165 (11th Cir. 1996).

293. *427 and 429 Hall St.*, 853 F. Supp. at 1399 n.23 (quoting *The Supreme Court, 1992 Term Leading Cases*, 107 HARV. L. REV. 144, 214 (1993)).

294. *See* Welling & Hager, *supra* note 150, at 889–90.

295. *See infra* notes 296–315 and accompanying text.

difficult to reconcile with congressional intent. Third, proportionality review's examination of a claimant's culpability is unnecessary and superfluous to an excessive fines determination. Fourth, inquiry regarding the severity of the offense in which the property was involved is likewise nonessential to excessiveness review. Last, varied and factually intensive proportionality analyses employed among the circuits to resolve civil forfeiture excessive fines issues frustrate consistent, objective, and predictable application of 21 U.S.C. § 881(a).

As indicated, proportionality review in the context of excessive fines issues is often attributed to a pronouncement in *Solem v. Helm*, where the United States Supreme Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment implicitly requires criminal punishments to be at least loosely proportionate to the crime of conviction.[296] Reliance on *Solem v. Helm*, however, as a source of Eighth Amendment proportionality requirement has proved to be misplaced. In *Harmelin v. Michigan*, five Justices of the United States Supreme Court either rejected the application of proportionality review in the Eighth Amendment context or sharply curtailed its utility.[297] In addition, other case law has acknowledged that, historically, the proportionality principle has not been applied under the Excessive Fines Clause. Consequently, whether proportionality review has a place in excessive fine determinations in the arena of civil forfeiture, or anywhere in the Eighth Amendment, is highly suspect.

In addition, proportionality review is difficult to reconcile with congressional intent. Courts have fashioned proportionality inquiries to include comparison of such factors as the value of the defendant property, gravity of the offense, and claimant's motive and extent of culpability.[298] When the intricacies of these considerations are compared with those that are statutorily mandated, it is evident that proportionality review has missed the mark. The Drug Abuse Prevention and Control Act provides for the forfeiture of "[a]ll conveyances...which are used, or are intended for use, to transport, or in any manner to facilitate" a violation of narcotics law.[299] Real property is also forfeitable "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation...punishable by more than one year's imprisonment."[300] There is no statutory indication that the *value* of the property should be considered. Further, forfeiture has traditionally required no inquiry into the value of the tainted property.[301] Justice Scalia's hypothetical is persuasive: "Scales used to measure out unlawful drug sales...are confiscable whether made out of the purest gold or the basest metal."[302] Potentially, proportionality review could excuse property from forfeiture, even where the requisite nexus between the property and the offense has been satisfied, thus frustrating the intent of the statute. Furthermore, inquiry into the

296. Solem v. Helm, 463 U.S. 277, 290 (1983). *See supra* notes 157–70 and accompanying text.
297. *See generally* Harmelin v. Michigan, 501 U.S. 957 (1991).
298. *See supra* parts III.B–C.
299. 21 U.S.C. § 881(a)(4) (1988).
300. *Id.* § 881(a)(7).
301. *See supra* note 33.
302. Austin v. United States, 509 U.S. 602, 627 (1993) (Scalia, J., concurring).

property's value inevitably involves a degree of subjective judgment on behalf of the judiciary.[303]

As the statute indicates, it is the *relationship* between the property and the offense which is at issue.[304] Instrumentality review addresses this principal issue, as is exemplified in the Fourth Circuit's decision in *United States v. Chandler*. Having articulated a laundry list of instrumentality considerations, the *Chandler* court pronounced that forfeiture is sustainable against an Eighth Amendment challenge where the court is able to conclude, under the totality of circumstances, "that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended."[305]

Third, proportionality review's examination of a claimant's culpability is unnecessary and superfluous to an excessive fines determination. Courts employing proportionality review as part of a multifactor inquiry reason that a proportionality test is necessary to check the potentially harsh results of pure instrumentality review.[306] Consequently, courts conduct detailed, fact-intensive inquiries into the role and degree of the property owner's culpability.[307] Such inquiries, however, are unnecessary. Forfeiture pursuant to 21 U.S.C. § 881(a)(4), (6) and (7) already ensures that owners devoid of culpability will not be deprived of property, regardless of the property's role in the commission of a proscribed narcotics offense.[308] Hence, even under exclusive instrumentality review, the innocence of the owner will not go unnoticed. In fact, where the claimant can prove by a preponderance of the evidence that any illicit narcotics activities obtained without his knowledge or consent, the property is not subject to forfeiture and the excessive fines issue is moot.[309] Clearly, forfeiture does not proceed unless the owner is, at least to some extent, culpable in the conduct for which the property is subject to forfeiture. Proportionality review, therefore, which inquires into the culpability of the claimant is an unnecessary and inefficient utilization of judicial resources.

Likewise, analysis of the severity of the crime at the root of a forfeiture is plethoric to an excessive fines analysis. In the case of real property, the Drug Act has already instituted a threshold inquiry into the severity of the crime in which the property is alleged to have been involved.[310] Section 881(a)(7) prescribes that in order for real property to be subject to forfeiture, the property must have been used, or intended for use, in the commission of "a violation...punishable by more than one year's imprisonment."[311] Where the

303. *See* Welling & Hager, *supra* note 150, at 864.

304. *Austin*, 509 U.S. at 627 (1993) (Scalia, J., concurring). Justice Scalia articulated the inquiry: "Was [the relationship between the property and the offense] close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?" *Id. See also supra* note 125.

305. United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).

306. United States v. 6380 Little Canyon Rd., 59 F.3d 974, 983 (9th Cir. 1994).

307. *See supra* notes 239–47 and accompanying text.

308. *See* 21 U.S.C. § 881(a)(4), (6), (7) (1988). *See also supra* notes 100–04 and accompanying text.

309. *See* 21 U.S.C. § 881 (a)(4), (6), (7) (1988). *See also supra* notes 100–04 and accompanying text.

310. 21 U.S.C. § 881(a)(7) (1988).

311. *Id.*

severity of the crime does not rise to this level, the real property may not be subjected to forfeiture. The Drug Act does not provide this threshold test for those instrumentalities which have no lawful or legitimate value, such as for the controlled substances themselves, manufacturing equipment and chemicals, firearms, drug paraphernalia, books and records, or moneys traceable to narcotics activities.[312] It is unlikely that any inquiry into the severity of a crime in which these articles were involved could prove exculpatory. Although no such threshold is provided for the forfeiture of conveyances such as automobiles, planes, boats, and other vehicles, innocent owner provisions within 21 U.S.C. § 881(a)(4) ensure that an owner completely devoid of culpability will exculpate the conveyance from forfeiture.[313] Consequently, the proportionality review's additional inquiry into the severity of the underlying crime is unnecessary.

Last, varied and factually intensive proportionality analyses employed among the circuits in civil forfeiture excessive fines issues frustrate consistent, objective, and predictable application of 21 U.S.C. § 881(a). Instrumentality review, on the other hand, demands only that the property subject to forfeiture be a substantial and meaningful instrumentality in the commission or facilitation of a drug violation.[314] Because the instrumentality approach limits a court's inquiry to the facts surrounding the defendant property's connection with the proscribed narcotics activities, it has a tendency to limit judicial discretion and ensure the utility of the Act itself.[315]

In fashioning an excessive fines review of civil forfeitures, the judiciary should find guidance in the Drug Prevention and Control Act itself. The Act indicates that any property used, or intended for use, in the facilitation of illicit narcotics activities is forfeitable. Further, the statute demands that the owner not be completely without fault. Instrumentality review focuses on these principal issues. By eliminating the compulsion to inquire into the factually intensive nature of each case, *i.e.*, the property's value, extent of culpability of the claimant, and the severity of the crime, instrumentality review guarantees consistent, objective, predictable judicial application of 21 U.S.C. § 881(a). Irrespective, though, of which analyses courts fashion to meet the command of *Austin v. United States*, one thing is clear. Given the large number of forfeitures nationwide, the likelihood is great that the courts will be receiving further guidance from the Supreme Court on the excessive fines issue.

312. *See supra* note 34 and accompanying text.
313. 21 U.S.C. § 881(a)(4) (1988).
314. United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995).
315. *See* Welling & Hager, *supra* note 150, at 864.