SUPREME COURT OF THE UNITED STATES

No. 92–6073

RICHARD LYLE AUSTIN, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 28, 1993]

JUSTICE SCALIA, concurring in part and concurring in the judgment.

We recently stated that, at the time the Eighth Amendment was drafted, the term "fine" was "understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 265 (1989). It seems to me that the Court's opinion obscures this clear statement, and needlessly attempts to derive from our sparse caselaw on the subject of *in rem* forfeiture the questionable proposition that the owner of property taken pursuant to such forfeiture is always blameworthy. I write separately to explain why I consider this forfeiture a fine, and to point out that the excessiveness inquiry for statutory *in rem* forfeitures is different from the usual excessiveness inquiry.

Whether any sort of forfeiture of property may be covered by the Eighth Amendment is not a difficult question. "Forfeiture" and "fine" each appeared as one of many definitions of the other in various 18th-century dictionaries. See *ante*, at 11, n. 7. "Payment," the word we used in *Browning-Ferris* as a synonym for fine, certainly includes in-kind assessments. Webster's New

International Dictionary 1797 (2d ed. 1950) (defining payment as "[t]hat which is paid; the thing given to discharge a debt or an obligation"). Moreover, for the

Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form of the Star Chamber abuses that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives, see *Browning-Ferris*, *supra*, at 266–267. Cf. *Harmelin* v. *Michigan*, 501 U. S. ——, ——, n. 9 (1991) (opinion of SCALIA, J.). In *Alexander* v. *United States*, —— U. S. ——, —— (1993), we have today held that an *in personam* criminal forfeiture is an Eighth Amendment "fine."

In order to constitute a fine under the Eighth Amendment, however, the forfeiture must constitute "punishment," and it is a much closer question whether statutory *in rem* forfeitures, as opposed to *in personam* forfeitures, meet this requirement. The latter are assessments, whether monetary or in-kind, to punish the property owner's criminal conduct, while the former are confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law. Statutory *in rem* forfeitures have a long history. See generally *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 680–686 (1974). The property to which they apply is not contraband, see the forfeiture passed by the First Congress, *ante*, at 10–11, nor is it necessarily property that can only be used for illegal purposes. The theory of *in rem* forfeiture is said to be that the lawful property has committed an offense. See, *e.g.*, *The Palmyra*, 12 Wheat. 1, 14–15 (1827) (forfeiture of vessel for piracy); *Brig Malek Adhel* v. *United States*, 2 How. 210, 233–234 (1844) (forfeiture of vessel, but not cargo, for piracy); *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 400–403 (1878) (forfeiture of distillery and real property for evasion of revenue laws); *J.W. Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505, 510–511 (1921) (forfeiture of goods concealed to avoid taxes).

However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part, see *United States* v. *Halper*, 490 U. S. 435, 448 (1989), punitive.[1] Its purpose is not compensatory, to make someone whole for injury caused by unlawful use of the property. See *ibid.* Punishment is being imposed, whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the property's owner. This conclusion is supported by Blackstone's observation that even confiscation of a deodand, whose religious origins supposedly did not reflect any punitive motive but only expiation, see Law of Deodands, 34 Law Mag. 188, 189 (1845), came to be explained in part by reference to the owner as well as to the offending property. 1 W. Blackstone, Commentaries *301; accord, Law of Deodands, *supra*, at 190. Our cases have described statutory *in rem* forfeiture as "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Calero-Toledo*, *supra*, at 682.

The Court apparently believes, however, that only actual culpability of the affected property owner can establish that a forfeiture provision is punitive, and sets out to establish (in Part III) that such culpability exists in the case of *in rem* forfeitures. In my view, however, the caselaw is far more ambiguous than the

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[1]Thus, contrary to the Court's contention, *ante*, at 16, n. 12, I agree with it on this point. I do not agree, however, that culpability of the property owner is necessary to establish punitiveness, or that punitiveness "in part" is established by showing that at least in *some* cases the affected property owners are culpable. That is to say, the statutory forfeiture must *always* be at least "partly punitive," or else it is not a fine. See *ante*, at 19, n. 14.

Court acknowledges. We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures. See *ante*, at 14, and n. 10; *Goldsmith-Grant*, *supra*, at 512 (reserving question); *Calero-Toledo*, *supra*, at 689–690 (same). A prominent 19th-century treatise explains statutory *in rem* forfeitures solely by reference to the fiction that the property is guilty, strictly separating them from forfeitures that require a personal offense of the owner. See 1 J. Bishop, Commentaries on Criminal Law §§816, 824, 825, 833 (7th ed. 1882). If the Court is correct that culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture. Well-established common-law distinctions should not be swept away by reliance on bits of dicta. Moreover, if some degree of personal culpability on the part of the property owner always exists for *in rem* forfeitures, see *ante*, at 11–16, then it is hard to understand why this Court has kept reserving the (therefore academic) question whether personal culpability is constitutionally required, see *ante,* at 14, as the Court does again today, see *ante*, at 14,
n. 10.

I would have reserved the question without engaging in the misleading discussion of culpability. *Even if* punishment of personal culpability is necessary for a forfeiture to be a fine; and *even if in rem* forfeitures in general do not punish personal culpability; the *in rem* forfeiture in *this* case is a fine. As the Court discusses in Part IV, this statute, in contrast to the traditional *in rem* forfeiture, *requires* that the owner not be innocent—that he have some degree of culpability for the "guilty" property. See also *United States* v. *92 Buena Vista Ave., Rumson*, 507 U. S. ——, —— (1993) (slip op., at 9–10) (plurality) (contrasting drug forfeiture statute with tradi-

tional statutory *in rem* forfeitures). Here, the property must "offend" *and* the owner must not be completely without fault. Nor is there any consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited. That is enough to satisfy the *Browning-Ferris* standard, and to make the entire discussion in Part III dictum. Statutory forfeitures under §881(a) are certainly *payment* (in kind), *to a sovereign* as *punishment* for an *offense*.

That this forfeiture works as a fine raises the excessiveness issue, on which the Court remands. I agree that a remand is in order, but think it worth pointing out that on remand the excessiveness analysis must be different from that applicable to monetary fines and, perhaps, to *in personam* forfeitures. In the case of a monetary fine, the Eighth Amendment's origins in the English Bill of Rights, intended to limit the abusive penalties assessed against the king's opponents, see *Browning-Ferris*, 492 U. S., at 266–267, demonstrate that the touchstone is value of the fine in relation to the offense. And in *Alexander* v. *United States*, we indicated that the same is true for *in personam* forfeiture. –—- U. S., at —— (slip op., at 14).

Here, however, the offense of which petitioner has been convicted is not relevant to the forfeiture. Section §881 requires only that the Government show probable cause that the subject property was used for the prohibited purpose. The burden then shifts to the property owner to show, by a preponderance of the evidence, that the use was made without his "knowledge, consent, or willful blindness," 21 U. S. C. §§881(a)(4)(C), see also (a)(7), or that the property was not so used. See §881(d) (incorporating 19 U. S. C. §1615). Unlike 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. Scales used to measure out unlawful drug sales, for example, 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.

This inquiry for statutory forfeitures has common-law parallels. Even in the case of deodands, juries were careful to confiscate only the instrument of death and not more. Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death. 1 M. Hale, Pleas of the Crown *419–*422; 1 Blackstone, Commentaries, at *301–*302; Law of Deodands, 34 Law Mag., at 190. Our cases suggest a similar instrumentality inquiry when considering the permissible scope of a statutory forfeiture. Cf. *Goldsmith-Grant*, 254 U. S., at 510, 513; *Brig Malek Adhel*, 2 How., at 235 (ship used for piracy is forfeited, but cargo is not). The relevant inquiry for an excessive forfeiture under §881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, "guilty" and hence forfeitable?

I join the Court's opinion in part, and concur in the judgment.