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## Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment

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## NOTE

### Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment

Let this be recorded as the time when America rose up and said “no” to drugs. The scourge of drugs must be stopped, and I am asking tonight for an increase of almost a billion dollars . . . to escalate the war against drugs. The war must be waged on all fronts.

— President George Bush<sup>1</sup>

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

— *Ex parte Milligan*<sup>2</sup>

To note that this country is engaged in a “war on drugs” borders on the cliché. In recent years, leading politicians have escalated the rhetoric and action against users and suppliers of illegal drugs.<sup>3</sup> The public has demanded increasingly tough enforcement, even demonstrating a willingness to infringe on civil liberties.<sup>4</sup> Since 1986, law enforcement agencies have stepped up seizures of cars, boats, and planes,<sup>5</sup> sometimes for possession of extremely small amounts of drugs.<sup>6</sup> As the country continues to fight the drug war, the battle

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1. *Text of President Bush's Speech to Congress*, Wash. Post, Feb. 10, 1989, at A20, col. 1.

2. 71 U.S. (4 Wall.) 2, 120-21 (1866).

3. See, e.g., *Text of the Address by President Bush*, Wash. Post, Sept. 6, 1989, at A18, col. 1 (announcing his drug policy and programs); *War Footing Urged for Drug Fight*, Wash. Post, May 25, 1988, at A17, col. 1.

4. See, e.g., Morin & Allen, *Are We Shooting Ourselves In the Foot In the War on Drugs?*, Wash. Post, June 26, 1988, at C1, col. 3 (“[A] new Washington Post survey shows that the public is ready to take harsh new measures to combat drug trafficking and use — including ones that would needlessly erode civil liberties.”).

5. See *Drug Case Booty Enriches Agencies*, N.Y. Times, Jan. 7, 1990, at A13, col. 1 (“In 1989 the Department of Justice seized cash and items valued at \$580 million, as against \$207 million in 1988 and \$94 million in 1986.”).

6. The height of this activity occurred in May 1988. See, e.g., *Tighter Federal Drug Dragnet Yields Cars, Boats and Protests*, N.Y. Times, May 22, 1988, § 1, at 1, col. 2; *Research Ship Seized in 'Zero Tolerance' Drug Raid*, Wash. Post, May 20, 1988, at A12, col. 1; *2nd Boat Seized; Coast Guard Says Small Amount of Narcotics Found*, L.A. Times, May 13, 1988, § 1, at 3, col. 1; *Smidgen of Marijuana Brings Boat Seizure, Coast Guard Says*, L.A. Times, May 12, 1988, § 1, at 3, col. 5; *Vehicle Seizures Stepped Up in Drug War; Truck, Several Mercedes Confiscated Under 'Zero Tolerance' Policy*, Wash. Post, May 10, 1988, at A9, col. 1 (“The \$2.5 million yacht seized by the Coast Guard Saturday after one-tenth of an ounce of marijuana was found on board is not the only casualty of the . . . escalating war on drugs.”). Similar seizures continue today. See, e.g., *A House Could be the Price of a Joint Under Federal Asset-Seizure Law*, L.A. Times, May 6, 1990, at A2, col. 1; Chi. Trib., Mar. 7, 1990, § 2 (DuPage), at 7, col. 4 (DuPage sports final ed.) (“[P]olice said they seized a car when officers found 2.5 grams of mar[i]juana on the front seat of the vehicle they had stopped for a minor traffic violation. The seizure was made under terms of the federal government's zero tolerance law . . .”).

should be waged with care to assure the campaign is fought within the bounds set by the Constitution.

The number of drug-enforcement weapons in the federal arsenal has increased steadily in the past twenty years. Forfeiture, one of the most powerful weapons recently enacted, draws on enforcement experience garnered during Prohibition.<sup>7</sup> The civil drug forfeiture statute, 21 U.S.C. § 881, enacted in 1970 and amended significantly in 1979 and 1984, provides for an action in rem against any conveyance or real property used to facilitate any drug activity.<sup>8</sup> In addition, property used in drug crimes may be forfeit under criminal forfeiture statutes,<sup>9</sup> or criminal forfeiture provisions in the RICO<sup>10</sup> or continuing criminal enterprise<sup>11</sup> statutes.

Civil forfeiture, however, carries a unique potential for government abuse. In civil forfeiture, a criminal conviction is not required before a forfeiture may be ordered and the procedural protections present in criminal trials are absent.<sup>12</sup> By combining the conveyance, asset, and real property forfeiture provisions, the government, under section 881,

7. See, e.g., 26 U.S.C. § 5615(3)(C) (1988) (forfeiture of land on which an illegal distillery is located).

8. 21 U.S.C. § 881 (1988) provides in relevant part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

....  
(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 [illegal drugs] . . . .

....  
(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 . . . .

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

9. 21 U.S.C. § 853 (1988) (criminal forfeiture of property involved in drug activity).

10. 18 U.S.C. § 1963 (1988).

11. 21 U.S.C. § 848 (1988).

12. See, e.g., *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986) (criminal acquittal does not bar forfeiture); *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 10 n.2 (1st Cir. 1977) (same); *United States v. Property Identified as 3120 Bancker Drive, N.E., Washington, D.C.*, 691 F. Supp. 497, 499 (D.D.C. 1988) (same).

Civil forfeiture proceedings are conducted under the Supplemental Rules for Certain Admiralty and Maritime Claims, FED. R. CIV. P. A - F. See 21 U.S.C. § 881(b) (1988). The form of action under the admiralty rules is against the property as wrongdoer, also known as a libel in rem. See FED. R. CIV. P. C(2); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 1-12 (2d ed. 1975). The property may be seized without judicial review of the complaint. FED. R. CIV. P. C(3). The government bears only the burden of proving probable cause that the defendant property is subject to forfeiture. Then, the burden of persuasion falls to the claimant to prove by preponderance of the evidence that the property is not subject to forfeiture or falls within one of the enumerated exceptions. See 21 U.S.C. § 881(b), (d), (e) (1988).

can threaten to seize all of a person's property.<sup>13</sup>

The circuits presently disagree over the scope of property subject to civil forfeiture.<sup>14</sup> Three circuits require a "substantial connection" between the conveyance or real property to be forfeit and the underlying crime.<sup>15</sup> These circuits assert that forfeiture is not justified where the connection between a conveyance or parcel of real property and the drug activity falls below a minimum threshold. Five other circuits have explicitly rejected this substantial connection test.<sup>16</sup>

This Note offers two justifications for narrowing the scope of section 881 forfeiture.<sup>17</sup> Part I argues that courts should apply the substantial connection test to section 881 forfeitures. This Part analyzes the statute using the traditional tools of statutory interpretation. While the text of the statute seems to support the broadest possible interpretation, the legislative history and context of adoption suggest that the substantial connection test is consistent with Congressional intent. In amending section 881, subsequent Congresses have favored application of the substantial connection test. Consistent with this narrower reading, present strategy in the "war on drugs" focuses stiff penalties on principal traffickers; individual users receive significantly

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13. *In re Kingsley*, 802 F.2d 571, 578 (1st Cir. 1986) (a broad application of the forfeiture statutes can result in seizing all of a defendant's property); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 & n.7 (10th Cir. 1986) (noting the potential for police and prosecutorial abuse in civil forfeitures); *United States v. Nichols*, 841 F.2d 1485, 1508-09 (10th Cir. 1988) (same).

14. Because the provision for forfeiture of conveyances was enacted first, the split is most pronounced in that area, that is, cases falling under 21 U.S.C. § 881(a)(4) (1988). In 1970, 21 U.S.C. § 881(a)(4) was enacted. Pub. L. No. 91-513, 84 Stat. 1276 (1970). In 1984, 21 U.S.C. § 881(a)(7) was enacted. Pub. L. No. 98-473, 98 Stat. 2050 (1984).

15. See *United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream with Burg. & Gold Stripes*, 777 F.2d 947 (4th Cir. 1985); *United States v. One 1976 Ford F-150 Pick-up*, 769 F.2d 525 (8th Cir. 1985); *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980). Several cases also refer to the test as an attempt to find a "sufficient nexus" between the property and the underlying crime. See *One 1972 Chevrolet Corvette*, 625 F.2d at 1029.

16. See *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Ill.*, 903 F.2d 490 (7th Cir. 1990); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983) (per curiam); *United States v. 1964 Beechcraft Baron Aircraft, TC-740*, 691 F.2d 725 (5th Cir. 1982) (per curiam), cert. denied, 461 U.S. 914 (1983); *United States v. One 1977 Lincoln Mark V. Coupe*, 643 F.2d 154, 157 (3d Cir. 1981), cert. denied 454 U.S. 818 (1981); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977).

Given the similar wordings of the conveyance and real property forfeiture provisions, the statutes have been and likely will continue to be interpreted similarly. See *supra* note 8. E.g., *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989) (acknowledging that its decisions under 21 U.S.C. § 881(a)(7) (real property forfeiture) will follow its decisions under 21 U.S.C. § 881(a)(4) (forfeiture of conveyances)); see also Note, *The Scope of Real Property Forfeiture Under 21 U.S.C. § 881(a)(7)*, 137 U. PA. L. REV. 303, 323 (1988).

17. Several recent articles have addressed different aspects of civil forfeiture. See Goldsmith & Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254; Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165 (1990); *Special Project: Current Issues in Drug Enforcement Law*, 43 VAND. L. REV. 1255 (1990).

more lenient treatment. Part II argues that eighth amendment<sup>18</sup> review should limit section 881 forfeiture. Section II.A argues that section 881 forfeiture, despite its civil label, functions as a criminal punishment to which constitutional protections should be applied. Section II.B argues, in the alternative, that the history of the eighth amendment and recent Supreme Court analysis justifies eighth amendment review in even purely civil cases where the government is the party seeking forfeiture. Finally, Part III engages each of the narrowing processes. First, the substantial connection cases denying forfeiture are harmonized by development of a "second-degree facilitation" test. Second, this Part identifies the seeds of eighth amendment values in the substantial connection cases. Section III.C suggests the circumstances in and the methods by which courts should apply eighth amendment review to section 881 forfeiture. Applying these eighth amendment principles will protect the rights of claimants without impeding the effort to curtail drug trafficking.

## I. STATUTORY INTERPRETATION

The text of section 881 seems to permit the broadest possible application of forfeiture. This Part, however, argues that the substantial connection test fully comports with the statute's text, read within principles of strict construction, and provides a better overall interpretation. The enacting Congress was primarily concerned with attacking large scale narcotics operations. Subsequent Congresses, in amending section 881, have indicated the propriety of the substantial connection test. In addition, interpreting the statute in the context of the present war on drugs suggests that an expansive reading of section 881 may be inconsistent with current values.

### A. *The Text of the Statute*<sup>19</sup>

Circuits rejecting the substantial connection test point directly to the text of the statute.<sup>20</sup> On its face, section 881 appears to require the

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

19. Statutory interpretation begins with the text. *See, e.g.,* *United States v. Turkette*, 452 U.S. 576, 586 (1981). Even scholars who propose interpretive schemes which look beyond the statute's text or the intent of the enacting legislature or both use the text as a boundary within which the interpretation must lie. *See, e.g.,* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 60 (1988) ("It is crucial to see that while nautical models of statutory interpretation may be openly *nonarcheological*, they are not *nontextual*. . . . Ultimately the question is, what is the most plausible meaning today *that these words will bear*."); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496 (1987) ("In many cases, the text of the statute will provide determinate answers . . . . In general, the more detailed the text is, the greater weight the interpreter will give to the textual considerations . . . .").

20. *United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Avenue, Elgin, Ill.*, 903 F.2d 490, 492 (7th Cir. 1990); *United States v. 1964 Beechcraft Baron Aircraft TC-740*, 691 F.2d 725, 727 (5th Cir. 1982) (per curiam), *cert. denied*, 461 U.S. 914 (1983); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 423 (2d Cir. 1977).

broadest possible scope for forfeiture.<sup>21</sup> Subsections 881(a)(4) and 881(a)(7) provide for forfeiture of property used “in any manner” to facilitate the underlying drug crime.<sup>22</sup>

Section 881 appears to have been modeled on a prior forfeiture statute covering much of the same ground. In language similar to section 881, 49 U.S.C. app. §§ 781-782<sup>23</sup> provide for the forfeiture of vessels, vehicles, and aircraft used in drug crimes. While “[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute . . . ,”<sup>24</sup> the language in section 881 differs primarily in the inclusion of the phrase “in any manner.” If section 881 was enacted with sections 781 and 782 in mind, the single phrase alteration might have substantive meaning. The circuits rejecting the substantial connection test have noted this different language in their expansive reading of section 881.<sup>25</sup> At first blush, their expansive reading may be necessary to avoid rendering section 881 redundant with sections 781-782.

This argument, however, assumes both explicit legislative consideration of the prior statute and a specific intended meaning for the phrase “in any manner.” Neither assumption is justified. First, the legislative history of section 881 is devoid of reference to section 781.<sup>26</sup> In 1970, Congress was deliberating a “comprehensive” drug abuse and enforcement act.<sup>27</sup> The duplication of the section 781-782 enforcement provisions in section 881 could be explained by Congress’ desire

21. See *supra* note 8.

22. See *supra* note 8. As the opinion in *One Parcel . . . Commonly Known as 916 Douglas Avenue* demonstrates, courts which refuse to look beyond the “plain meaning” of the statute will be inclined against the substantial connection test. 903 F.2d at 492-96. This Part implicitly suggests that other evidence better illuminates Congressional intent. Additionally, the words of section 881 should be read as words defined by similar words in a previous drug forfeiture statute. Hence, plain meaning is inappropriate. See *infra* notes 23-34 and accompanying text.

23. The statutes provide: “It shall be unlawful . . . to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.” 49 U.S.C. app. § 781(a)(3) (1982). “Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this Appendix, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited . . . .” 49 U.S.C. app. § 782 (1982). 49 U.S.C. §§ 781-782 were enacted in 1939. Act of Aug. 9, 1939, Pub. L. No. 76-357, 53 Stat. 1291, 1291-92.

24. *Russello v. United States*, 464 U.S. 16, 25 (1984). *But see* *Communication Workers of America v. Beck*, 487 U.S. 735, 745 (1988) (nearly identical language of Railway Labor Act section and National Labor Relations Act section compelled identical interpretation despite general rule against reading the statutes together).

25. See, e.g., *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 423-25 (2d Cir. 1977).

26. See generally H.R. REP. NO. 1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566 [hereinafter 1970 HOUSE REPORT]; 116 CONG. REC. 33603-67, 35050, 35051-58, 35477-90, 35494-96, 35516-23, 35549-59 (1970).

27. The House Committee wrote,

This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective

to include all programs and penalties in a single bill. Had sections 781 and 782 been at the forefront of Congress' consideration, those statutes would likely have been amended, or, at least, would have been discussed in the legislative history. In fact, section 881 seems to have commanded little of the enacting Congress' attention; the main debates occurred over the theory of punishment to be followed<sup>28</sup> and the desirability and constitutionality of "no-knock" warrants.<sup>29</sup>

Second, if Congress did desire section 881 to broaden the scope of property subject to forfeiture, this conclusion does not require rejection of the substantial connection test. Courts had construed sections 781-782 extremely narrowly. In general, these cases rejected forfeiture of vehicles which had clearly facilitated a drug transaction, but had not been part of the actual drug crime. In the typical case, the courts refused to order forfeiture of vehicles which had provided transportation to negotiations and did not transport the drugs after the sale.<sup>30</sup> Congress, therefore, may have been pointing at transportation to or from the scene of the negotiations or crime by inclusion of the phrase "in any manner." This conclusion does not invalidate the substantial connection test. The Eighth Circuit, which has adopted the substantial connection test, has also held that section 881 supports forfeiture of vehicles used to transport traffickers to preliminary negotiations.<sup>31</sup> Other circuits have avoided the issue by holding that, even under the substantial connection standard, a vehicle used solely for transportation would be subject to forfeiture.<sup>32</sup> In fact, the Fifth Circuit has characterized the forfeitability of conveyances used for negotiations as the primary difference between section 881 and sections 781 and 782.<sup>33</sup> The substantial connection test invalidates forfeiture only in circumstances where the conveyance or real property is even less connected than transportation to negotiations.<sup>34</sup>

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means for law enforcement aspects of drug abuse prevention and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs. 1970 HOUSE REPORT, *supra* note 26, at 2, *reprinted* at 4567. *See also id.* at 5, *reprinted* at 4571 (Many pieces of legislation enacted at various times have "necessarily given rise to a confusing and often duplicative approach . . . . This bill collects and conforms these diverse laws in one piece of legislation . . . .").

28. 1970 HOUSE REPORT, *supra* note 26, at 9-12, *reprinted* at 4575-79 (noting the debate over retributive and rehabilitative punishment schemes); *see also* 116 CONG. REC. 35,477-83 (1970).

29. *See, e.g.*, 1970 HOUSE REPORT, *supra* note 26, at 86-89, *reprinted* at 4653-57; 116 CONG. REC. 35,523-40, 33,603-67 (1970).

30. *See, e.g.*, *Howard v. United States*, 423 F.2d 1102, 1103 (9th Cir. 1970) (refusing to forfeit vehicle which had been driven to meet the car transporting drugs, but never itself contained drugs); *Platt v. United States*, 163 F.2d 165, 167 (10th Cir. 1947) (refusal to forfeit the car used to drive to the pharmacy where defendant attempted to have fraudulent prescriptions filled).

31. *See One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986).

32. *See, e.g.*, *United States v. One 1984 Cadillac*, 888 F.2d 1133, 1137-38 (6th Cir. 1989); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1427 (11th Cir. 1983) (*per curiam*).

33. *See United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982); *United States v. One 1977 Cadillac Coupe de Ville*, 644 F.2d 500, 501-02 (5th Cir. 1981).

34. *See infra* section III.A.

Although the plain language of section 881 might seem to reject the substantial connection test, reading the phrase “in any manner” against the narrow scope of sections 781-782, indicates that Congress’ desire to expand forfeiture may have stopped short of such a broad command. To choose between these interpretations, the context of adoption, the explicit statements of the enacting Congress, and other extrinsic sources of legislative history must be surveyed.

### B. Rules of Strict Construction

When confronted with ambiguous statutes, courts often resort to rules of construction to guide interpretation. While these canons are capable of manipulation, each stands for a substantive proposition the courts seek to uphold. In evaluating section 881, two canons may aid interpretation. First, since the coercive power of the state is implicated, criminal statutes should be construed narrowly.<sup>35</sup> Second, courts should favor readings which avoid potential constitutional conflicts. Because forfeiture is a penalty imposed on participants in illegal drug activities, and its application to legitimately acquired conveyances and real property implicates eighth amendment protections,<sup>36</sup> section 881 ought to be narrowly construed.

In general, criminal statutes are strictly construed in favor of the defendant.<sup>37</sup> The Supreme Court has defended this rule of construction based on principles of fair notice to potential defendants and prevention of police abuse.<sup>38</sup> Early forfeiture cases explicitly adopted this standard. In 1875, in *Farmers’ and Mechanics’ National Bank v. Dearing*,<sup>39</sup> the Supreme Court wrote: “Forfeitures are not favored in the law. Courts always incline against them. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred.”<sup>40</sup> Similarly, in a Prohibition-era case, the Supreme Court reiterated that “[f]orfeitures are not favored; they should be enforced only when within both the letter and spirit of the law.”<sup>41</sup> Circuit courts also have applied generally the rule of strict construction both in interpreting forfeiture statutes<sup>42</sup> and in determin-

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35. Despite Congress’ designation of § 881 as a civil forfeiture remedy, it is in fact a criminal penalty. See *infra* section III.A. The present section avoids the problem of characterizing the statute by considering only court pronouncements explicitly specifying the standard of interpretation of forfeiture provisions.

36. See *infra* Part II.

37. See, e.g., W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 658 (1988); 3 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 59.03 (4th ed. 1974).

38. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating vagrancy statute as unconstitutionally vague).

39. 91 U.S. 29 (1875).

40. 91 U.S. at 35 (citations omitted).

41. *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939).

42. See, e.g., *United States v. McKeithen*, 822 F.2d 310, 315 (2d Cir. 1987) (applying the rule



ing whether the property in a specific case should be forfeit under the accepted interpretation.<sup>43</sup> Since the text of section 881 can be read to support both the substantial connection test and a more expansive reading, the narrow construction should be preferred.

Still, Supreme Court pronouncements regarding interpretation of forfeiture statutes have not been uniform. In the cases advocating broader interpretation, however, the Court was faced with statutes which mandated only the forfeiture of per se illegal goods.<sup>44</sup> In *United States v. Stowell*,<sup>45</sup> the Court interpreted the forfeiture statute in question, arguing that "statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong . . ."<sup>46</sup> Although the forfeiture constituted a penalty, the statute ought "not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature."<sup>47</sup> The forfeiture of goods on which tax has not been paid more clearly represents a purely remedial action. The statute implies that no property rights arise until the importation tax is paid. By contrast, section 881, in many cases, extinguishes the claimant's property right in legitimately acquired property. While section 881 certainly was enacted "for the public good and to suppress a public wrong," all criminal

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of strict construction to criminal forfeiture under the Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (1982)); *United States v. Long*, 654 F.2d 911, 914 (3d Cir. 1981) (same); *United States v. Charles D. Kaier Co.*, 61 F.2d 160, 162 (3d Cir. 1932) ("The power to condemn or to declare a forfeiture must be found in the statutes, and such statutes must be pursued with reasonable strictness.").

43. See, e.g., *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 417 (10th Cir. 1982); *United States v. One (1) 1975 Thunderbird*, 576 F.2d 834, 836 (10th Cir. 1978).

44. This distinction will recur in this Note. The difference between a statute which confiscates goods in which the claimant never had a property right (e.g., the marijuana itself) and a statute which extinguishes a legitimately acquired property right characterizes the forfeiture as a civil or criminal penalty and as either remedial or punitive. Cf. Darmstadter & Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeiture Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 30-31 (1987). Darmstadter and Mackoff suggest a division between the drugs as malum in se and conveyances and assets as derivative properties. While substantially agreeing with their position, this Note departs from Darmstadter and Mackoff's treatment by advocating heightened protections for any property which may have been acquired legitimately. Darmstadter and Mackoff group together for lesser protection "[a]ny money or other property that has been acquired through the sale of drugs, or intended to be used to purchase drugs, are the fruits of, or have been tainted by an illegal transaction." *Id.* at 31. Only conveyances are accorded heightened protection by Darmstadter and Mackoff. *Id.* Further, this Note proposes that extinguishing legitimately acquired property rights requires constitutional protection and should be evaluated as a fine under the eighth amendment. See *infra* Part II. This Note also differs with the scheme advanced in Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 475-80 (1976). Clark looks to the purposes for which the property was acquired and the persons from whom it was acquired, instead of focusing on the means by which property rights, if any, were acquired.

45. 133 U.S. 1 (1890).

46. 133 U.S. at 12.

47. 133 U.S. at 12.

statutes fall within this rubric. The exception would swallow the rule; the policies of notice and restraint of the police power would be lost. Additionally, section 881 does not function as a typical civil penalty, the severity of which is determined by the damages caused by each violation.<sup>48</sup>

The Supreme Court recently applied a broad interpretation rule to RICO forfeiture.<sup>49</sup> The Court, however, relied in part on the explicit congressional command of liberal interpretation.<sup>50</sup> RICO forfeiture, moreover, only reaches tainted parts of the enterprise.<sup>51</sup> Legitimately acquired property or businesses are not forfeited.

A second canon of statutory construction, avoiding constitutional issues, also supports a narrow interpretation of section 881. "Assuming that the legislature is loathe to come close to enacting unconstitutional criminal statutes, courts will construe criminal penalties narrowly enough so that there is no question of the statute's constitutionality . . . ."<sup>52</sup> While this canon has been the subject of criticism,<sup>53</sup> it should be applied to interpreting section 881. Judicial action in this area is justified by the very real need for constitutional protections.<sup>54</sup>

Canons of interpretation are best applied when two plausible interpretations of the statute are supportable by the text and its legislative history.<sup>55</sup> Here, however, the text of section 881 points toward a broad interpretation while the legislative history favors the narrower, substantial connection interpretation. Nonetheless, as the division in the circuits demonstrates, both interpretations are plausible readings of section 881. The rule of narrowly construing penal statutes and the presumption that legislative enactments are constitutional provide principled bases for selecting between the competing readings. In this situation, these canons strongly suggest that the narrower substantial connection test should apply in section 881 cases.

### C. *The Context of Adoption*

In attempting to determine the meaning or purpose sought by the

48. See *infra* notes 160-69 and accompanying text.

49. *Russello v. United States*, 464 U.S. 16, 27 (1983).

50. 464 U.S. at 27. Section 904 of Pub. L. No. 91-452, 84 Stat. 922, required liberal interpretation to effectuate the "remedial" purposes of RICO. See 18 U.S.C. § 1961 (1988) (annotation).

51. See *infra* notes 295-98 and accompanying text.

52. W. ESKRIDGE & P. FRICKEY, *supra* note 37, at 676.

53. Eskridge and Frickey note the following major criticisms: 1. The rule is employed only when it reaches the predetermined result the court seeks; 2. The rule creates a second plane of judicial activism, upsetting the intent of the legislature not only when the statute is unconstitutional, but also when it might be. *Id.* at 689 (citing H. FRIENDLY, *Mr. Justice Frankfurter & the Reading of Statutes*, in BENCHMARKS 211-12 (1967) (proposition number 1) and R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985) (proposition number 2)).

54. Part II will demonstrate that § 881 forfeiture gives rise to genuine eighth amendment concerns.

55. W. ESKRIDGE & P. FRICKEY, *supra* note 37, at 694.

enacting Congress, an interpreter should consider the atmosphere and pressures under which the legislators were working. Henry M. Hart and Albert Sacks advocate identifying instances in which the enacting Congress clearly would have thought the statute applied, and then reasoning from these examples to cases the legislature probably did not consider directly.<sup>56</sup> Approaching statutory interpretation from a law-and-economics perspective, Judge Posner argues that the context of adoption should be determined in order to preserve the bargains struck between various legislators and between the legislators and involved interest groups.<sup>57</sup> Under these approaches, the pressures on and motivations of the enacting Congress inform interpretation.

The Congress that originally enacted section 881<sup>58</sup> was clearly concerned with the scope of organized drug trafficking.<sup>59</sup> The solution it adopted, however, does not evidence a purely punitive approach, an approach which would justify reading the forfeiture provision as broadly as possible. The attack mounted by the Comprehensive Drug Abuse Prevention and Education Act of 1970<sup>60</sup> contained three main programs: (1) education; (2) rehabilitation; and (3) enforcement. Even in the enforcement arena, the statute focused on rehabilitation, rather than purely punitive measures.<sup>61</sup> Fines and penalties were decreased in some areas.<sup>62</sup> Additionally, section 881 contained three exceptions to mandatory forfeiture. First, conveyances owned by common carriers could not be forfeit so long as the carrier had no knowledge of illegal use.<sup>63</sup> Second, the property of innocent owners was not subject to forfeiture.<sup>64</sup> Third, the statute incorporated provisions for administrative remission and mitigation.<sup>65</sup>

The legislation's overall plan indicates Congress directed the most severe measures at large scale drug traffickers.<sup>66</sup> The evidence suggests the enacting Congress intended forfeiture to apply to large scale

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56. See generally H. HART & A. SACKS, *THE LEGAL PROCESS* (tent. ed. 1958); see also W. ESKRIDGE & P. FRICKEY, *supra* note 37, at 576 (interpreting Hart and Sacks' approach).

57. R. POSNER, *supra* note 53, at 286-89.

58. Treating the 1970 Congress, which enacted the conveyance forfeiture statute, 21 U.S.C. § 881(a)(4), as the enacting Congress is appropriate because the real property forfeiture statute, 21 U.S.C. § 881(a)(7) (1988), is worded nearly equivalently. See *supra* note 8.

59. 1970 HOUSE REPORT, *supra* note 26, at 6, reprinted at 4566, 4572 ("Drug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions."); *id.* at 22, 30, reprinted at 4588, 4596. The findings and declarations of the bill focus on the traffic in illegal drugs. *Id.* at 30, reprinted at 4596.

60. Pub. L. No. 91-513, 84 Stat. 1227 (1970).

61. 1970 HOUSE REPORT, *supra* note 26, at 9-10, reprinted at 4575.

62. *Id.* at 11, reprinted at 4576.

63. 21 U.S.C. § 881(a)(4)(A) (1988).

64. 21 U.S.C. § 881(a)(4)(C), (6), (7) (1988); cf. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974).

65. 21 U.S.C. § 881(d) (1988) (incorporating by reference 19 U.S.C. § 1618 (1988)).

66. See 1970 HOUSE REPORT, *supra* note 26, at 10-11, reprinted at 4575-77.

drug traffickers and their operations. The legislation focused on depriving criminals of the profits of their trade — an attack on persons who make a living from drug trafficking. The exceptions, for common carriers and innocent third parties, demonstrate concern that those unwittingly involved in drug transactions not have their property confiscated. The cases typically addressed by the substantial connection test, of apparently minimal involvement in drug trafficking or the extinguishment of legitimately acquired property rights, fall between these two extremes. The total scheme of the 1970 Act, however, in adopting rehabilitative and lenient measures, may indicate that Congress would have been reluctant to forfeit property of all persons connected with any drug crime.<sup>67</sup>

#### D. *Explicit Statements of the Enacting Congress*<sup>68</sup>

The committee reports accompanying section 881 indicate no clear intent for the scope of forfeiture. The House Report, for example, does not discuss the forfeiture provision other than to provide a brief summary of the statute.<sup>69</sup> In fact, the report does not even recite the purpose of the forfeiture provisions. The little evidence in the report, however, suggests a narrow scope for section 881. Discussing the forfeiture provision, the committee wrote,

Subsection (a) of this section sets forth the conditions for forfeiture and the property to be forfeited. These include all controlled substances produced or obtained in violation of the act, all raw materials, products, and equipment used, or intended for use, in manufacturing, handling, or

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67. Examination of § 881 as it presently reads might indicate that § 881(a)(4) should cover the intermediate cases because § 881(a)(6) provides for forfeiture of all drug profits and all assets purchased with those profits. 21 U.S.C. § 881(a)(6) (1988); see *supra* note 8 for relevant text. Section 881(a)(6), however, was not adopted until 1978, see *infra* notes 83-92 and accompanying text, and therefore is of no assistance in determining the intent of the 1970 Congress. Further, the 1978 Congress explicitly discussed the substantial connection test, indicating its appropriateness. See *infra* notes 83-92 and accompanying text.

68. The next step in traditional statutory interpretation is to look to legislative pronouncements of intent. See, e.g., Aleinikoff, *supra* note 19, at 23-24 (outlining the methods of traditional statutory interpretation). Data here include problems acknowledged by Congress in hearings and debates and pronouncements made by the committees in their reports on the legislation. By piecing together this data, the interpreter will attempt to determine the problems the statute sought to solve and use that conclusion to assist in the present controversy. See W. ESKRIDGE & P. FRICKEY, *supra* note 37, at 709 ("Most scholars and judges agree that committee reports should be considered as authoritative legislative history and should be given great weight . . ."). But see Aleinikoff, *supra* note 19, at 29 ("[L]egislative reports once written to inform legislators about pending legislation, and legislative floor debates once intended to provide a forum for deliberation, are now primarily constructed to influence future interpreters."); Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95 n.164 (1988) ("As legislators and lobbyists have begun to understand how much courts use legislative history, posturing and fabrication have become possible. The fight, if lost on the language of the statute, moves to the language of the committee report or perhaps to getting a scripted colloquy entered into the Congressional Record.") Cf. R. POSNER, *supra* note 53, at 269 ("But if legislators know that courts look to legislative history in interpreting statutes — and they do know this — then when they vote for a bill they are assenting, in a sense, to at least some of what is in that history.").

69. 1970 HOUSE REPORT, *supra* note 26, at 55-56, reprinted at 4623-24.

conveying controlled substances in violation of the act and any container for property previously described. Also subject to forfeiture are all conveyances used, or intended for use, to transport or conceal such violative property.<sup>70</sup>

Under this interpretation, the conveyance could only be forfeit when used or intended for use in transporting or storing the illegal drugs. For example, an automobile which drug dealers used for transportation to negotiations would not be forfeitable. Similarly, property on which a drug transaction actually occurred would not be forfeitable, so long as the property did not "conceal" the drugs. This reading is actually narrower than the substantial connection test.<sup>71</sup> Combined with the evidence of a multi-level attack by the enacting Congress,<sup>72</sup> this language indicates a narrow interpretation would comport more closely with Congress' intent.

### E. *Subsequent Consideration of the Statute*

Legislative reexamination of the statute may also provide clues for interpretation.<sup>73</sup> Later congressional consideration of section 881 further bolsters the case for narrowing its reach. Data from subsequent Congresses generally include amendments and repeals introduced and never passed, hearings held and action subsequently taken, reports on the effectiveness of a statute, and floor debate in response to court decisions.<sup>74</sup> At the least, pronouncements by succeeding Congresses regarding the meaning of a statute may deserve weight out of respect for Congress' democratic nature.<sup>75</sup>

The Supreme Court has given varying weight to pronouncements of subsequent Congresses. In *United States v. Price*,<sup>76</sup> for example, the Court wrote, "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."<sup>77</sup> On the other hand,

70. *Id.* at 55, reprinted at 4623. The Senate report uses substantially similar language in discussing the forfeiture provision of the Senate bill. S. REP. NO. 613, 91st Cong., 1st Sess. 32 (1969).

71. Even under the substantial connection test, courts commonly allow forfeiture of conveyances where they transported a drug dealer to the scene of a transaction, whether drugs are actually present in the car or not. See, e.g., *United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream with Burg & Gold Stripes*, 777 F.2d 947, 953 (4th Cir. 1985) ("[T]he use of an airplane or other vehicle or vessel in a drug transaction, either to transport controlled substances or to transport conspirators to an exchange site, establishes a 'substantial connection' between the conveyance and the criminal activity sufficient to justify an order of forfeiture."); see also *infra* section III.A.

72. See *supra* notes 58-67 and accompanying text.

73. W. ESKRIDGE & P. FRICKEY, *supra* note 37, at 757-59.

74. See generally, Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 1 (1987).

75. See W. ESKRIDGE & P. FRICKEY, *supra* note 37, at 759.

76. 361 U.S. 304 (1960).

77. 361 U.S. at 313; see also *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) ("[T]he views of some Congressmen as to the construction of a statute adopted years before by another Con-

the Court, especially at times when the meaning of the statute is unclear, has been willing to accord "significant weight" to statements made by subsequent Congresses.<sup>78</sup> The Court acknowledges "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."<sup>79</sup> Because the text and legislative history of section 881 can support either the substantial connection test or a broader reading, subsequent legislative pronouncements should be considered. Members of subsequent Congresses likely were not biased against the original weight assigned to various factors by the enacting Congress.<sup>80</sup> The original drug statute embodied an attempt to confront a public problem; subsequent interpretations of the statute by the legislature were no less likely addressed to the same problems.<sup>81</sup> The congressional statements in evidence here are taken from the history of legislation evaluating and amending section 881.<sup>82</sup>

Section 881 has been amended substantively three times since the enactment of the conveyance forfeiture provision. Congressional statements made during consideration of two of these amendments provide strong evidence that the substantial connection test should be employed in applying section 881. In the first reconsideration, in 1978, Congress added an asset forfeiture provision.<sup>83</sup> Commenting on the asset forfeiture amendment, the joint committee report contained the following language, which many of the courts requiring a substantial connection have quoted with approval:<sup>84</sup>

Due to the penal nature of forfeiture statutes, it is the intent of these

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gress have 'very little, if any, significance.'") (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958)); R. POSNER, *supra* note 57, at 279 (giving weight to post enactment statements will upset the original "deal" that produced the legislation).

78. See, e.g., *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure.") (citations omitted).

79. *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

80. Cf. R. POSNER, *supra* note 53, at 279 ("I do not want to anathematize completely the use of postenactment materials to interpret a statute, because such materials may in some cases reflect a disinterested and informed view by a committee that is monitoring the administration of a statute; the problem is to identify those cases.")

81. Given the increasing attention accorded to illegal drugs, subsequent Congresses probably were, if anything, predisposed toward broader interpretations.

82. In other words, the statements do not constitute the mere opinion of legislators seeking to influence courts or the public when they have not been able to prevail in Congress. See *supra* note 68. Additionally, the context moves these subsequent statements closer to the model of subsequent legislation, which the Court has more consistently given "great weight." See *South Carolina v. Regan*, 465 U.S. 367, 379 n.17 (1984) (pointing at subsequent legislation, more than subsequent statements, as deserving "great weight").

83. Pub. L. No. 95-633, § 301, 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)); see *supra* note 8 for relevant text.

84. See *United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream with Burg & Gold Stripes*, 777 F.2d 947, 953 (4th Cir. 1985); *United States v. One 1972 Chevrolet Corvette*,

provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent. . . . Similarly, any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent.<sup>85</sup>

This statement strongly suggests the substantial connection test best reflects Congress' intent.

Courts refusing to follow this history note the lack of similar history for the conveyance forfeiture provision. In *United States v. 1964 Beechcraft Baron Aircraft, TC-740*,<sup>86</sup> the Fifth Circuit wrote that section 881(a)(6)'s "legislative history makes no mention of using the same test for other forfeiture actions and the legislative history of § 881 [(a)(4) and (a)(7)] is devoid of any mention of a 'substantial connection' test."<sup>87</sup> The Fifth Circuit might have added that the text of section 881(a)(6) does not include the phrase "in any manner."<sup>88</sup> This distinction gives strong textual support to a refusal to read the substantial connection test into the conveyance and real property forfeiture provisions.

This argument, while strong, does not provide sufficient ground for rejecting the substantial connection test. First, the committee report does not seem to be discussing the amendment exclusively. The first sentence, referring to substantial connection, addresses the entire forfeiture statute. The committee's statement that "similarly" the new provision allows forfeiture of moneys only if it bears a substantial connection indicates the prior reference is to section 881(a)(4), the conveyance forfeiture provision. The committee report seems to be first explaining that section (a)(4) only applies when a substantial connection is found and, second, stating that the same standard will apply to the proposed section (a)(6). As corroboration, the same joint explanatory statement elsewhere described the existing forfeiture statute narrowly.

The types of property covered under the current law includes illicit abusable drugs, raw materials and equipment used in manufacturing such drugs, property used to contain or conceal such drugs, vehicles used to facilitate the transportation of such drugs, and any records,

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625 F.2d 1026, 1029 (1st Cir. 1980); see also *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 889 (11th Cir. 1989) (Vance, J., dissenting).

85. *Joint Explanatory Statement of Titles II and III*, 124 CONG. REC. S17647 (daily ed. Oct. 7, 1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9518, 9522 [hereinafter 1978 *Joint Explanatory Statement*].

86. 691 F.2d 725 (5th Cir. 1982) (per curiam), cert. denied, 461 U.S. 914 (1983).

87. 691 F.2d at 727.

88. See *supra* note 8.

books, or formulas used in violation of Federal illicit drug laws.<sup>89</sup> This statement, while general, mirrors the interpretation given the statute by the enacting Congress<sup>90</sup> and requires that the conveyance or real property actually be used in the transportation or concealment of the illegal drugs. These two statements, in combination, demonstrate that the amending Congress believed the substantial connection test should apply to forfeitures of conveyances.

Second, the purpose of section 881, attacking drug trafficking's profits and instrumentalities, contradicts the Fifth Circuit's distinction between asset forfeiture and conveyance forfeiture. As early as 1950, the Congress recognized the need to focus on the profits and instrumentalities of the drug suppliers.

Enforcement officers of the Government have found that one of the best ways to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. Vessels, vehicles, and aircraft may be termed the operating tools of dope peddlers, and often represent major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.<sup>91</sup>

Given this concern, especially with seizing *liquid* assets, Congress would not have enacted a stricter standard for forfeiture of cash than for conveyances.<sup>92</sup> Both the explicit language of the amending committee's report and the purpose of section 881 forfeiture establish that the amending Congress believed the substantial connection test should apply.

The enactment of the real property forfeiture provision, as part of

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89. 1978 *Joint Explanatory Statement*, *supra* note 85, reprinted at 9522.

90. See *supra* sections I.C - I.D.

91. HOUSE COMM. ON WAYS & MEANS, H.R. REP. NO. 2751, 81st Cong., 2d Sess. 3, reprinted in 1950 U.S. CODE CONG. & ADMIN. NEWS. 2952, 2953. This purpose was judicially recognized in *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974).

92. That conveyances and property can be traced and seized more easily than cash does not justify seizing them as surrogates. First, the inability to justify specific illegally generated proceeds casts doubt on the existence of criminal activity. Second, since the conveyance or real property often is acquired legitimately, greater protections, not lesser, are necessary in those cases.

The distinction drawn *supra* note 44, between property that may never be legitimately owned and property legitimately acquired but forfeit by virtue of illegal use, can be expanded. Section 881(a)(6) applies to assets that both are to be furnished for and are derived from illegal narcotics transactions. 21 U.S.C. § 881(a)(6) (1988). Money acquired by sale of narcotics, which may never be owned legally, clearly is forfeitable. When money acquired legitimately is forfeit because it was intended to purchase narcotics, the courts should view this as an extinguishment of the legitimate property right and should use special care. Separating these seemingly similar transactions for different treatment actually requires the government to establish the same proof in each case. In order to show that money is derived from a drug transaction, a transaction must be shown. In other words, the government must establish illegal activity. Where no transaction has occurred, the government should be held to the higher burden of showing its contemplation.



the Comprehensive Forfeiture Act of 1984,<sup>93</sup> occasioned the second important reexamination of the conveyance forfeiture provision. This legislation was prompted in large part by the 1981 publication of a General Accounting Office Report criticizing the nonuse of forfeiture statutes.<sup>94</sup> In its hearings and reports, the amending committee identified as the existing statutes' primary failings the limited scope of RICO forfeiture and the inability to reach real property under the civil forfeiture provisions.<sup>95</sup> Notably absent from discussion was the "substantial connection" test.<sup>96</sup> The committee report summarized section 881's perceived failings:

The extent of drug-related property subject to civil forfeiture under 21 U.S.C. 881 is also too limited in one respect. Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, [the drug dealer's] use of the property renders it subject to civil forfeiture. But if [the drug dealer] uses a secluded barn to store tons of marihuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject [the] real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.<sup>97</sup>

The committees demonstrated their awareness of the state of forfeiture law, both at the circuit and district level.<sup>98</sup> While the committee statements do not comment specifically on the substantial connection test, the committee's general awareness of the state of forfeiture law combined with the commitment to increase the scope of forfeiture law<sup>99</sup> implies the committee would have at least discussed, if not altered, the law had the substantial connection test been viewed with disfavor.<sup>100</sup>

93. Pub. L. 98-473, 98 Stat. 2050 (codified at 21 U.S.C. § 881(a)(7)); see *supra* note 8 for relevant text.

94. COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, ASSET FORFEITURE — A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING (1981).

95. See SENATE COMM. ON THE JUDICIARY, COMPREHENSIVE FORFEITURE ACT OF 1983, S. REP. NO. 224, 98th Cong., 1st Sess. 17.

96. By this time, the First and Second Circuits had formulated the substantial connection test. See *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977).

97. SENATE COMM. ON CONTINUING APPROPRIATIONS, 1985, COMPREHENSIVE CRIME CONTROL ACT OF 1984, S. REP. NO. 225, 98th Cong., 2d Sess. 195, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3378 [hereinafter 1984 SENATE REPORT].

98. See, e.g., SENATE COMM. ON THE JUDICIARY, *supra* note 95, at 17 n.18 (noting circuit decisions construing the scope of RICO forfeiture narrowly); *id.* at 22-23 nn.24-27 (citing circuit court decisions interpreting RICO forfeiture).

99. See SENATE COMM. ON THE JUDICIARY, *supra* note 95, at 14 ("In recent years the Justice Department and other Federal agencies have made a concerted effort to increase the use of forfeiture in narcotics and racketeering cases. This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated the active pursuit of forfeiture . . .").

100. Interpreting direct silence is, of course, a tricky matter, and this piece of evidence probably should be accorded less weight. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 671-73 (1987) (Scalia, J., dissenting); Farber, *supra* note 74, at 10 ("Silence is an imperfect signal of congressional approval. Nevertheless, silence clearly communicates some information . . .").

### F. *A Dynamic Interpretation of Section 881*<sup>101</sup>

Careful reflection on current public sentiment does not support the extremely broad reading of section 881 that courts rejecting the substantial connection test adopt. Drug trafficking and abuse are significant current problems. This section does not attempt to refute that fact. Rather, this section attempts to demonstrate that the evidence does not all point in the same direction. Current policies and attitudes do draw distinctions between types of drug offenses and offenders. Presently, section 881 doctrine makes no distinctions between classes of offenders.<sup>102</sup> The substantial connection test is one method for establishing different levels of culpability.<sup>103</sup>

Americans label drug abuse the number one problem in recent polls.<sup>104</sup> This may in part reflect public response to the increased attention given the issue by the Bush administration.<sup>105</sup> Objective data indicate drug use declined in the past decade.<sup>106</sup> Standing in sharp contrast to President Reagan's highly promoted "zero tolerance" program which cracked down on users,<sup>107</sup> police officials have argued these strict enforcement programs are not effective.<sup>108</sup> In fact, follow-

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101. Several legal commentators have advocated adoption of a more "dynamic" process of interpreting statutes. See, e.g., R. DWORKIN, *LAW'S EMPIRE* (1986); Aleinikoff, *supra* note 19; Eskridge, *supra* note 19. These models look to current needs and public opinion to determine an appropriate interpretation of the statute. R. DWORKIN, *supra*, at 341, 349; Eskridge, *supra* note 19, at 1483. Statutes, at least in situations where the text and legislative history will support alternate readings, should be read against the current "web of beliefs" to identify an interpretation meeting current needs. See also Aleinikoff, *supra* note 19, at 49 ("[T]reat the statute as if it had been enacted yesterday and try to make sense of it in today's world."). Eskridge limits the scope of his dynamic interpretation to public regarding statutes; the drug enforcement statutes, however, are not passed to service narrow interest groups. Cf. Eskridge, *supra* note 19, at 1483.

102. See *supra* note 8.

103. Parts II and III examine a second method for drawing lines between drug offenders. In applying eighth amendment protections, current public opinion arguably should weigh much less. See *infra* sections II.B, III.B (discussing the cruel and unusual punishments clause).

104. See Kohut & Hugick, *Colombians Question Worth of Drug War; Americans Skeptical It Can Be Won*, GALLUP RPT. NO. 288, Sept. 1989, at 4 (Sixty-three percent of respondents named drugs/drug abuse as the nation's number one problem.).

105. See *id.* (In May 1989, before President Bush's drug policy address, only twenty-seven percent of respondents thought drugs/drug abuse the nation's number one problem.).

106. See, e.g., Morin & Allen, *supra* note 4, at C4, col. 1 ("Contrary to public perceptions, however, drug use appears to be slowly declining. . . . Even cocaine, the hot drug of the '80s, showed a significant drop in overall use last year. . . . Researchers believe . . . that even crack is losing favor and will fade significantly in the next few years.").

107. Meese Asks *Drug Tests For 'Most' Workers: Mayors Assail Federal Efforts As Poorly Run, Underfunded*, Wash. Post, Apr. 27, 1988, at A1, col. 4 ("Attorney General Edwin Meese III, saying the nation needs 'zero tolerance of drugs in any place, any time,' called yesterday for virtually all workers in the country to be tested by their employers for use of illicit drugs.").

108. See, e.g., *New Tactic in Drug War Is to Aim at Casual Users*, Boston Globe, Apr. 2, 1989, at 1 (quoting Patrick Murphy, director of police policy for the National Council of Mayors and a former top police official); *'Zero Tolerance': Zero Effect?*, The Christian Science Monitor, Aug. 23, 1988, at 3, col. 3 ("Seventy-three percent of state and local prosecutors queried singled out the Reagan administration's policy of 'zero tolerance' as having little importance as an enforcement tool.").

ing a public outcry resulting from the seizure of many pleasure boats after finding only small amounts of drugs, the government moved away from zero tolerance.<sup>109</sup> While some polls indicate the general public is willing to institute drug enforcement procedures which will infringe civil liberties,<sup>110</sup> the trend has been toward more lenient enforcement, at least for casual users — the group most likely to be exempted from forfeiture by the substantial connection test. Congress recently has enacted provisions which substantially decrease penalties for first-time offenders.<sup>111</sup> The new law reduces the maximum fine from \$100,000 to \$10,000 and shifts enforcement to the civil arena.<sup>112</sup> These changes were intentionally made by Congress; the Attorney General's office had not proposed the decrease in penalties.<sup>113</sup>

In sum, while the text of section 881 may support a broad interpretation, a narrower scope for civil forfeiture better matches the intent of the enacting Congress, the understanding of subsequent Congresses, and present public opinion for fighting the war on drugs. As the next Part demonstrates, the eighth amendment may also mandate a narrower interpretation of section 881.

## II. THE EIGHTH AMENDMENT MANDATES NARROWING THE SCOPE OF SECTION 881 FORFEITURE

This Part offers two arguments for eighth amendment review of civil forfeitures.<sup>114</sup> First, the forfeiture of conveyances or real property, especially those acquired legitimately and subject to forfeiture only by involvement in drug activity, should be treated as a criminal or quasi-criminal penalty. Despite express congressional intent to fashion a civil remedy, forfeiture's punitive nature mandates eighth amendment protection. Second, the lack of specific reference to criminal proceedings in the text of the eighth amendment strongly argues in favor of applying it to civil proceedings. While the Supreme Court has explicitly ruled out eighth amendment review of punitive damages awards in suits between private parties,<sup>115</sup> the government prosecutes

109. *U.S. Softens Policy of Seizing Boats With Drugs Aboard*, Wash. Post, Feb. 21, 1989, at A21, col. 1.

110. See Morin & Allen, *supra* note 4.

111. 21 U.S.C.A. § 844a (West Supp. 1990); see also *The Drug Bill and Decriminalization: Maximum Civil Penalty Will Be Far Lighter Than Under Current Law*, Wash. Post, Oct. 28, 1988, at A3, col. 1.

112. This use of civil process is less troubling than civil forfeiture because the fines are relatively small. 21 U.S.C.A. § 844a (West Supp. 1990). Further, federal guidelines require proportionality review for fines. See 18 U.S.C. § 357(a) (1988); *infra* note 287.

113. Wash. Post, *supra* note 111, at A3, col. 3 (statement of Karey Copeland, Deputy Associate Attorney General).

114. A Note recently published in the *Cornell Law Review* independently reached a similar conclusion. Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990).

115. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

civil forfeiture. The cruel and unusual punishments clause or the excessive fines clause of the eighth amendment or both ought to limit all section 881 forfeitures.

### A. *The Penal Nature of Forfeiture Mandates Eighth Amendment Review*

This section advocates eighth amendment proportionality review of section 881 forfeitures. Civil forfeiture proceedings sufficiently penalize defendants that constitutional protections should be applied. Additionally, the Supreme Court's doctrine surrounding the cruel and unusual punishments clause and the excessive fines clause mandates eighth amendment review of civil forfeitures.

The initial question is whether constitutional protections should be applied in a civil forfeiture proceeding at all. Courts generally conclude that constitutional rights do not apply civil settings.<sup>116</sup> Government prosecution of civil forfeitures, however, requires constitutional protection. In several instances, the Supreme Court has applied certain constitutional protections to forfeiture proceedings, evincing concern for their quasi-criminal nature. In *Boyd v. United States*,<sup>117</sup> the Supreme Court applied the fifth amendment to a forfeiture proceeding, invalidating a statute compelling the defendant to produce documents of illegal importation or stand to have admitted the fact. While the "Court has declined . . . to give full scope to the reasoning and dicta in *Boyd* . . . ,"<sup>118</sup> the proposition that forfeiture is at least quasi-criminal<sup>119</sup> has survived. In *One 1958 Plymouth Sedan v. Pennsylvania*,<sup>120</sup> the Court followed *Boyd* and applied the exclusionary rule to evidence procured by an illegal search and offered in a civil forfeiture action.<sup>121</sup> The Court wrote, "[A]s . . . Justice Bradley aptly pointed out in *Boyd*, a forfeiture proceeding is quasi-criminal in character."<sup>122</sup> Similarly, in *United States v. United States Coin & Currency*,<sup>123</sup> the Court invali-

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116. See *Browning-Ferris Industries*, 109 S. Ct. at 2915 ("At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any *protections for persons convicted of crimes*. This criticism provided the impetus for the inclusion of the Eighth Amendment in the Bill of Rights.") (quoting *Ingraham v. Wright*, 430 U.S. 651, 666 (1977) (emphasis added)); 109 S. Ct. at 2914-16 (asserting the Bill of Rights applied to the criminal context); *In re Winship*, 397 U.S. 358, 371-73 (1970) (Harlan, J., concurring) (enumerating reasons that constitutional protections are not required in "civil" cases); see also *Darmstadter & Mackoff*, *supra* note 44, at 39-46 (examining the limited constitutional and procedural protections afforded § 881 claimants). *But see infra* section II.B.

117. 116 U.S. 616 (1886).

118. *United States v. Ward*, 448 U.S. 242, 253 (1980).

119. *Boyd*, 116 U.S. at 633-34.

120. 380 U.S. 693 (1965).

121. 380 U.S. at 696. *Plymouth Sedan* involved a violation of Pennsylvania liquor tax laws. 380 U.S. at 694.

122. 380 U.S. at 700.

123. 401 U.S. 715 (1971).

dated, on fifth amendment grounds, a statute requiring gamblers to register with the government.<sup>124</sup> While not a forfeiture case, *United States v. Halper*<sup>125</sup> is significant in that the Supreme Court held that the double jeopardy clause applies to civil penalties sought on the basis of activity for which the defendant previously had been criminally punished.<sup>126</sup>

The Supreme Court has developed a two prong test to determine whether constitutional protections should be applied to a given statutory penalty:

First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.<sup>127</sup>

Analyzing section 881 under the first prong of this test will demonstrate that Congress intended the forfeiture to be a civil proceeding. The second prong, however, reveals that constitutional protections should apply. Civil forfeiture is a penal sanction and the risk of government police abuse justifies applying eighth amendment protections.

Congress undeniably intended section 881 to function as civil forfeiture. The legislative history establishes that the proceeding should be by way of libel in rem, a civil complaint against the property as wrongdoer.<sup>128</sup> Subsequent legislative pronouncements demonstrate that section 881 is considered a civil remedy.<sup>129</sup> Still, Congress did recognize the penal nature of forfeiture. The avowed purpose in depriving drug traffickers of assets and instrumentalities demonstrates Congress' intent to punish or at least incapacitate.<sup>130</sup>

The second prong of the Supreme Court's constitutional-protections test evaluates the congressional characterization of the penalty. In *Kennedy v. Mendoza-Martinez*,<sup>131</sup> the Supreme Court elucidated

124. 401 U.S. at 716-18 (following *Boyd*).

125. 109 S. Ct. 1892 (1989).

126. 109 S. Ct. at 1902.

127. *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (citations omitted).

128. 1970 HOUSE REPORT, *supra* note 26, at 56, *reprinted* at 4624; *see also* *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 400 (3d Cir. 1990) ("We are satisfied that the language of the subchapter shows that Congress intended § 881(a)(7) to be a civil remedy. We say this because § 881(a)(7) appears under Part E, Administrative and Enforcement Provisions of the subchapter, not in Part D, Offenses and Penalties. Furthermore, the civil proceedings of the Custom Laws for in rem proceedings apply, 21 U.S.C. § 881(d) (1988).") (citation omitted); *supra* note 12.

129. 1984 SENATE REPORT, *supra* note 97, at 193, *reprinted* at 3376 ("A variety of assets used in drug violations, such as boats, cars, and manufacturing equipment, may be civilly forfeited under 21 U.S.C. [§] 881.")

130. *See supra* sections I.C - I.D; text accompanying note 85 ("[d]ue to the penal nature of forfeiture statutes"); text accompanying note 97 ("forfeiture . . . [is] a powerful deterrent").

131. 372 U.S. 144 (1963).

seven factors to consider when determining whether a purportedly civil statute is sufficiently punitive to demand application of the full panoply of constitutional rights available in criminal proceedings:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . . .<sup>132</sup>

In general, however, courts considering whether constitutional protections reach section 881 proceedings have not discussed the *Mendoza-Martinez* test. In *United States v. Tax Lot 1500*,<sup>133</sup> the Ninth Circuit, while acknowledging that criminal forfeiture and civil forfeiture were “functionally equivalent,”<sup>134</sup> held that the historical development of the proceedings differed and Congress still chose to make a distinction.<sup>135</sup> This result ignores the purpose of the *Mendoza-Martinez* test, which is to determine the substance behind the form of a sanction.<sup>136</sup> In *United States v. Santoro*,<sup>137</sup> the Fourth Circuit also deferred to congressional designation of section 881 as civil forfeiture. The court noted that congressional intent could be upset on “the clearest proof” that the effects of this statute are so punitive that the forfeiture cannot be treated as civil.”<sup>138</sup> The *Santoro* court, however, failed to apply the *Mendoza-Martinez* test to determine whether that “clear proof” was present. The Supreme Court, on the other hand, continues to apply the *Mendoza-Martinez* test.<sup>139</sup>

Examining the *Mendoza-Martinez* factors establishes that civil forfeiture is sufficiently penal to justify application of constitutional pro-

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132. 372 U.S. at 168-69 (footnotes omitted).

133. 861 F.2d 232 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 364 (1989).

134. 861 F.2d at 234.

135. 861 F.2d at 235.

136. *See Mendoza-Martinez*, 372 U.S. at 168.

137. 866 F.2d 1538 (4th Cir. 1989).

138. 866 F.2d at 1543; *see also* *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 401 (3d Cir. 1990) (where the court faced an eighth amendment challenge to a § 881 forfeiture and court's entire analysis of the penal/civil distinction occupied one paragraph, and addressed none of the *Mendoza-Martinez* factors, merely citing *Santoro* for support).

139. *United States v. Ward*, 448 U.S. 242, 249 (1989) (“This list of considerations, while certainly neither exhaustive nor dispositive, has proved helpful in our own consideration of similar questions . . . .”). In one recent forfeiture case, the Supreme Court reviewed the enumerated factors to determine whether constitutional protection should be applied. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365-66 (1984). In other areas, the Court continues to use the *Mendoza-Martinez* test to characterize penalties as either civil or criminal. *See, e.g., United States v. Halper*, 109 S. Ct. 1892, 1902 (1989).

tections.<sup>140</sup> Forfeiture clearly acts as an affirmative disability or liability, the first *Mendoza-Martinez* factor. Congress passed section 881 as a means of attacking the large scale drug trafficker, and of deterring the commission of drug felonies by eliminating the traffickers' profits.<sup>141</sup> More tellingly, Congress also intended to confiscate the instrumentalities of drug traffickers, thereby disabling them from future dealings.<sup>142</sup> Courts have recognized that forfeiture constitutes a punishment of the individual. In *Boyd*, the Supreme Court wrote, "We are also clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."<sup>143</sup> In *In re Kingsley*,<sup>144</sup> the First Circuit noted that application of the forfeiture laws could result in confiscation of all of the defendant's property.<sup>145</sup> The forfeiture of a person's assets certainly imposes an affirmative disability; the question must be whether that disability can be explained in civil terms. The forfeiture of conveyances under section 881(a)(4) and real property under 881(a)(7), however, does not simply confiscate illegal property nor does it impose traditional civil damages.

The history of civil forfeiture, the second *Mendoza-Martinez* factor, also reveals the punitive nature of section 881. Concepts of forfeiture, and the fiction of the property as wrongdoer, date from Old Testament times.<sup>146</sup> While initially a device to limit liability,<sup>147</sup> forfeiture of estate became a common penalty imposed by the English crown on felons.<sup>148</sup> As the Court in *Calero-Toledo v. Pearson Yacht Leasing Inc.*<sup>149</sup> noted, however, forfeiture of the offending property as deodand did not become part of American law.<sup>150</sup> After acknowledging the series of cases which followed the tradition of the property as

140. Cf. Darmstadter & Mackoff, *supra* note 44, at 49-50 (briefly considering *Mendoza-Martinez* and section 881).

141. See *supra* section I.C.

142. See *supra* section I.D.

143. *Boyd v. United States*, 116 U.S. 616, 633-34 (1886).

144. 802 F.2d 571 (1st Cir. 1986).

145. 802 F.2d at 578; *United States v. Nichols*, 841 F.2d 1485, 1508-09 (10th Cir. 1988) (noting the potential for police abuse in seizing defendant's assets); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 & n.7 (10th Cir. 1986) (same).

146. "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned and his flesh shall not be eaten; but the owner of the ox shall be quit." *Exodus* 21:28.

147. O.W. HOLMES, *THE COMMON LAW* 7-16 (1923) (giving up the offending property insulated its owner from liability).

148. 3 W. BLACKSTONE, *COMMENTARIES* \*\*259-62; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974), ("Forfeiture also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.")

149. 416 U.S. 663 (1974).

150. 416 U.S. at 682-83. A deodand is property which has offended the king, usually by

wrongdoer,<sup>151</sup> the Court upheld a Puerto Rico drug forfeiture statute on the ground it supported the *criminal* laws.

Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents. Forfeiture of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.<sup>152</sup>

Despite congressional intent to develop a separate line of civil forfeiture statutes, distinct from criminal forfeiture, the substance of the history shows they are, in fact, the same.<sup>153</sup>

The third *Mendoza-Martinez* factor, the finding of scienter, shows section 881 forfeiture as penal. This test factors out statutorily imposed penalties for negligence in the tort context. While the claimant need not be found guilty in a criminal trial for the property to be forfeit,<sup>154</sup> section 881 focuses on property used or “intended to be used” to facilitate drug crimes.<sup>155</sup> Several courts have held that involvement in drug trafficking is secondary; “intent is the determining factor . . .”<sup>156</sup> The statute creates an exception for innocent owners.<sup>157</sup> The Court in *Calero-Toledo* noted that forfeiture of innocent owners’ property might give rise to constitutional problems.

[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without

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causing a death, and is therefore forfeit. Traditionally, the king was to dedicate the property to charity.

151. 416 U.S. at 683-86; see also Note, *supra* note 17, at 172-75 (tracing the history of civil forfeiture); Darmstadter & Mackoff, *supra* note 44, at 28-29 (same).

152. 416 U.S. at 686-87 (footnote omitted). In the omitted footnote, the Court recognized that the Puerto Rican statute at issue was substantially the same as section 881(a). 416 U.S. at 686 n.25.

153. This conclusion may be bolstered in three ways: (1) history should not be the touchstone and is, in fact, only one part of the *Mendoza-Martinez* analysis; (2) as section II.B will argue, the eighth amendment was intended by the framers to apply to civil realm; (3) the conclusion of the *Calero-Toledo* court demonstrates that civil forfeiture serves the traditional aims of criminal law — punishment and deterrence.

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

155. 21 U.S.C. § 881(a)(4), (6), (7) (1988); see *supra* note 8.

156. *United States v. One 1980 Cadillac Eldorado*, 705 F.2d 862, 863 (6th Cir. 1983) (per curiam); see also *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 887-88 (11th Cir. 1989) (“It is the state of mind of the criminal with respect to the property sought to be forfeited which is determinative, not whether the property is actually used to execute the criminal intentions . . .”) (citing *United States v. 124 East North Avenue, Lake Forest, Ill.*, 651 F. Supp. 1350 (N.D. Ill. 1987)).

157. 21 U.S.C. § 881(a)(4)(b), (a)(7) (1988). Property will not be forfeit where used without the owner’s permission or with permission but without consent to use in a drug transaction, provided the innocent owner has taken reasonable steps to prevent such use. 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7) (1988). See Goldsmith & Linderman, *supra* note 17 (arguing that innocent owners need added protections); Note, *supra* note 17 (same as to innocent transferees).



his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.<sup>158</sup>

Further, while the forfeiture action is not predicated on violation of criminal statutes, the subsections triggering forfeiture, 881(a)(1)-(2), mirror criminal drug activity.<sup>159</sup>

Applying the fourth *Mendoza-Martinez* factor, whether the penalty operates as punishment or deterrence, reveals that section 881 goes beyond other civil statutes. Whereas general civil remedies are directly proportional to the harm caused by the activity, civil forfeiture clearly serves to punish. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment . . ."<sup>160</sup> In *United States v. Ward*,<sup>161</sup> the Supreme Court distinguished the holding of *Boyd v. United States*,<sup>162</sup> on the basis that the penalty imposed in *Ward* was "much more analogous to traditional civil damages."<sup>163</sup> In *Ward*, the statute imposed a fine on companies spilling oil in navigable waterways. The amount of the fine depended, in large part, on the actual cost of cleanup.<sup>164</sup> A civil penalty also qualifies as purely remedial if the government simply seizes contraband.<sup>165</sup> The claimant cannot assert any property right in illegal goods. The Supreme Court has applied this distinction to a statute forfeiting automobiles used to further violation of state liquor tax laws. "There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects [its owner to possible forfeiture]."<sup>166</sup> Section 881 does not provide that forfeiture in an individual case will be ordered only where necessary to compensate the government. In practice, the application of section 881 operates to forfeit property based on its facilitation of or participation in drug crimes, not its relation to harm caused.<sup>167</sup> Congress added the real property forfeiture provision to

158. 416 U.S. at 689-90 (citations and footnote omitted).

159. See *infra* note 170.

160. *United States v. Halper*, 109 S. Ct. 1892, 1902 (1989).

161. 448 U.S. 242 (1980).

162. 116 U.S. 616 (1886).

163. *Ward*, 448 U.S. at 254.

164. 448 U.S. at 256-57 (Blackmun, J., concurring in the judgment).

165. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

166. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

167. While it might be contended that *any* property that facilitates drug crimes in *any* way causes immeasurable harm, the eighth amendment proportionality principle seems to demand determining precise costs. See *infra* notes 256-64 and accompanying text. Further, the premise of infinitely great harm seems implausible.

section 881 to further the “deterrent” power of the law.<sup>168</sup> In fact, even the Justice Department acknowledges that the “purpose of civil forfeiture is . . . to *deter and punish criminal activity*.”<sup>169</sup>

The scope of property subject to forfeiture under section 881(a)(4) is determined by sections 881(a)(1), 881(a)(2), and 881(a)(9)<sup>170</sup> which refer to the criminal drug statutes enacted as the “Controlled Substances Act.”<sup>171</sup> This interconnection shows that the fifth *Mendoza-Martinez* factor, the criminal nature of the behavior, points toward applying constitutional protections. Under section 881(a)(7), real property may be forfeit only if it facilitates the commission of a drug crime punishable by more than one year’s imprisonment.<sup>172</sup> The main thrust of the civil forfeiture statutes is to attack or punish criminal behavior, not merely to act as a civil penalty for tortious conduct. In addition, section 881 incorporates administrative procedures for remission and mitigation.<sup>173</sup> The inclusion of these provisions indicates that only those suspected of criminal behavior will be prosecuted in a civil forfeiture action.<sup>174</sup>

168. See *supra* note 97 and accompanying text (“[T]he forfeiture of property would . . . be[] a powerful deterrent.”).

169. 11 THE DEPARTMENT OF JUSTICE MANUAL B-25 (Prentice-Hall Law & Business Supp. 1988-2). “Therefore, even if the property is worth little, its forfeiture may nonetheless serve legitimate and overriding law enforcement objectives by depriving the wrongdoer of its use and availability.” *Id.*

170. These sections provide:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(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.

21 U.S.C. § 881(a)(1)-(2), (9) (1988). 21 U.S.C. § 881(a)(4) (1988) provides for forfeiture, in most instances, of all conveyances used to facilitate transportation, etc., of the substances, materials, products, and equipment defined in sections (a)(1)-(2) and (9).

171. Title II of Pub. L. No. 91-513, 84 Stat. 1242 (1970).

172. 21 U.S.C. § 881(a)(7) (1988); see *supra* note 8.

173. 21 U.S.C. § 881(d) (1988); 19 U.S.C. § 1618 (1988); 28 C.F.R. § 9 (1989).

174. The regulation provides that the Attorney General will mitigate forfeiture or remit the property when a claimant can prove she had no knowledge of the illegal use of the property. 28 C.F.R. § 9.5 (1989). *Cf.* *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971).

[T]he broad language of § 7302 [the civil forfeiture statute at issue] cannot be understood without considering the terms of the other statutes which regulate forfeiture proceedings. An express statutory provision permits the innocent owner to prove to the Secretary of the Treasury [that remission is justified] . . . Upon this showing, the Secretary is authorized to return the seized property . . . It is not to be presumed that the Secretary will not conscientiously fulfill this trust, and the courts have intervened when the innocent petitioner’s protests have gone unheeded. When the forfeiture statutes are viewed in their entirety, it is

The sixth *Mendoza-Martinez* factor seeks a rational alternative purpose for the penalty. While section 881 might be construed as a remedial compensation for the government's costs of preventing drug trafficking, this alternative purpose alone does not show section 881 to be nonpunitive. All criminal activity imposes social costs. A civil remedy exists only when the costs of the single act can be associated with a specific harm.<sup>175</sup> Section 881 does permit the proceeds of the forfeiture to fund further drug enforcement efforts.<sup>176</sup> This purpose, however, should be considered secondary. The costs of past and future drug enforcement cannot be traced to the particular activity giving rise to forfeiture. Additionally, the fines imposed in any criminal case could serve as repayment for enforcement expenses.<sup>177</sup> Absent the involvement of the property in criminal activity, the government's need for revenue would never justify forfeiture.<sup>178</sup>

The final *Mendoza-Martinez* factor, whether the penalty is excessive compared with any alternate purpose, militates in favor of applying constitutional protections to civil forfeiture. Section 881 does not require a determination that the value of the property sought to be forfeit is related to the harm caused or the cost of enforcement. Rather, the only determination required is whether the property somehow facilitated a drug crime. The potential for prosecutorial abuse is obvious.<sup>179</sup> In fact, since the enactment of provisions allowing prosecuting agencies to retain the forfeit property or its proceeds, the total dollar amount of forfeiture has jumped dramatically.<sup>180</sup> While some increase may be due to heightened emphasis on drug crimes, the size of the jump strongly suggests an alternate motive, pecuniary gain for their departments, on the part of the police.<sup>181</sup>

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manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

401 U.S. at 721-22 (citations and footnote omitted).

175. See *United States v. Halper*, 109 S. Ct. 1892, 1902 (1989) (quoted *supra* in text accompanying note 157); *United States v. Ward*, 448 U.S. 242, 256-57 (1980) (Blackmun, J., concurring in the judgment); 4 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 25.1 (2d ed. 1986) (discussing the principle of compensation).

176. 21 U.S.C. § 881(e) (1988).

177. Even if the rationale of repaying government enforcement expenses is accepted, faithful execution of that principle would require some government showing of cost and an appropriate judicial finding. Such a showing, which now does not occur, would be one important piece of evidence in the proportionality review proposed *infra* Part III.

178. In several cases where the forfeiture statute was explicitly enacted to protect the revenue laws, the Supreme Court has either used strict review of the scope of forfeiture or explicitly applied constitutional protections. See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1963) (exclusionary rule applies to evidence offered in a forfeiture proceeding); *Boyd v. United States*, 116 U.S. 616 (1886) (applying the fifth amendment to a customs enforcement and forfeiture statute); *supra* notes 44-47 and accompanying text.

179. See *supra* notes 13, 145.

180. *Drug Case Booty Enriches Agencies*, *supra* note 5.

181. *Id.* ("[T]he booty of the drug war, acquired through laws that were intended to punish criminals by seizing their property but are now being viewed by law-enforcement groups as a way

Each of the seven *Martinez-Mendoza* factors indicates section 881's civil forfeiture provisions should be considered punitive and actions thereunder should be conducted with constitutional safeguards. The "clearest proof" sought by the *Santoro* court<sup>182</sup> seems to be present. Civil forfeiture ought to be considered a quasi-criminal proceeding and traditional constitutional protections ought to be applied.

### B. *The Eighth Amendment Should Apply to All Government Extracted Fines*

Alternatively, eighth amendment protections should apply without regard to whether the proceeding is criminal/penal or civil. The Court's eighth amendment cases demonstrate concern for proportional punishment and protection against abuse of police powers. Section 881 forfeiture of property gives rise to these concerns, mandating explicit eighth amendment review.

Most of the Supreme Court's eighth amendment doctrine centers on the cruel and unusual punishments clause. This clause requires that all punishments be proportional to the behavior being punished. Section 881 runs afoul of the cruel and unusual punishment clause by utilizing forfeiture in all cases, regardless of the degree of involvement of the property or the seriousness of the crime.

The Supreme Court's eighth amendment proportionality doctrine focuses on the nature of both the crime and the punishment. In *Rummel v. Estelle*,<sup>183</sup> a case seen as an attempt to limit the applicability of eighth amendment cruel and unusual punishment analysis to death penalty cases,<sup>184</sup> the Court suggested that the triviality of the crime was a relevant factor. Rummel received a mandatory life sentence after obtaining \$120.75 under false pretenses.<sup>185</sup> Rummel was convicted and sentenced under Texas' recidivist statutes.<sup>186</sup> The Court, in affirming Rummel's sentence, noted the "unique nature" of capital pun-

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to increase their own arsenals," is vigorously sought by police agencies.); *id.* ("The aim used to be [sic] to hurt the bad guy" said Lisa Griffiths, who manages seized and forfeited property for the United States Marshall Service in the southern district of Texas. "Now we want to hurt the bad guy and maximize profit for the government."); *id.* ("The increased seizure activity nationwide is credited mostly to the provisions of the new law that allows asset sharing[.] with local law enforcement agencies who may receive a portion of the proceeds from seized and sold property).)

182. *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989). See *supra* notes 127, 139 and accompanying text.

183. 445 U.S. 263 (1980).

184. See *Rummel*, 445 U.S. at 288 (Powell, J., dissenting) ("The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged."); Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, 1065 (1981); Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1112.

185. 445 U.S. at 266.

186. 445 U.S. at 266-67. Rummel's prior offenses were "fraudulent use of a credit card to

ishment and wrote, "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."<sup>187</sup> In rationalizing its prior decision of *Weems v. United States*,<sup>188</sup> where the Court had invalidated a sentence of *cadena temporal*,<sup>189</sup> the Court relied to some extent on the "trivial nature" of Weems' offense.<sup>190</sup> Additionally, the Court noted that proportionality review would be appropriate in the noncapital context where the offense was truly trivial. "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, if a legislature made overtime parking a felony punishable by life imprisonment."<sup>191</sup>

In *Rummel*, the Supreme Court was also concerned with the nature of the punishment. *Rummel* pointed at the death penalty as a unique *type* of punishment,<sup>192</sup> and, in its discussion of *Weems*, also typed *cadena temporal* as especially egregious punishment.<sup>193</sup> The *Rummel* majority reasonably may be read as being most concerned with appellate courts, especially federal courts reviewing state courts in habeas cases, becoming involved in reviewing the "duration" of sentences established by legislatures.<sup>194</sup> In *Hutto v. Davis*,<sup>195</sup> a per curiam described *Rummel* as drawing a distinction between consideration of the time length of a sentence and the nature of the punishment.

Like the respondent in this case, *Rummel* argued that the length of his imprisonment was so "grossly disproportionate" to the crime for which he was sentenced that it violated the ban on cruel and unusual punishment of the Eighth and Fourteenth Amendments. In rejecting that argument, we distinguished between punishments — such as the death penalty — which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration.<sup>196</sup>

Civil forfeiture qualifies as a punishment for purposes of the cruel and unusual punishments clause. First, as demonstrated in section

obtain \$80 worth of goods or services. . . . [and] passing a forged check in the amount of \$28.36. . . ." 445 U.S. at 256.

187. 445 U.S. at 272.

188. 217 U.S. 349 (1910).

189. A minimum sentence of 12 years and one day, which included harsh physical labor while in chains. 217 U.S. at 364.

190. *Rummel*, 445 U.S. at 273 (Weems had falsified a public record.).

191. 445 U.S. at 274 n.11.

192. 445 U.S. at 272 ("This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions.").

193. 445 U.S. at 275 ("Similarly, in *Weems* the Court could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system."); see also *supra* note 189.

194. See *Rummel*, 445 U.S. at 274-76.

195. 454 U.S. 370 (1982) (per curiam).

196. 454 U.S. at 372-73.

II.A, forfeiture acts as punishment for and deterrence to engaging in criminal activities.<sup>197</sup> Second, from the perspective of eighth amendment policy, concerns over proportionality of punishment and abuse of police power mandate typing civil forfeiture a punishment.<sup>198</sup> Third, the fiction that the property is actually the wrongdoer no longer should be maintained. Property cannot alone take any action. Forfeiture deprives a person of property, often legitimately acquired property. When combined with the potential for prosecutorial abuse, the constitutional value of proportionality ought to overcome the fiction.<sup>199</sup>

The Court's recent decision in *Browning-Ferris Industries v. Kelco Disposal, Inc.*<sup>200</sup> provides additional justification for applying eighth amendment protections to civil forfeitures. In *Browning-Ferris Industries*, the Supreme Court considered whether the eighth amendment limits punitive damages in civil suits between private parties. The rationale the court provided for denying eighth amendment scrutiny in the case of punitive damages suggests the amendment should apply to civil forfeiture.<sup>201</sup>

The eighth amendment's history demonstrates that it should be applied whenever the coercive power of the state is brought to bear. In *Browning-Ferris Industries*, the majority reviewed the history of the eighth amendment. The amercements clause of Magna Charta,<sup>202</sup> in language substantially similar to the eighth amendment, was addressed to the problem of wrongdoers being put at the "Mercy of the King" when "it was within the King's power to require [the wrongdoer's estate] forfeit."<sup>203</sup> The amercements clause was reproduced in the English Bill of Rights of 1689.<sup>204</sup> The same language appeared in

197. See *supra* notes 141-53 and accompanying text.

198. See *supra* notes 183-96 and accompanying text.

199. Such a notion of rights *in rem* is . . . crude and fallacious; and it can but serve as a stumbling-block to clear thinking and exact expression. A man may indeed sustain close and beneficial *physical* relations to a given *physical thing*: he may *physically* control and use such thing, and he may *physically* exclude others from any similar control or enjoyment. But, obviously, such purely *physical* relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings.

Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 721 (1917) (footnotes omitted).

200. 109 S. Ct. 2909 (1989).

201. The Court explicitly refused to hold that the excessive fines clause would be limited to criminal cases. 109 S. Ct. at 2914.

202. Magna Charta, ch. 20.

203. 109 S. Ct. at 2918 n.15 (citations omitted); see also Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1251 n.107 (1987) ("Bracton provides a voluminous listing of conduct meriting amercement that may be categorized as follows: . . . crimes, . . . civil misconduct, . . . and sanctions in civil litigation . . .").

204. See 4 W. BLACKSTONE, COMMENTARIES \*\*378-79. ("For the Bill of Rights has partic-

the Virginia Declaration of Rights in 1776, and eventually the Bill of Rights.<sup>205</sup> In *Browning-Ferris Industries*, Justice O'Connor, concurring in part, dissenting in part, noted that the framers' debates over the eighth amendment arguably point toward its application in civil as well as criminal contexts. "After deciding to confine the benefits of the Self-Incrimination Clause of the Fifth Amendment to criminal proceedings, the Framers turned their attention to the Eighth Amendment. There were no proposals to limit that Amendment to criminal proceedings . . . ."<sup>206</sup>

While implicitly rejecting the full force of the historical analysis above,<sup>207</sup> the Court's opinion in *Browning-Ferris Industries* does provide support for applying the excessive fines clause to civil proceedings in which the government prosecutes the action, including section 881 forfeitures. First, the Court interpreted fines broadly enough to include forfeitures.

In the absence of direct evidence of Congress' intended meaning, we think it significant that at the time of the drafting and ratification of the Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense. Then, as now, fines were assessed in criminal, rather than in private civil, actions.<sup>208</sup>

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ularly declared that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted . . . ; and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void."); Massey, *supra* note 203, at 1255-56 ("Since ancient prohibitions against excessive amercements — the precursor to seventeenth-century fines — applied to both civil and criminal proceedings, and since similar prohibitions against excessive fines were ingrained in the case law, it was important for accuracy's sake that article ten [of the English Bill of Rights] not be limited to criminal cases.") (footnote omitted); *id.* at 1256 ("The Declaration of Rights' excessive fines clause thus should be read as simultaneously prohibiting excessive fines and amercements, whether imposed by judge or jury, in both civil and criminal proceedings."). Professor Massey notes that forfeiture was one of the abuses the English Bill of Rights was intended to address. *Id.* at 1244 n.62.

205. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1962) (suggesting that by the time the eighth amendment was inserted into the Bill of Rights, the language had become constitutional "boilerplate"); Massey, *supra* note 203, at 1241-42 (same).

206. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2930 (1989) (O'Connor, J., concurring in part and dissenting in part); see also Massey, *supra* note 203, at 1241 (noting the same history, but warning that "[f]ar too much meaning can be read into the congressional silence; a more likely, and mundane, reading is that Congress uncritically accepted the language, treating it as a shorthand expression for ancient rights rooted in the soil of English law"). Compare *United States v. One 107.9 Acre Parcel of Land Located in Warren Township, Bradford County, Pa.*, 898 F.2d 396, 400 (3d Cir. 1990), where the court assumed that eighth amendment protections would only apply to criminal statutes, and predicated the application of that amendment on passing the two-part inquiry demanded in *Ward* (see *supra* note 127 and accompanying text):

"When a statute is challenged under the eighth amendment on the ground that it is criminal rather than civil, a court will engage in a two-level inquiry. First, it will determine the congressional purpose. Second, if the statute is civil, the court will decide whether the statutory scheme is so punitive either in purpose or effect as to negate a civil objective."

The court failed to undertake the inquiry, however. See *supra* note 138.

207. See *supra* notes 202-06 and accompanying text (The history of the eighth amendment demonstrates that it should be applied in both civil and criminal contexts.).

208. 109 S. Ct. at 2915 (footnote omitted).

Of course, the Court here distinguishes between criminal and civil actions. This would seem to make applicability of the excessive fines clause to civil forfeiture contingent upon passing the *Mendoza-Martinez* test.<sup>209</sup> This objection is premature. In a footnote in *Browning-Ferris Industries*, the Court noted that “fines” could include “money, recovered in a civil suit, which was paid to government.”<sup>210</sup> In fact, the Supreme Court explicitly distinguished a private civil suit on the grounds that, between two private parties, no concern of abuse of government power arose. “Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its ‘prosecutorial’ power, not concern with the extent or purposes of civil damages.”<sup>211</sup> The Court continued, “These concerns are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery.”<sup>212</sup> The Court cited for comparison *United States v. Halper*,<sup>213</sup> which applied the double jeopardy clause to government imposition of civil fines. In *Halper*, the government’s police power was implicated in a manner analogous to forfeiture.

Second, in a civil forfeiture proceeding, the potential for government abuse is unambiguous. The government is entitled to seize the suspect property before the proceeding.<sup>214</sup> The government brings the action against the property and the claimant, need only prove probable cause, and may do so by the introduction of circumstantial or hearsay evidence.<sup>215</sup> By a combination of the section 881 provisions, all of a person’s property and assets can be confiscated; in such a situation, judicial review of the remedy should be strict, not perfunctory.<sup>216</sup>

Through either of two avenues, section 881 forfeiture should be subject to eighth amendment review. A forfeiture proceeding does not focus on the traditional elements of a civil claim for damages; rather section 881 acts to punish and deter persons involved in drug traffick-

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209. See *supra* section II.A.

210. 109 S. Ct. at 2915 n.7.

211. 109 S. Ct. at 2915.

212. 109 S. Ct. at 2918.

213. 109 S. Ct. 1892 (1989).

214. 21 U.S.C. § 881(b) (1988).

215. 21 U.S.C. § 881(b) (1988); see also *United States v. One 1980 Bertram 58 Foot Motor Yacht*, 876 F.2d 884, 887 (11th Cir. 1989) (asserting “well settled” principle that hearsay and circumstantial evidence are admissible to prove probable cause).

216. See cases cited *supra* note 13 (potential for abuse). In *Browning-Ferris Industries*, the Court noted that a jury in civil cases can check any excessive statutory remedy. 109 S. Ct. at 2919. While “a claimant who has had property seized pursuant to section 881 is entitled to a jury trial on the issue of whether the property was connected with drugs[,]” *Darmstadter & Mackoff*, *supra* note 116, at 40 (citing *United States v. One 1976 Mercedes Benz*, 618 F.2d 453 (7th Cir. 1980)), “as a practical matter, most section 881 matters are settled on a . . . summary judgment motion . . .” *Id.* at 41.



ing. Alternatively, eighth amendment protections should apply to all government imposed fines and penalties.

### III. TWO APPROACHES TO NARROWING THE SCOPE OF FORFEITURE

This Part applies the substantial connection test and eighth amendment proportionality review as two methods for narrowing the scope of section 881 forfeiture.<sup>217</sup> The first section examines and attempts to harmonize the cases decided under the substantial connection test. The substantial connection cases generally deny forfeiture when the property has only facilitated the underlying criminal activity in a removed, incidental manner. This note suggests reformulating the substantial connection test into a second degree facilitation test. Next, this Part identifies the seeds of eighth amendment review in the substantial connection cases, and argues that the second degree facilitation test for rationalizing the substantial connection cases meets eighth amendment standards. This Part contends that the substantial connection test does not go far enough; eighth amendment proportionality review ought to be a factor in all forfeitures under section 881. Finally, this Part suggests that applying the substantial connection test, eighth amendment review, or both, need not impede the war on large-scale drug trafficking.

#### A. *Harmonizing the Substantial Connection Cases*

Many courts applying section 881 have employed the substantial connection or nexus analysis. In general, these courts have upheld forfeiture even under the stricter standard of review. The connection between the conveyance of real property and the underlying criminal activity in any particular case will fall along a spectrum.<sup>218</sup> This section attempts to formulate a workable standard for determining instances where forfeiture should not be allowed. To that end, this section analyzes five cases in which the courts refused to order forfeiture and which fall along the hypothetical connectedness spectrum. This section concludes that a test for second degree facilitation identifies cases where forfeiture should not be ordered.

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217. While the two paths have been developed somewhat independently in this Note, some connections are obvious. For example, the general eighth amendment arguments, especially in light of the rules of construction discussed in section I.B, support the substantial connection test (or another narrow construction of § 881). Additionally, the substantial connection test indicates that some courts find forfeiture to be a disproportionate penalty in certain cases; this general perception should be extended to include general eighth amendment review in all forfeiture cases.

218. Even the Justice Department admits that some property will not be forfeitable under any standard of review. See 11 THE DEPARTMENT OF JUSTICE MANUAL B-25 (Prentice Hall Law & Business Supp. 1988-2) ("Whatever judicial standard is applied, it is clear that the more remote the connection between the conveyance and the illegal activity, the less likely it is that the property is subject to forfeiture.").

The first two cases denying forfeiture can be disposed of on grounds which need not rely on the substantial connection test. In these cases, the government simply failed to prove any connection. In *United States v. One 1981 Cadillac Eldorado*,<sup>219</sup> the Drug Enforcement Agency (DEA) had been investigating the claimant's husband and daughter for alleged involvement in heroin trafficking. The DEA agents one evening followed the reputed traffickers and attempted to pull them over. The suspects sped away in their automobile and were apprehended only after a high speed chase. The car and the suspects were searched but the DEA agents found no drugs and the suspects were released. The next day the DEA agent found two packets of heroin in his official car, in which the suspects had been transported to the police station. The government attempted to prove by circumstantial evidence that the heroin packets could have come only from the suspects and, therefore, the defendant automobile must have been used in the transportation of drugs.<sup>220</sup>

The court found that the inferences urged by the government were insufficient to sustain forfeiture.<sup>221</sup> Despite the court's language, this decision was not based on a true substantial connection analysis. The substantial connection test *admits* the connection of the property with a crime, but denies forfeiture on the basis that the connection is too attenuated. Here, the court refused to find that any crime had been established.

In *United States v. One 55 Foot Fishing Vessel . . . Known as "The Sole,"*<sup>222</sup> a court also used the rhetoric of substantial connection, but the decision actually denied any connection. In this case, an informant contacted a DEA agent and stated he had unloaded marijuana bales from a mother ship to a fishing vessel. After extensive searching by the DEA, the informant identified the defendant vessel through a photograph. The trial court, in its decision on the merits, noted that it had issued a warrant of seizure based on this information. "More than mere suspicion was involved that there was a nexus between this property and the crime. The information supplied by the informant was adequate and sufficiently reliable . . ." <sup>223</sup> After trial on the merits,

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219. 535 F. Supp. 65 (N.D. Ill. 1982).

220. The evidence consisted of testimony by the DEA agent to whom the official car was assigned that no one but himself, his partner, and the two suspects had been in the car for the prior two days. 535 F. Supp. at 67.

221. 535 F. Supp. at 68. The court wrote:

The connection that the government has been able to show in the case at bar, while not wholly unreasonable, is not sufficient to pass the threshold of probable cause that the vehicle in question was involved in the transport of narcotics as a matter of law. For this Court to permit forfeiture of claimant's vehicle under these tenuous fact circumstances would sanction a precedent — subject to potential abuse — for the disposition of other forfeiture cases. 535 F. Supp. at 68.

222. 656 F. Supp. 967 (D. Mass. 1987).

223. 656 F. Supp. at 969.

however, the court found that the fishing vessel in question was more likely a similar vessel owned by the claimant's brother.<sup>224</sup> Hence, this forfeiture denial was also based on the grounds no connection existed.

The second group of cases truly followed the substantial connection test. These cases refused forfeiture when the involvement of the conveyance was, in some way, removed from the criminal activity. In *United States v. One 1972 Chevrolet Corvette*,<sup>225</sup> the claimant drove the defendant automobile to Logan Airport to deliver the front money for an LSD purchase. The claimant was arrested at the airport and the automobile was seized. The First Circuit reversed the lower court's forfeiture order, reasoning that section 881 provided per se forfeiture only for the transportation of drugs. The First Circuit simply did not believe Congress intended a tenuous connection such as the one in this case to support forfeiture.<sup>226</sup> The court viewed facilitation as significantly different from the "used in" language of the statute. "Although we agree that DeLorenzo's promise to reimburse Simard may have been *essential* to the occurrence of the transaction, once the sale had been consummated, Simard's actual reimbursement was not necessary to 'facilitate' that transaction."<sup>227</sup> The court seems to be suggesting that only those uses which make easier the actual consummation of the illegal activity will support forfeiture. Under this standard, a car used as a place to conduct a sale out of plain view would be forfeitable, while a car which solely transports the seller away from the scene of the sale<sup>228</sup> would not.

This interpretation of *One 1972 Chevrolet Corvette*, that facilitation must involve an "antecedent relationship" to the criminal transaction, is inadequate. While the automobile may not have facilitated the sale of the drugs, the automobile did facilitate both the transportation and possession of the drugs after the sale; facilitation of transportation or possession are bases for forfeiture under section 881.<sup>229</sup> The "antecedent relationship" test also would disallow the forfeiture of vehicles whose use constitutes a but-for cause of the crime. The court admitted that the claimant's commitment to provide financing was essential to the deal. It is possible, however, to view the court's decision as drawing a line at two-step relationships to the drug crime. The court obviously would agree that financing facilitates a drug transaction. Similarly, a car actually moving the drugs would facilitate a crime and would be forfeit.<sup>230</sup> A car used as transportation by the financier,

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224. The brother admitted as much in testimony before the court. 656 F. Supp. at 970.

225. 625 F.2d 1026 (1st Cir. 1980).

226. Cf. *infra* note 241 and accompanying text.

227. 625 F.2d at 1030 (emphasis added).

228. If the seller does not have drugs or proceeds on her person at the time.

229. 21 U.S.C. § 881(a)(4) (1988); see *supra* note 8.

230. 625 F.2d at 1024-25.

however, merely facilitates the financing of the crime or, in other words, "facilitates the facilitation." The First Circuit could logically claim that this second degree facilitation did not fall within the scope of the statute, notwithstanding the "in any manner" language.

The second true substantial connection case, *United States v. One 1976 Ford F-150 Pick-up*,<sup>231</sup> can be read consistently with the second degree facilitation test. In this case, the claimant was observed driving the defendant truck near marijuana fields. The claimant parked nearby and unloaded roofing supplies for a small shed near the fields. The claimant then surveyed the marijuana crop. The Eighth Circuit reversed the lower court's forfeiture order on the grounds that no evidence demonstrated that the truck had facilitated growing the crop.

While this use of the truck may be said to have facilitated the repair of the shed, we do not believe this fact suffices to show that the truck facilitated the possession of the marijuana. It is unclear as to how the shed helped or otherwise made easier the possession of the crop. In fact, there was testimony that the shed was too small to be of any use in processing the crop or in shielding the drugs from detection once harvested.

Finally, there was no evidence presented that the truck was used to transport seed, fertilizer, agricultural tools or other equipment, items which could be said to have facilitated the cultivation of the illegal crop.<sup>232</sup>

While the tending of a marijuana crop would definitely constitute facilitation, the conveyance here was several steps removed from that involvement. In the absence of more direct evidence, a visit to tend the shed that may have been used in growing the marijuana was second degree facilitation.<sup>233</sup>

The second degree facilitation test does not, however, fit all present cases denying forfeiture. For example, in *United States v. Certain Lots In City of Virginia Beach*,<sup>234</sup> a DEA agent contacted the claimant to arrange the sale of some cocaine to acquaintances of the agent. At the agent's insistence, the claimant allowed the agent to come to the claimant's residence to finalize the transaction and view the cocaine. The agent and the claimant then left for the site of the actual sale. On the way, the claimant was arrested.

In rejecting forfeiture of the real property, the court relied on several rationales. First, the court emphasized that the property had been used for only one transaction.<sup>235</sup> This argument is inconsistent with

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231. 769 F.2d 525 (8th Cir. 1985) (per curiam).

232. 769 F.2d at 527.

233. The court's characterization, of course, is disputable. The claimant did look over the marijuana crop while there to fix the shed. This case is most useful for illustrating the type of reasoning that should occur under the second degree facilitation test.

234. 657 F. Supp. 1062 (E.D. Va. 1987).

235. "At [the second hearing], the government conceded that it could prove only the one transaction on June 7, 1985, and that that single transaction was the only connection between the property sought to be forfeited and any criminal or drug-related activity." 657 F. Supp. at 1064.

the general substantial connection test. Courts usually have rejected versions of a de minimis argument.<sup>236</sup>

Second, the court relied on the fact that the DEA agent had insisted on meeting in the claimant's house.<sup>237</sup> The court may have been concerned that these actions resembled entrapment. If read this way, the court's decision holds that the government should not be able to manipulate the transaction to involve additional property that, in the absence of other criminal involvement, would not be forfeit. In other words, the *Certain Lots* court did not attempt to identify a place on the spectrum of connection segregating justified and unjustified forfeitures. Rather, the case noted the absence of any evidence that the real property facilitated other drug activities, and excluded the evidence from the single event which occurred at the insistence of the DEA agent.

The second degree facilitation test serves as an effective surrogate for the substantial connection test. In addition to rationalizing some of the leading cases, the test provides a construct courts may be able to apply more consistently. The second degree facilitation test looks to the quality of the connection instead of attempting to place an individual case on the entire spectrum.

### B. *Finding the Seeds of Eighth Amendment Analysis in the Substantial Connection Test*

Eighth amendment proportionality review evinces concern for the harshness of the penalty and the seriousness of the crime.<sup>238</sup> This section establishes that these same concerns inform the substantial connection cases and suggests that courts following the substantial connection test should consider applying full proportionality review.

In *United States v. One 1972 Chevrolet Corvette*,<sup>239</sup> the court applied the substantial connection test on the basis of the relatively mi-

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236. See, e.g., *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989) (affirming forfeiture of substantial acreage on the basis of one sale on one part of the property); *United States v. One Parcel of Real Estate At 7707 S.W. 74th Lane, Miami, Dade County, Fla.*, 868 F.2d 1214 (11th Cir. 1989) (same).

The argument that forfeiture should only be applied upon a showing of multiple crimes is not supported by the text of § 881. The statute calls for forfeiture after the commission of any felony. Additionally, to make § 881 contingent on a pattern of behavior would be to make its forfeiture provisions redundant with the forfeiture provisions governing continuing criminal enterprises, 21 U.S.C. §§ 848-853 (1988).

237. The court wrote,

The drugs, along with a scale, were brought from [the claimant's] place of work to his house on the day of the transaction, after the government informant insisted that [the claimant] meet him there. There is no evidence that [the claimant] used the house to store or hide drugs. He merely allowed the government informant to meet him there, and then only as a result of the informant's insistence.

657 F. Supp. at 1065.

238. See *supra* notes 183-95 and accompanying text.

239. 625 F.2d 1026 (1st Cir. 1980).

nor nature of the crime.<sup>240</sup> The court likened the involvement of the automobile, which served only as the financier's transportation, to an even more tangentially connected situation.

Were we to accept the government's argument, [the claimant's] vehicle would also be subject to forfeiture if its only involvement had been to drive to the bank weeks later to cash a check received from [the person making the buy and sale], since "title" to the LSD would not pass until the check cleared. We cannot believe Congress intended such minimal involvement to trigger forfeiture.<sup>241</sup>

Denying forfeiture in the case of insubstantial connection also follows eighth amendment concern over applying a harsh type of punishment. In *United States v. One 1976 Ford F-150 Pick-Up*,<sup>242</sup> the Eighth Circuit followed the analysis of *United States v. One 1974 Cadillac Eldorado Sedan*,<sup>243</sup> and *One 1972 Chevrolet Corvette*. The court also noted that forfeiture as a penalty was to be disfavored. For support, the *One 1976 Ford F-150 Pick-Up* court quoted the Supreme Court's decision in *United States v. One 1936 Model Ford V-8 De Luxe Coach*.<sup>244</sup> "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."<sup>245</sup> In *One 1936 Model Ford V-8*, the Supreme Court also held that "[t]he forfeiture acts are exceedingly drastic. . . . It would require unclouded language to compel the conclusion that Congress [intended forfeiture in these circumstances]."<sup>246</sup> Hence, courts applying the substantial connection test may be typing forfeiture as a harsh remedy and inquiring into the circumstances of the case to justify its application.<sup>247</sup>

The second degree facilitation test also comports with eighth amendment analysis. The second degree facilitation test would provide a line where courts could distinguish between types of offenses.<sup>248</sup>

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240. The facts are set out in the text accompanying notes 225-28 *supra*.

241. 625 F.2d at 1030.

242. 769 F.2d 525 (8th Cir. 1985) (per curiam).

243. 548 F.2d 421 (2d Cir. 1977).

244. 307 U.S. 219 (1939).

245. 307 U.S. at 226.

246. 307 U.S. at 236. The claimant in *One 1936 Model Ford V-8* was a good faith, but allegedly nominal, lienholder against the vehicle which had been used to violate the liquor control and revenue laws.

247. This review is no more invasive than the Supreme Court's offered analysis in *Rummel v. Estelle*, 445 U.S. 263 (1980). Although *Rummel* identified the death penalty as a unique type of punishment, inquiry into whether it constitutes cruel and unusual punishment requires an analysis of the particular case and a determination whether the death penalty is out of proportion to the type of crime. *Rummel*, 445 U.S. at 271-72.

248. The line is, of course, subject to close cases and somewhat varying interpretations. This objection should not, however, destroy its utility as a starting point. See Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 380 (1985).

A line that is determined "arbitrarily" rather than by tracking some natural division of the world need not be any less precise than any other kind of line, and is often *more* precise. There is then no reason to suppose that the line, once drawn, cannot bear the burden of preventing a decisionmaking body from going further.

Courts would not be called upon to evaluate the seriousness of any single drug crime or the degree of involvement of the property and whether forfeiture was a proportional punishment. Rather, after determining whether the property facilitated the crime directly or only by means of a secondary mechanism, the court would either permit or deny forfeiture. This would foster consistency in judicial decision making.<sup>249</sup> Additionally, the penalty imposed on those participating in large scale drug trafficking would not be impaired. Rather, those persons whose involvement was minor or questionable would receive rough justice. The security of interest in legitimately acquired property would be preserved.

### C. *Applying the Eighth Amendment to Section 881 Forfeitures*

Section 881 forfeitures should receive full proportionality review. Application of the court's current cruel and unusual punishments clause doctrine will demonstrate that some section 881 forfeitures should be denied or judicially mitigated. Additionally, the excessive fines clause provides grounds for true proportionality review of forfeitures. Objections to judicial review based on practicality or on deference to the legislature fail to recognize situations where the judiciary engages in analogous forms of balancing. This balancing, mandated by respect for constitutional rights, protects claimants in civil forfeiture actions while maintaining the efficacy of forfeiture as a weapon against drug traffickers.

The cruel and unusual punishments clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."<sup>250</sup> In *Solem v. Helm*,<sup>251</sup> the Supreme Court addressed the question whether its previous opinion in *Rummel v. Estelle*<sup>252</sup> limited cruel and unusual punishment review to capital cases and explicitly held that it did not.<sup>253</sup> While the Court noted that successful eighth amendment challenges outside the capital context would

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*Id.* This line, however, does attempt to track the natural world. Additionally, the second degree facilitation test provides an additional method for analyzing forfeiture cases. It usefully shifts the debate from whether the connection was substantial "enough," a question fraught with policy implications, to whether the involvement was one or more steps removed from the activities identified in the forfeiture statute.

249. This is not to foreclose the possibility that eighth amendment analysis should always be concerned with proportionality. The next section advocates this approach. Here, I have focused on the quality distinction as one way to meet the primary objection of judicial second guessing and to appeal to a wider body of Supreme Court decisions. Still, after *Solem v. Helm*, 463 U.S. 277 (1983), case-by-case proportionality review is probably the better view. See *infra* section III.C.

250. 463 U.S. at 284.

251. 463 U.S. 277.

252. 445 U.S. 263 (1980). *Rummel* is discussed *supra* notes 183-96 and accompanying text.

253. *Solem*, 463 U.S. at 289.

be “exceedingly rare,”<sup>254</sup> the Court decided that “no penalty is *per se* constitutional.”<sup>255</sup> In the course of its analysis, the Court considered the following factors:

In sum, a court’s proportionality analysis under the eighth amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.<sup>256</sup>

Applying these factors to section 881 forfeiture will demonstrate that the punishment, while not *per se* invalid, should be tailored in each case to avoid constitutional infirmity.<sup>257</sup>

Drug trafficking is, without doubt, a serious crime. Judicial notice of its effects abound. In *Hutto v. Davis*,<sup>258</sup> the Supreme Court reversed a district court finding that a forty-year sentence for sale of nine ounces of marijuana violated the cruel and unusual punishments clause. Justice Powell, concurring, characterized the sale as more serious than the offenses for which the defendant in *Rummel* received life in prison without parole.<sup>259</sup> In *United States v. Busher*,<sup>260</sup> where the Ninth Circuit applied the *Solem* factors to RICO forfeiture, the court indicated that collateral consequences of the crime, “*e.g.*, drug addiction,” served to increase its seriousness.<sup>261</sup>

The collateral consequences of drug trafficking suggest a distinction between traffickers and users; drug traffickers push others to addiction and traffickers probably commit the most serious violent crimes, not individual users.<sup>262</sup> Section 881, however, does not distin-

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254. 463 U.S. at 290 (quoting *Rummel*, 445 U.S. at 272).

255. 463 U.S. at 290.

256. 463 U.S. at 292.

257. While the court in *United States v. Harris*, 903 F.2d 770, 778 (10th Cir. 1990), said that it considered the *Solem* factors and held that the forfeiture was not disproportionate, the opinion includes no explicit discussion of those factors.

258. 454 U.S. 370 (1982) (per curiam).

259. 454 U.S. at 380. Justice Powell, however, did not go on to consider the other factors he later elucidated in his opinion for the Court in *Solem*. In fact, he did not address the fact that the defendant in *Rummel* was a recidivist, a factor which caused the *Rummel* majority pause in comparing punishments for other crimes. See *Rummel v. Estelle*, 445 U.S. 263, 280 (1980).

260. 817 F.2d 1409 (9th Cir. 1987).

261. 817 F.2d at 1415 (citing *Solem*, 463 U.S. at 293); see also *Young v. Miller*, 883 F.2d 1276, 1283 (6th Cir. 1989), *petition for cert. filed* (U.S. Jan. 29, 1990) (No. 89-6960). (“Petitioner Young was convicted of possession with intent to deliver 650 grams or more of heroin. We have little doubt that her crime is one of the gravest a person can commit today.”); *Terrebonne v. Butler*, 848 F.2d 500, 504 (5th Cir. 1988) (en banc) (“Except in rare cases, the murderer’s red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner’s evil image — others who create others still, across our land and down our generations, sparing not even the unborn.”) (quoting *Terrebonne v. Butler*, 820 F.2d 156, 157-58 (5th Cir. 1987)).

262. The use of drugs may have collateral consequences such as robbery. However, this collateral activity is independently criminalized and is not of the nature of addiction. By contrast, drug trafficking, by its very nature, encourages widespread addiction. In any event, the collateral effects of trafficking certainly have a much wider ambit.



guish based on the claimant's position in the distribution chain. Sections 881(a)(1) and (2),<sup>263</sup> the sections triggering forfeiture, focus solely on connection with illegal drugs. The courts presently have not adopted a de minimis exception for users.<sup>264</sup> The differing gravity of the consequences suggest that courts should look to the individual circumstances before ordering forfeiture.

The second prong of the *Solem* analysis requires a comparison of penalties for other crimes in federal drug law. With the exception of 49 U.S.C. section 781, section 881 forfeiture applies to far less severe criminal activity than other forfeiture statutes.<sup>265</sup> Outside section 881, forfeiture may be imposed for a drug crime either by criminal forfeiture<sup>266</sup> or by forfeiture of a continuing criminal enterprise.<sup>267</sup> In both circumstances, the scope of the potential punishment is much narrower. Criminal forfeiture may be granted only when the defendant has been found guilty of an offense "punishable by imprisonment for more than one year."<sup>268</sup> Narcotics offenses carrying prison terms of more than one year include: manufacturing or distributing,<sup>269</sup> distributing drugs without a prescription or forging prescriptions,<sup>270</sup> manufacturing or distributing in or near schools,<sup>271</sup> and employment of persons under eighteen years of age for the purpose of avoiding the narcotics laws.<sup>272</sup> Specifically excluded from punishment by imprisonment for greater than one year is simple possession.<sup>273</sup> Proof of a continuing criminal enterprise likewise requires showing substantial criminal activity.<sup>274</sup> These statutes recognize that forfeiture is a serious penalty to be applied only to significant criminal activities, and do

263. 21 U.S.C. § 881(a)(1), (2) (1988); see *supra* note 170.

264. See *supra* note 236 (citing cases where de minimis exception has been rejected).

265. Since § 881 seems to have been based on § 781, see *supra* notes 23-33 and accompanying text, the similarity of the penalties should not be given much corroborative value. Rather, these statutes should be compared versus forfeiture in other arenas.

266. 21 U.S.C. § 853(a)(1), (2) (1988).

267. 21 U.S.C. § 848(c) (1988) defines a continuing criminal enterprise. 21 U.S.C. § 853(a)(3) (1988) provides for forfeiture of any interest in a continuing criminal enterprise.

268. 21 U.S.C. § 853(a) (1988).

269. 21 U.S.C. § 841(a) (1988).

270. 21 U.S.C. § 843(a) (1988).

271. 21 U.S.C. § 845a(a) (1988).

272. 21 U.S.C. § 845b(a) (1988).

273. 21 U.S.C. § 844 (1988); see also 21 U.S.C.A. § 844a (West Supp. 1990) (civil penalty for personal use possession).

274.

"[A] person is engaged in a continuing criminal enterprise if —

(1) he violates any provision . . . the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations . . .

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c) (1988).

not require forfeiture for crimes punishable by less than one year in prison. Since individual users cannot be punished for longer than one year,<sup>275</sup> these statutes explicitly track the distinction previously made, between drug traffickers and users. Further, these statutes at least implicitly recognize a per se exemption for the casual user.

The third *Solem* factor requires comparison of section 881 to state forfeiture statutes. While several state forfeiture statutes substantially follow section 881,<sup>276</sup> these statutes are narrower than section 881 in some significant ways. For example, the Supreme Court of Kentucky has held the presumption of forfeitability applied to money found on a drug trafficker is rebutted when the defendant has been acquitted in a criminal proceeding.<sup>277</sup> While this does not limit directly the scope of the property forfeitable, this presumption does accord additional procedural protection to the claimant.<sup>278</sup> Both Kentucky and South Dakota exempt from forfeiture property used to facilitate crimes involving personal use amounts of marijuana.<sup>279</sup>

The standard for utilizing this data is unclear. First, while the statutory language may be similar, the courts of many states have yet to address the scope of their statutes.<sup>280</sup> Section 881 itself preempts state law and requires forfeiture of the offending property to the

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275. Absent showing recidivism. 21 U.S.C. § 844 (1988).

276. See, e.g., ALASKA STAT. § 17.30.110 (1983); KAN. STAT. ANN. § 65-4135 (1985); KY. REV. STAT. ANN. § 218A.410 (Michie Supp. 1988); N.M. STAT. ANN. § 30-31-34 (1989); S.D. CODIFIED LAWS ANN. § 34-20B-70 (1986); TENN. CODE ANN. § 53-11-409 (Supp. 1989); W. VA. CODE § 60A-7-703 (1989).

About one-third of the states do not have effective asset-seizure laws and rely almost entirely on Federal prosecutors, said Cary H. Copeland, director of the office for asset forfeiture in the United States Department of Justice. And only a handful of states, including California, Arizona, Florida and New Jersey, have been very active in bringing cases to confiscate the assets of drug dealers.

Hinds, *States Seek Tougher Drug Forfeit Laws*, N.Y. Times, July 16, 1990, at A11.

The forfeiture provision of the UNIF. CONTROLLED SUBSTANCES ACT, § 505, 9 U.L.A. 833 (1988), was approved by the National Conference of Commissioners on Uniform State Laws in 1970. Section 505(a)(4) provides for forfeiture of "all conveyances . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of [illegal drugs]. . . ." The provision, similar to 21 U.S.C. § 881(a)(4) (1988), see *supra* note 8, has not been updated by the commissioners to reflect changes in the federal law. Although the National Conference of Commissioners on Uniform State Laws was to consider strengthening § 505 in mid-July 1990, Hinds, *supra*, at A11, no amendment was adopted and the proposal was referred back to a drafting committee, telephone conversation with John McCabe from the Commissioners' Office. See also Goldsmith & Lindermen, *supra* note 17, at 1291-94 (reviewing state forfeiture laws).

277. *Smith v. Commonwealth*, 707 S.W.2d 342 (Ky. 1986).

278. Under § 881, acquittal on criminal charges implies nothing about forfeitability. See, e.g., *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986); *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 10 n.2 (1st Cir. 1977); *United States v. Property Identified as 3120 Banneker Drive, N.E., Washington, D.C.*, 691 F. Supp. 497, 499 (D.D.C. 1988).

279. KY. REV. STAT. ANN. § 218A.410(h)(4) (Michie Supp. 1988); S.D. CODIFIED LAWS ANN. § 34-20B-70(4) (1986).

280. For example, the annotated codes of each of the state statutes cited *supra* note 276 listed few cases under each statute.

United States,<sup>281</sup> thus depriving states of the opportunity to litigate the issue. Second, interpretation of state forfeiture statutes likely will follow the federal experience.<sup>282</sup> Third, it is unclear how much dissonance between the punishment applied in a given case and the practice in other jurisdictions must exist for an eighth amendment violation to be found. In *Solem v. Helm*,<sup>283</sup> the Supreme Court found that the questioned penalty, life without prospect of parole for a seventh nonviolent crime, was more severe than that which could be applied in any other state.<sup>284</sup> The Court overturned the sentence. In *Young v. Miller*,<sup>285</sup> on the other hand, the Sixth Circuit upheld a sentence of life imprisonment without parole for a first time offender involved in the sale of 650 grams of heroin. The court there noted that the sentence imposed by Michigan was the harshest allowed in the nation, but was not so out of line with other states as to justify overruling it.<sup>286</sup>

The best resolution of this indeterminate standard of review would be to adopt a case-by-case approach, giving greater weight to the comparable federal provisions. Forfeiture will not be excessive in all circumstances, especially in cases involving large scale drug trafficking. Because section 881 authorizes forfeiture in even the most minimal cases, the factors of individual cases should be weighed. In general, the three-part *Solem* analysis justifies careful consideration of forfeiture in individual use cases. The collateral effects of personal use are substantially smaller than trafficking. Federal forfeiture statutes in other areas and some state statutes modeled after section 881 seem to recognize the severity of forfeiture and restrict its use to serious crimes.

Case-by-case analysis of forfeitures would follow the requirements of the excessive fines clause. While the cruel and unusual punishment clause may seem, on its face, focused on specific types of punishments that can be identified in the abstract, the excessive fines clause seems to require considering each case individually. An absolute rule, that all fines over a certain dollar amount are excessive would make little sense. Rather, "excessive" depends upon the context of a certain case.<sup>287</sup>

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281. See 21 U.S.C. § 881(a), (h) (1988).

282. See, e.g., *Resek v. State*, 706 P.2d 288 n.9 (Alaska 1985) (referring to federal cases construing section 881 in interpreting Alaska's forfeiture statute).

283. 463 U.S. 277 (1983).

284. 463 U.S. at 299-300.

285. 883 F.2d 1276 (6th Cir. 1989).

286. 883 F.2d at 1284-85.

287. Cf. 18 U.S.C. § 3572(a) (1988):

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

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is finan-

Unfortunately, the excessive fines clause has not been central to much litigation, especially in the criminal arena.<sup>288</sup> The Supreme Court has said merely that “the text is explicit that bail and fines may not be excessive.”<sup>289</sup> Two standards are possible. First, the courts could simply affirm any forfeiture unless it shocked “the judicial conscience.”<sup>290</sup> Second, the excessive fines clause might require an inquiry into the circumstances of each individual case. For example, a court would consider the gravity of the individual offense, the extent of criminal behavior of the defendant, and the defendant’s financial situation.

Courts employ the second standard in many other areas.<sup>291</sup> Any fine imposed in criminal proceedings must be evaluated against a detailed list of case-specific criteria.<sup>292</sup> In bail proceedings, when preventive detention is not an issue, courts follow the factor analysis

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cially dependent on the defendant, or any other person . . . that would be responsible for the welfare of any person financially dependent on the defendant, . . .

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense . . .

18 U.S.C. § 3553(a) (1988) provides:

The court, in determining the particular sentence to be imposed, shall consider —

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed —

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

Applying these criteria would require some distinctions between offenders based on their offenses.

288. In some cases, in fact, courts have treated the excessive fines clause as a mere subset of the cruel and unusual punishments clause. *See, e.g., United States v. Elkins*, 885 F.2d 775, 789 (11th Cir. 1989) (“There may be circumstances where an excessive fine constitutes cruel and unusual punishment in violation of the Eighth Amendment.”).

289. *Solem*, 463 U.S. at 289.

290. *See Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524, 1530-31 (11th Cir. 1988) (the court found that excessive fines clause did not apply to a punitive damages award between two private, civil plaintiffs. If the excessive fines clause had applied, the court held, the award would still stand unless it “shock[ed] the judicial conscience.”).

291. The *Solem* Court wrote,

For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

*Solem*, 463 U.S. at 294 (footnote omitted). The *Solem* Court pointed to case-by-case determinations of speedy trial right violations and to the right to jury trial decisions. 463 U.S. at 294-95.

292. *See* 18 U.S.C. § 3572(a) (1988) (text set out *supra* note 287); NATL. INST. OF JUSTICE, U.S. DEPT. OF JUSTICE, FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION 58-64 (1984).

described by Congress in setting bail.<sup>293</sup> These factors have been held to protect against the imposition of excessive fines.<sup>294</sup>

RICO provides an example of how courts could review forfeitures to effectuate eighth amendment concerns. In RICO, courts routinely determine the extent of the property used to maintain the RICO enterprise. The difficult arena for section 881 forfeiture is the seizure of legitimately acquired property. In RICO, however, the seizure is limited to the tainted proceeds.<sup>295</sup> Because of this limitation, eighth amendment concerns are mitigated. The forfeiture consists only of the illegal proceeds from the RICO enterprise. The Second Circuit's analysis in *United States v. Huber*<sup>296</sup> typifies the strategy.

We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision . . . is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime. We further note that where the forfeiture threatens disproportionately to reach untainted property of a defendant, for example, if the criminal and legitimate aspects of the "enterprise" have been commingled over time, section 1963 permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision.<sup>297</sup>

This strategy is analogous to the distinction previously drawn, that assets derived from drug transactions under section 881(a)(6) clearly are forfeitable.<sup>298</sup> Forfeitures proceeding under section 881(a)(4) or

293. See 18 U.S.C. § 3142 (1988); see also *Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that* defendant.") (emphasis added). While the Court in *United States v. Salerno*, 481 U.S. 739, 752-54 (1987), explicitly refused any implication that *Stack v. Boyle* required the courts to admit *every* defendant to bail, the Court emphasized that the detention determination must be individualized. 481 U.S. at 750-52. Further, preventative detention is a temporary measure, unlike forfeiture.

294. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (The Federal Rules of Criminal Procedure provide the standards for constitutionally required determination of individualized bail.); *United States v. Salerno*, 481 U.S. 739 (1987) (Bail Reform Act provides protection for defendant's constitutional rights.).

295. See, e.g., *United States v. Porcelli*, 865 F.2d 1352, 1365 (2d Cir. 1989) ("The Congressional aim guiding these forfeitures is to recover all of the racketeer's ill-gotten gains but not to seize legitimately acquired property.").

296. 603 F.2d 387 (2d Cir. 1979).

297. 603 F.2d at 397; see also *United States v. Acosta*, 881 F.2d 1039, 1041 n.4 (11th Cir. 1989) (RICO forfeiture does not violate the eighth amendment because, "in light of the extent of appellant's racketeering activities and his resulting profits, the forfeitures in the instant case serve merely to divest appellant of his ill-gotten wealth."); *United States v. Feldman*, 853 F.2d 648, 663 (9th Cir. 1988) ("When the district court orders that the defendant forfeit the profits gained from illegal activity, it is hard to imagine how such a forfeiture could constitute cruel and unusual punishment."); *United States v. Kravitz*, 738 F.2d 102, 106-07 (3d Cir. 1984) (declining to reach eighth amendment issue because property seized was "'keyed to the magnitude of a defendant's criminal enterprise'") (quoting *Huber*, 603 F.2d at 397); *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir. 1980) (magnitude of forfeiture keyed to magnitude of defendant's interest in illegal enterprises).

298. See *supra* note 92 and accompanying text.

(a)(7), on the other hand, would be more carefully scrutinized as a fine since the defendant initially acquired the property legitimately.

The RICO example also serves to refute the major criticism of extended judicial use of eighth amendment review. The main objection to employing the eighth amendment in this context, and indeed the main concern of the majority in *Rummel v. Estelle*,<sup>299</sup> is that the federal courts not evaluate the appropriateness of the length of a sentence. If the decision is whether to impose *X* or *Y* number of years of identical confinement or *X* or *Y* dollars fine, the legislature may indeed be the more competent or otherwise appropriate decisionmaker.<sup>300</sup> The *Rummel* court, however, argued that courts are competent to evaluate whether a certain type of punishment is excessive for the crime committed. In *Solem*, the dissenters, who numbered among the majority in *Rummel*, worried that the judiciary would substitute their own judgment for the sentences prescribed by the legislature.<sup>301</sup> Still, the judiciary must "ultimately decide the meaning of the Eighth Amendment."<sup>302</sup> The RICO example demonstrates that the judiciary is capable of focusing on the activity Congress wished to stop while protecting eighth amendment concerns.

Increased judicial diligence in monitoring the magnitude of forfeiture will not harm the war on drugs.<sup>303</sup> The assets which constitute illegally derived profits will be subject to forfeiture without question. Further, through the appropriate use of presumptions, few large scale traffickers will retain conveyances or real property when forfeiture is sought under sections 881(a)(4) or (a)(7). For example, courts could presume that the automobiles of a large scale drug trafficker without other visible means of support actually were bought with proceeds from illegal activities, despite the difficulty of directly proving that fact.<sup>304</sup> Finally, even if the conveyance or real property was legiti-

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299. 445 U.S. 263 (1979); see *supra* notes 192-96 and accompanying text.

300. See *Rummel*, 445 U.S. at 274.

301. *Solem v. Helm*, 463 U.S. 277, 314 (1983) (Burger, J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980).

302. *Rummel*, 445 U.S. at 279.

303. See, e.g., *United States v. 1964 Beechcraft Baron Aircraft, TC-740*, 691 F.2d 725 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); see also Note, *supra* note 16, at 333-34 (paraphrasing *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 427 (2d Cir. 1977)).

304. This was the approach taken by the court in *United States v. \$33,000 United States Currency*, 640 F. Supp. 898 (D. Md. 1986). The claimant asserted that the money constituted proceeds from the sale of a horse, coins and stocks. The court held, however, that the horse was purchased at a time when the claimant had no other means of support. Therefore, the horse and its proceeds were drug proceeds and forfeit. 640 F. Supp. at 899-900; see also *United States v. Parcels of Land*, 903 F.2d 36, 39-40 (1st Cir. 1990) ("The sheer magnitude of [claimant's] expenditures supports an inference that his property acquisitions were funded with the proceeds of drug trafficking; [the claimant's] millions of dollars in purchases far exceeded his reported average annual income of \$27,690, and there was no other apparent legitimate source of money to account for this magnitude of expenditures."); *United States v. One 1986 Nissan Maxima GL.*, 895 F.2d 1063 (5th Cir. 1990) (automobile bought with cash by person with no legitimate means of obtaining that much cash was forfeit). Cf. *United States v. All Funds and Other Property*

mately purchased, the court still may find, after review of its proportionality or excessiveness, that the forfeiture constituted an acceptable fine for the defendant's criminal activity.

This Part has attempted to give some substance to the substantial connection test and to eighth amendment review of section 881 forfeiture. The substantial connection test should be refocused on how removed the conveyance or real property sought has been to the underlying drug activity. While a step in the right direction, even the "second degree facilitation" test does not fully protect claimants facing civil forfeiture. To that end, this section has demonstrated that eighth amendment review of section 881 forfeiture would, at a minimum, exempt many individual users and should be applied to protect the rights of all defendants.

#### IV. CONCLUSION

This Note offers two justifications for narrowing the scope of civil forfeiture. Courts should adopt the substantial connection test as the best reading of section 881. Admittedly, the language of the section seems to support the broadest possible scope for forfeiture. This Note has contended, however, that Section 881, read against the full range of interpretive aids, commands forfeiture only where the property bears a substantial connection to the underlying criminal activity.

Courts should also treat each forfeiture as if it were a criminal fine and evaluate its proportionality. Civil forfeiture often extinguishes legitimately acquired property rights. These forfeitures are executed without regard to the magnitude of the crime, the value of the property or any characteristics of the individual defendant. This Note has argued therefore that section 881 operates as a criminal punishment. Further, when the government seeks forfeiture, eighth amendment protections against government punishment are implicated; each forfeiture should be subject to individual proportionality review. Civil forfeiture is a powerful weapon for eliminating the profit of drug trafficking. The very power of the weapon mandates guarding against abuse.

— James B. Speta