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STUDENT ARTICLE

ZERO TOLERANCE FOR FORFEITURE: A CALL FOR REFORM OF CIVIL FORFEITURE LAW

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I. INTRODUCTION

In August of 1986 the *New York Times* ran a front page story about the latest tactic used by the police in the "war on drugs."¹ During the previous week in Manhattan, 43 motorists were stopped while cruising in their cars. Not only were these people arrested for possessing crack, but their cars were seized. The majority of the owners of the cars taken were from middle-class suburban communities.² Since the date of the story, over 3,000 cars have been seized.³

In April, 1991, the *New York Times* ran a story about a recent raid and seizure of the three University of Virginia fraternity houses.⁴ The fraternity houses were seized because drug dealing took place on their premises.⁵ Should convictions occur, alumni corporations that own the houses could claim they were "innocent owners" unaware of drug activity. However, if their defense fails, the houses, said to be worth \$1 million, would become the property of the federal government and the Charlottesville police could claim their share, which could exceed \$500,000.⁶ Federal law authorizes the seizure of

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1. Purdum, *New York Police Now Seizing Cars in Arrests for Possession of Crack*, N.Y. Times, Aug. 5, 1986, at A1, col. 1.

2. *Id.* In a four day period, which ended the previous Saturday, 30 cars were taken. Since July 30, 1986, 211 cars were seized. N.Y. Times, Oct. 14, 1986, at B1, col. 1.

3. Farber, *For Out-of-Towners, New York City is a Drug Mart*, N.Y. Times, Dec. 3, 1989, at A23, col. 2.

4. Anderson, *Mixed Messages From a Drug Bust*, N.Y. Times, Apr. 1, 1991 at A10, col. 1.

5. *Id.*

6. *Id.*

assets used to facilitate drug dealing.⁷ The Feds may sell the seized assets and share the proceeds with local law enforcement agencies according to the agencies' level of participation.⁸ This is just one example of how forfeiture is being utilized to combat the drug problem. Forfeiture statutes have been in existence for many years, but until recently were not used very often and were targeted at drug dealers and traffickers.⁹ The statutes, however, are now being reinterpreted and used to reach people from all social strata, and have resulted in many citizens losing their cars, boats, land or any other property deemed to have been used as an "instrument" in a drug transaction.¹⁰ People must forfeit their property even if they are not a drug dealer, but a first-time offender or a recreational user in possession of a small quantity of drugs. Policies such as the one in New York are specifically aimed at, and attempt to deter use by, middle-class drug buyers.

While civil forfeiture may be an effective tactic, in many cases it is not a fair one. People are forfeiting hundreds of thousands of dollars in property for buying and selling drugs, regardless of the amount. In addition, "under federal forfeiture laws, the government need not actually find drugs; forfeiture can occur when the owner merely *intended* to use the property to facilitate a drug law violation."¹¹ The result is often a loss of property much greater than warranted by the underlying offense and a "radical growth in the power and authority of the state over the individual citizen."¹²

Examples of this policy include forfeiture of a shrimp boat after U.S. Coast Guard personnel found three grams of marijuana stems and seeds,¹³ forfeiture of all worldly possessions, including the house, clothing, food and bank accounts, of a

7. *Id.*

8. *Id.*

9. See Lauter, *U.S. Seizure of Assets Accelerates*, THE NAT'L L.J., Sept. 6, 1982, at 8, col. 4; Kessler, *State's Criminal Forfeiture Law — Is it Working After Two Years?*, N.Y. L.J., Dec. 18, 1986, at 6, col. 2; Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1152 (1990) [hereinafter *Fear*].

10. Strasser, *Forfeiture Isn't Only for Drug Kingpins*, THE NAT'L L.J., July 17, 1989, at 26, col. 2. During the calendar year 1988 in Broward County Florida the following were forfeited: 50 vehicles valued at \$208,000, 2 boats valued at \$10,000, 3 planes valued at \$180,000, cash amounting to \$511,231.05 and miscellaneous property worth \$6,600. See also *Fear*, *supra* note 4, at 1151.

11. Herpel, *United States v. One Assortment of 89 Firearms*, REASON, May 1990, at 34.

12. Chambers, *Civil Penalty is Becoming Powerful Tool*, THE NAT'L L.J., Sept. 17, 1990, at 13, col. 4.

13. Herpel, *supra* note 11, at 33.

Massachusetts resident suspected of dealing drugs,¹⁴ and many instances when defendants were prosecuted and sent to prison for growing marijuana in their back yards. In these last cases the government seized not only the gardens where the marijuana grew, but the entire parcel of land, including all buildings upon it.¹⁵

The federal statute used as the basis for these seizures is 21 U.S.C. § 881.¹⁶ Since courts view this statute as civil, rather than criminal, the constitutional safeguards which surround criminal proceedings are not available. The government must only show by a preponderance of evidence that the car, or other property, was used as an instrument in a drug transaction. This standard is in contrast with the "beyond a reasonable doubt" standard mandated for a criminal prosecution.¹⁷ Thus, the government need not bring any type of criminal prosecution against the claimant before the institution of a forfeiture action. Under federal law (the model for legislation in the individual states),

the petitioner has the burden of defense while the prosecutor has no burden of proof; a car found with a single marijuana seed can be subject to forfeiture; innocence is only sometimes a defense; hearsay is admissible evidence and acquittal of the alleged offender has no bearing on the civil case.¹⁸

As one commentator noted, "Given all of these advantages over criminal prosecutions, it is no wonder that forfeiture became, in the words of the Justice Department, 'one of the primary law enforcement tools of the 1980s.'"¹⁹

14. *Id.*

15. Chambers, *supra* note 12, at 13, col. 4.

16. 21 U.S.C. § 881(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

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

(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 title.

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

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

17. Chambers, *supra* note 12.

18. Strasser, *supra* note 10, at 27, col. 1.

19. Herpel, *supra* note 11, at 34.

The foundation for civil forfeiture is a medieval doctrine under which an inanimate object can be guilty of wrongdoing. When we combine the origin and operation of civil forfeiture law it is hard to disagree, as one author opines, "that they [the origin and operation of civil forfeiture laws] are fundamentally incompatible with the principles of a free society."²⁰

The forfeiture mechanism described above, while hailed by law enforcement officials and prosecutors,²¹ has also been attacked for violating Constitutional rights.²² One challenge is that certain forfeitures constitute "cruel and unusual punishment," which is prohibited under the eighth amendment. The Supreme Court has held that "cruel and unusual punishment" includes penalties that are disproportionate to the crime committed.²³ In many instances, the amount of property forfeited under § 881 is vastly disproportionate to the underlying offense.

In July, 1990, state prosecutors and the Justice Department suffered a major defeat when the influential National Conference of Commissioners on Uniform State Laws rejected a tough, much-lobbied-for model forfeiture act. This legislation was aimed at expanding federal-style forfeiture statutes to all fifty states.²⁴ The drafting committee was asked to come back with language requiring courts to apply a proportionality test.²⁵ This rejection of forfeiture legislation is indicative of the growing concern about the disproportionality which occurs under current civil forfeiture laws.

This essay will address disproportionality under the eighth amendment in the context of civil forfeiture, and, after discussing the history and problems surrounding civil forfeiture, will conclude that the current federal civil forfeiture statute (21 U.S.C. § 881) should be amended. The following is an example of the problem that exists under current forfeiture law. In New York, a person convicted of the crime of possession of a controlled substance is guilty of a Class A misdemeanor,²⁶ which allows a maximum monetary fine of \$1,000.²⁷ However,

20. Herpel, *supra* note 11, at 33.

21. deCourcy Hinds, *States are Seeking Tougher Laws on Seizing Property in Drug Cases*, N.Y. Times, July 16, 1990, at A11, col. 3.

22. *Id.*

23. *Solem v. Helm*, 463 U.S. 277 (1983).

24. *Model Forfeiture Act for the States is Rejected*, THE NAT'L L.J., July 30, 1990, at 5, col. 2.

25. *Id.*

26. N.Y. PENAL LAW § 220.03 (McKinney 1982).

27. N.Y. PENAL LAW § 80.05 (McKinney 1982).

under the civil forfeiture statutes, citizens can lose their property, prior to, and regardless of, a criminal conviction.²⁸ Should a person face a civil penalty resulting in a greater punishment than that which would be allowed by the criminal process? This author thinks not.

Consider the following hypothetical: one man drives in a BMW to a streetcorner where he purchases 2 grams of marijuana; another drives in an old VW bug and executes the same transaction; finally, a third man simply walks to the corner to purchase his 2 grams of marijuana. Assume the previous transactions all took place in New York, where it is not a crime to possess less than 25 grams of marijuana.²⁹ If all three are subjected to civil forfeiture, the first man is out \$35,000, the second is out \$3,500 and the third has not lost a thing. Even if this took place outside of New York, it is hard to imagine anyone being fined \$35,000 for possession of 2 grams of marijuana.³⁰

The above example illustrates the bizarre outcomes possible under current forfeiture laws. In these cases the forfeiture is disproportionate to the offense committed. Statutes should not allow forfeitures which are significantly disproportionate to the offense committed. The following is a suggested amendment to the current federal statute, 21 U.S.C. § 881(a)(7):

(C) no property shall be forfeited under the provisions of this section where the fair market value of the property exceeds the maximum fine which could be imposed for the relevant criminal offense, except that,

(1) where the property is determined to be substantially connected to its owner's criminal activity subsection (C) shall not apply and the property shall be forfeited.

(D) where property is not subject to forfeiture under subsection (C), the owner of the property may be required to pay a fine equal to, but not greater than, the fine that would be imposed for the relevant criminal offense as a precondition to the release of his or her property from custody.

28. Chambers, *supra* note 12.

29. N.Y. PENAL LAW §§ 221.05, 221.10 (McKinney 1982).

30. For this argument, see also Darmstadter & Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeiture Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 31 (1987) ("... [I]n the case of conveyances, the vehicle may only be peripherally and non-exclusively connected with the drugs. For example, it may have only been used to bring its owner to a place where an exchange is to take place, or only momentarily used to conceal or transport drugs. Thus, forfeiture of these items seems more punitive . . .").

(E) where an individual is subsequently found free of any criminal wrong-doing, any forfeited property, or money, shall be returned promptly.

Statutory limits would be set, establishing a minimum and maximum amount of property that could be forfeited for a given quantity of drugs. This would allow the court to be flexible in determining whether a forfeiture is proportionate under a given set of circumstances. The upper limit would be equal to the fine for the underlying criminal offense.

To illustrate, I will use a variation on the above hypothetical. Suppose the quantity of drugs involved is five grams of marijuana. I will assume that the criminal fine for this offense would be \$5,000. The statutory guidelines for this quantity of drugs would allow forfeitures of property valued at \$3,000-5,000. The person who drives to purchase drugs in his BMW valued at \$35,000 would not have to forfeit the vehicle, as it is far beyond the statutory range and is valued at seven times the statutory fine for the underlying criminal offense. Instead he would pay \$5,000. The person who drives to purchase drugs in his VW bug, valued at \$3,500, would forfeit his vehicle, as it is within the established range and is valued at less the statutory fine. The person who walked to the corner would merely pay \$5,000.

An extremely important point to remember is that my proposal only pertains to the civil forfeiture aspect of the proceedings. If a person is found guilty of criminal wrongdoing then the criminal process takes over. Thus, even if a person does not have to forfeit his property under civil forfeiture laws, such as the BMW driver above, he may have to do so anyway under criminal forfeiture laws. Under criminal forfeiture law, if a person is convicted of a drug offense he must forfeit all property that was purchased with "drug money" or is substantially connected with drug smuggling.³¹

In the above example then, if the BMW driver bought his car with proceeds derived from the drug business, he would have to forfeit it pursuant to criminal forfeiture laws. Also, if he was involved in reselling the drugs he purchased such that the BMW was an integral part of his business of buying and selling drugs, then the criminal forfeiture statutes would also require him to forfeit his car. If, however, the BMW was used solely as a means of transportation for him to drive to the cor-

31. *Fear, supra* note 9, at n.39 (21 U.S.C.A. § 881(a)(6)-(7) (West 1981 & Supp. 1989) (property connected with drugs)).

ner to buy drugs for personal consumption, then forfeiture of the car is not warranted, which is the essence of this essay.

II. DISPROPORTIONALITY AND THE EIGHTH AMENDMENT

A. *Civil Forfeiture is Punishment*

Before arguing that civil forfeiture results in a punishment that is disproportionate to the crime committed, it must be established that civil forfeiture does in fact constitute punishment. Punishment, characteristically,

is unpleasant. It is inflicted on an offender because of an offense he has committed; it is deliberately imposed, not just the natural consequence of a person's action (like a hang-over), and the unpleasantness is essential to it, not an accidental accompaniment to some other treatment (like the pain of the dentist's drill). It is imposed by an agent authorized by the system of rules against which an offense has been committed; a lynching is not a standard case of punishment.³²

It is clear that civil forfeiture is a form of punishment. When citizens are deprived of their personal property, it is certainly unpleasant. The forfeiture of property takes place pursuant to the commission of an offense and is deliberately imposed. Moreover, in the case of civil forfeiture, a person need only be suspected of committing an offense, as his property can be forfeited prior to a criminal conviction. Finally, forfeiture is imposed by law enforcement agents, who are authorized by the system of rules against which the offense is committed.

Civil forfeiture was created and traditionally used for remedial, as opposed to punitive, purposes. However, civil forfeiture is currently being used in ways that are much more akin to its criminal counterpart and has survived challenge because of its "civil" label. Regardless of the remedial purposes that may be served by civil forfeiture, the end result is punishment. "Forfeiture is considered a punitive sanction when it is used without regard to actual damage caused, particularly when the property forfeited is not contraband, but an asset which the defendant has a legal right to possess," wrote Kenneth Mann, an expert on white-collar law.³³ When citizens forfeit clothes, cars, boats and homes, they are losing assets which are right-

32. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29 (P. Edwards ed. 1967).

33. Quoted in Chambers, *supra* note 12, at 13, col. 4.

fully and legally theirs.³⁴ Since civil forfeiture is a punishment, the government should be required to observe procedural and proportionality restraints throughout the course of the proceedings.

In *Trop v. Dulles*, the Supreme Court held a statute which provided that a citizen "shall lose his nationality by deserting the military . . . in time of war . . ." unconstitutional.³⁵ The Court held that § 401(g) of the Nationality Act of 1940 violated the eighth amendment because it was penal in nature and prescribed cruel and unusual punishment.³⁶ In *Trop*, the Court wrote that the words of the [eighth] amendment are not precise and their scope is not static.³⁷ Further, determined the Court, "the Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. The provisions of the Constitution are the rules of the government, and the principles that authorize as well as limit governmental powers."³⁸ "When it appears that an Act of Congress conflicts with one of these provisions," said the Court, "we have no choice but to enforce the paramount commands of the Constitution."³⁹ Civil forfeiture, in many cases, does conflict with the provisions of the Constitution. A statute which allows the government to take people's private property, even though the value of the property greatly exceeds any monetary fine that would be imposed upon conviction of the suspected offense, is a statute which gives the government too much power over the individual citizen. Constitutional limits should not be pushed back to accommodate popular legislation.

B. *Development of Disproportionality*

My claim that gross disproportionality between the offense committed and the penalty received is violative of the eighth amendment is based on the case of *Solem v. Helm*.⁴⁰ In *Solem*, the Court explained that "[t]he principle that a punishment

34. Of course, this assumes that the forfeiture is being imposed on a citizen who is not in the business of buying and selling drugs, but is only purchasing a small amount of a controlled substance for personal consumption. In the case of an individual who derives his livelihood from the drug business and purchased the forfeited property with drug money, then the property is not rightfully or legally his and is subject to forfeiture under criminal forfeiture laws.

35. *Trop v. Dulles*, 356 U.S. 86 (1958).

36. *Id.*

37. *Id.* at 100-01.

38. *Id.* at 103.

39. *Id.* at 104.

40. *Solem v. Helm*, 463 U.S. 277 (1983). The Court said that the final

should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."⁴¹ This principle was repeated in the English Bill of Rights,⁴² and when the Framers of the eighth amendment adopted the language of the English Bill of Rights, they also adopted the English principles of proportionality.⁴³ The Supreme Court has recognized the Constitutional principle of proportionality for almost a century, and in the leading case of *Weems v. United States* held, "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."⁴⁴ The Court went on to endorse proportionality as a constitutional standard, saying, "the eighth amendment prohibits penalties that are grossly disproportionate to the offense."⁴⁵

In the landmark case, *Coker v. Georgia*, the Supreme Court held that the sentence of death for the crime of rape was grossly disproportionate and excessive punishment forbidden by the eighth amendment.⁴⁶ The Court cited many cases holding that "the eighth amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed."⁴⁷ The Court in *Gregg* gave two grounds for determining that a punishment is "excessive" and unconstitutional, and said that a punishment could fail the test on either ground. The first ground is "a punishment which makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."⁴⁸ For purposes of this article it is the second ground which is of primary interest, that being a punishment that "is grossly out of proportion to the severity of the crime."⁴⁹ Such a punishment is "excessive" and, therefore, unconstitutional.

Civil forfeiture often results in a penalty vastly disproportionate to the crime committed, and in some cases is even

clause of the eighth amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

41. *Id.* at 284.

42. 1 Wm. & Mary, 2d Sess. (1689) c. 2.

43. *Solem*, 463 U.S. at 284-86.

44. *Weems v. United States*, 217 U.S. 349, 367 (1910).

45. *Id.* at 372-73.

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

47. *Id.* at 592. (The Court cited *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1910)).

48. *Id.* at 592.

49. *Id.*

applied when no crime has been committed at all. Possession or purchase of small quantities of drugs is a crime, but it is not so heinous as to warrant forfeiture of items such as cars, boats and land. People who sell large quantities of drugs - drug traffickers - should be, and are (under criminal forfeiture statutes), made to forfeit any assets used in their "business" or purchased with drug proceeds. However, people's private property not used in furtherance of the drug trade, nor purchased with "drug money," should not be subject to forfeiture. When an individual buys a gram of marijuana for personal consumption, he should be fined, but his car should not be forfeited. When a joint is found on a yacht, the owner should be fined, but his yacht should not be forfeited. When an ounce of cocaine is found in someone's home, they should be penalized, but he should not forfeit his home. These examples show how the goals of the statute break down and result in disproportionate penalties.

Disproportionality in the area of criminal forfeiture has been recognized as a legitimate concern. Under requirements, published in 1989, the Justice Department's organized crime and racketeering section ". . . will consider the nature and severity of the offense when determining the extent of forfeiture to be sought."⁵⁰ "The rules also state flatly, for the first time, that in pursuing a forfeiture action, the government will try to make the punishment fit the crime [D]epartment policy . . . is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime."⁵¹ In spite of such developments, the disproportionality problem remains in civil forfeiture, where the eighth amendment, currently, has no power.⁵²

50. *Controversial Rules on Asset Seizure Modified*, THE NAT'L L.J., Oct. 30, 1989, at 5, col. 1 [hereinafter *Controversial*] (The U.S. Justice Department, in response to heavy criticism, has imposed limits on the use of pretrial restraining orders aimed at defendants' assets. The organized crime and racketeering section will review any proposed forfeiture temporary restraining order, and U.S. attorneys must show that "less intrusive remedies are not likely to preserve the assets for forfeiture in the event of a conviction." In addition, prosecutors have to describe fully any anticipated impact that forfeiture and the restraining order would have on innocent third parties — such as investors or creditors — and balance those effects against the government's need to preserve assets. Finally, prosecutors are required to state publicly, as soon as possible, that the government will try not to disrupt the normal, legitimate business activities of the defendant nor seek to take back from third parties any assets they have received legitimately from the defendant").

51. *Id.*

52. See *United States v. Santaro*, 866 F.2d 1538, 1544 (4th Cir. 1989)

C. *The Excessive Fines Clause - The Browning-Ferris Case*

In addition to prohibiting penalties that are disproportionate to the crime, the eighth amendment provides that "excessive fines shall not be imposed." The excessive fines clause, like the cruel and unusual punishment clause, has only been applied to criminal proceedings. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, the Supreme Court held that the excessive fines clause of the eighth amendment does not apply to awards of punitive damages in cases between private parties.⁵³ In her dissent, Justice O'Connor provided a compelling argument for not confining the excessive fines clause to criminal cases. The *Browning-Ferris* case, and Justice O'Connor's dissent therein, provide a solid foundation for the argument that the eighth amendment in its entirety should be applicable to civil forfeiture proceedings.

Browning-Ferris was in the business of commercial waste collection and disposal in Vermont. The company was sued by one of its major competitors for violating the federal Sherman Act and Vermont tort law. A federal district court jury ruled against Browning-Ferris on both claims. In considering the state tort claim, the jury determined that punitive as well as compensatory damages were warranted and decided on \$6 million as the appropriate punitive damages amount.⁵⁴ Browning-Ferris appealed its case. In reviewing the damage award, the Second Circuit noted that it amounted to "less than .5% of Browning-Ferris's revenues . . . for fiscal year 1986."⁵⁵ The court assumed, for argument's sake, that the excessive fines clause applied to punitive damages, but the court concluded,

("to judicially encumber what clearly is intended to be a civil proceeding with criminal procedural safeguards is contrary to the plain dictates of Congress. We share this view and decline to extend eighth amendment protections to 21 U.S.C. § 881(a)(7)"); *United States v. 1985 BMW*, 677 F. Supp. 1039, 1041 (C.D. Cal. 1987) (" . . . the court finds that the statute is civil in nature and that an Eighth Amendment analysis is unnecessary"); and *Chambers*, *supra* note 12, at 14 ("the eighth amendment, the courts remind the defense bar, applies to criminal and not to civil cases").

53. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989). (Respondents filed suit against petitioners, charging Browning-Ferris Industries with antitrust violations and with interfering with Kelco's contractual relations in violation of Vermont tort law. A jury found Browning-Ferris Industries liable on both counts, and awarded Kelco, in addition to \$51,146 in compensatory damages, \$6 million in punitive damages on the state-law claim.)

54. *Id.*

55. *Kelco Disposal, Inc. v. Browning-Ferris, Inc.*, 845 F.2d 404, 410 (2d Cir. 1988).

that this award was not "so disproportionate as to be cruel, unusual, or constitutionally excessive."⁵⁶

The Supreme Court granted certiorari on the excessive fines clause issue, and found no constitutional violation, on the ground that the clause does not pertain to damages awarded in a private civil action.⁵⁷ In her dissent, Justice O'Connor criticized the Court for confining the excessive fines clause of the eighth amendment to criminal cases, asserting that there was no historical basis for doing so. Justice O'Connor wrote, "[i]n my view, a chronological account of the clause and its antecedents demonstrates that the clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct."⁵⁸ Although *Browning-Ferris* specifically dealt with the excessive fines clause, the analysis employed by Justice O'Connor is equally compelling when applied to the clause prohibiting cruel and unusual punishment, as the two really go hand in hand with respect to civil forfeiture. Civil forfeitures both "exact monetary penalties" and can result in extreme disproportionality. As with the excessive fines clause, the cruel and unusual punishment clause should not be restricted in its application to criminal proceedings.⁵⁹

Justice O'Connor echoed the view that the eighth amendment in its entirety should not be confined to criminal proceedings. She noted that there was little debate over the eighth amendment in the First Congress, and further, there were no proposals to limit that amendment to criminal proceedings. Justice O'Connor provides a detailed discussion of the historical background surrounding the eighth amendment and concludes that, "around the time of the framing and enactment of the eighth amendment some courts and commentators believed that the word 'fine' encompassed civil penalties."⁶⁰ Justice O'Connor cites a holding of the Massachusetts Supreme Judicial Court that "the word 'fine' in a statute meant 'forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence.'"⁶¹ The Supreme Court, contrary to historical evidence and Justice O'Connor's argument, has decided that the eighth amendment has no place in civil proceedings such as forfeitures.

56. *Id.* at 410.

57. 109 S. Ct. at 2909.

58. *Id.* at 2926.

59. *Id.* at 2930.

60. *Id.* at 2931.

61. *Id.* (quoting *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858)).

III. HISTORY OF CIVIL FORFEITURE

When a middle-class, suburban citizen is stopped by the police and a very small quantity of drugs is found in his or her car, the government has the preponderance of evidence it needs for a forfeiture action. Based on this evidence, the automobile is subsequently forfeited, because it is viewed as being an instrumentality used in a drug transaction. On the surface, this forfeiture is punishment for a crime. The above scenario is clearly "criminal" in nature. Why is it termed "civil" such that this kind of forfeiture is seemingly immune from constitutional reproach?

Courts historically distinguished between criminal and civil forfeiture. At common law, the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as deodand.⁶² The origins of the deodand⁶³ are traceable to Biblical⁶⁴ and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accursed and that religious expiation was required.⁶⁵ While deodands never became a common-law tradition in the United States, the concept behind them, forfeiture, did. "Long before the adoption of the Constitution the common law courts in the Colonies — and later in the states during the period of Confederation — were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes."⁶⁶ Because the rule regarding deodands was premised on the guilt of the property itself, property was forfeitable regardless of the guilt or innocence of the owner.⁶⁷ The classical distinction between civil and criminal forfeiture was born and this tradition still holds true today.

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

63. *Id.* at 681, n.16. Deodand derives from the Latin *Deodandum*, to be "given to God."

64. *See Exodus* 21:28 ("[I]f an ox gore a man or a woman and they die, he shall be stoned and his flesh shall not be eaten").

65. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974). (The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses. 1 W. BLACKSTONE, COMMENTARIES 300.

66. *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943) (Under classical *in rem* forfeiture, "the thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . ."); *The Palmyra*, 25 U.S. 1, 14 (1827).

67. Herpel, *supra* note 11, at 34.

The two different types of forfeitures are technically known as *in personam* and *in rem*. Forfeiture against the person operates *in personam* and requires a conviction before any property can actually be taken. This type of forfeiture is regarded as criminal in nature because it is penal, and primarily seeks to punish.⁶⁸ Forfeiture against the thing is *in rem* and the forfeiture is based upon the unlawful use of the *res*, irrespective of its owner's culpability. These forfeitures are regarded as civil; their purpose is remedial.⁶⁹ Note that under both types of forfeiture property is taken. In one instance it is called punishment, in one instance it is not.

One court states that civil forfeiture statutes serve remedial purposes such as stripping the drug trade of its instrumentalities and denying drug dealers the proceeds of ill-gotten gains.⁷⁰ The legislative history of § 881, illustrates that Congress intended this penalty to attach to drug dealers and not to drug users.⁷¹ The legislative history states that the goal of the statute is to increase research, to penalize drug dealers, and to encourage drug users to seek treatment.⁷²

These remedial purposes are useful and legitimate; the statutes, however, are used to go beyond these noble goals to impose penalties on persons. Seizing a person's car or other property does not directly encourage him or her to seek treatment, nor does it directly encourage research.⁷³ The statutes, much more directly and effectively, achieve the criminal goals of punishment and deterrence. Traditionally, criminal and civil proceedings have maintained a separate existence, but with the increased use of civil forfeiture, the two are beginning to overlap. With civil forfeiture we see the worst of both worlds; proceedings and penalties which appear criminal, but which do not enjoy constitutional protection.

IV. THE GUILTY PROPERTY FICTION

The ancient doctrine of deodand and the idea of guilty property are fictional notions that have no place in modern forfeiture actions, and lead to unjust results. An example of this is the *Calero-Toledo v. Pearson Yacht Leasing Co.* case. In *Calero-*

68. See *United States v. Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987).

69. *Id.* at 1076-77.

70. *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989).

71. *Fear*, *supra* note 9, at 1155.

72. H.R. Rep. No. 1444, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4566.

73. *Fear*, *supra* note 9, at 1155.

Toledo, a leased pleasure yacht was seized and forfeited under the statutes of Puerto Rico after police found marijuana aboard.⁷⁴ Despite the fact that only one marijuana cigarette was found and that the owner/lessor was innocent because he could not control the lessee's activities, the yacht, valued at \$20,000, was forfeited.⁷⁵ The Court held that the appellee voluntarily entrusted the lessees with possession of the yacht and that no proof was offered that the company did all that it reasonably could to avoid having its property put to an unlawful use.⁷⁶ In his dissent, Justice Douglas pointed out that, ". . . the ancient law is founded on the fiction that the inanimate object itself is guilty of wrongdoing."⁷⁷ Justice Douglas, quite correctly, recognized that the notion of the property as being the wrongdoer is mere fiction, and is used in an attempt to circumvent Constitutional challenges.

In this case we see *in rem* forfeiture at work. Innocence of the owner is completely irrelevant, for it is not he that is the accused, but rather the yacht itself. Because of this strange doctrine, forfeiture cases are always brought, not against people, but against objects. However, inanimate objects simply cannot be guilty of culpable conduct. It is true that such items as cars, boats and land are often used as instruments of the drug trade and that through forfeiture such "tools of the trade" can, and should, be disposed of. On the other hand, where such items are not used in connection with someone's business of selling drugs and are not bought with drug proceeds, but instead are items of personal property that are used only as a means of transportation or as a residence, it is ludicrous to say that the property is guilty of wrongdoing and must therefore be forfeited.

Seizing a person's car, boat or land under civil forfeiture law, under the guise that it is the property which is at fault, is an extremely potent weapon for law enforcement. "Through this statute, [21 U.S.C. § 881] Congress has expanded the nation's war on drugs to every piece of real property involved in the narcotics trade."⁷⁸ Unlike criminal forfeiture, the property may be taken by showing merely a preponderance of evidence, (more likely than not), and is taken before any criminal proceedings are instituted, much less before any determination

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

75. *Id.*

76. *Id.* at 690.

77. *Id.* at 693.

78. *United States v. Twelve Thousand Five Hundred Eighty Five and No/100 Dollars in U.S. Currency*, 869 F.2d at 1093, 1096 (8th Cir. 1989).

of guilt has been made. In criminal forfeiture proceedings, as mentioned previously, the standard of proof is beyond a reasonable doubt, (meaning virtual certainty), and, of course, there are numerous Constitutional safeguards to protect the defendant during the course of the proceedings.⁷⁹ As one commentator has noted, civil forfeitures "have the effect of punishing crime without criminal process."⁸⁰

Other legal professionals have made similar attacks on the problems with the characterization of the forfeiture proceedings as civil, and the resulting infringement on eighth amendment rights. In 1989, top law enforcement officials in New York announced a plan to "significantly strengthen the state's civil forfeiture law."⁸¹ Norman Siegel, executive director of the New York Civil Liberties Union, expressing his opposition to the proposal and questioning the constitutionality of the plan, commented, "too often, the forfeiture laws are simply used as a form of summary punishment . . . and imposition of penalties that are vastly disproportionate to the crimes that have been committed."⁸² William J. Hughes (D-N.J.), Chairman of the House Subcommittee on Crime, expressing his doubts about civil forfeiture, was quoted as saying, "the penalty has to fit the crime. Forfeiture is an important tool, and I have some concerns when it is not balanced, not reasonable."⁸³ He also pointed out an important problem with distinguishing certain types of forfeitures as "civil," saying, "in some states the penalty for possession of marijuana is a small fine, and you would have to prove it beyond a reasonable doubt . . . [h]ere you can be fined millions by just proving probable cause. Calling this a civil proceeding is pure fiction."⁸⁴

The fiction of "guilty property" is, in the words of Blackstone, a superstition inherited from the "blind days of popury"⁸⁵ and is used to label an essentially criminal process as civil, such that the eighth amendment prohibition against disproportionate punishment may be avoided in the context of certain forfeiture proceedings, as demonstrated by *Calero-*

79. Examples of such safeguards are the fifth amendment protections against self incrimination and double jeopardy, and the sixth amendment right to counsel.

80. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 383 (1988).

81. Fox, *New Anti-Drug Drive by State Law Enforcers*, N.Y. L.J., Feb. 10, 1989, at 1, col. 5.

82. *Id.* at 2, col. 1.

83. THE NAT'L L.J., May 23, 1988, at 5, col. 1.

84. *Id.* at 7, col. 1.

85. 1 W. BLACKSTONE, COMMENTARIES *300.

Toledo. Although many courts have construed 21 U.S.C. § 881 as a civil statute, nowhere is it explicitly stated that the statute was intended as such, nor has the Supreme Court ever definitively ruled on this issue.⁸⁶ While the Supreme Court has yet to answer whether 21 U.S.C. § 881 is meant as a civil or criminal forfeiture statute, many of the nation's other courts have given their answers, asserting that the statute is civil and therefore undeserving of a proportionality analysis.

V. IS § 881 CIVIL OR CRIMINAL?

A. *One Court's Approach*

In *U.S. v. Santoro*, defendant's property, consisting of approximately 26 acres of land and valued in excess of \$100,000 was forfeited pursuant to 21 U.S.C. § 881(a)(7).⁸⁷ On four separate occasions, Mrs. Santoro sold small amounts of cocaine to an undercover officer. The government subsequently filed a forfeiture action against the defendant's real property based on the alleged criminal conduct of Mrs. Santoro. One of defendant's challenges was that 21 U.S.C. § 881(a)(7) is a criminal, rather than a civil, provision.⁸⁸ The court said that a two-step analysis was appropriate in determining whether the provision is civil or criminal. First the court must determine whether Congress indicated either expressly or impliedly a preference for one label or the other. Second, if it is decided that Congress indicated its intention to establish a civil penalty, it must be ascertained whether the statutory scheme is so punitive either in purpose or effect as to negate that intention.⁸⁹

As to the first inquiry, the court in *Santoro*, said that Congress obviously intended 21 U.S.C. § 881(a)(7) to be a civil statute. The court based this finding upon the fact that the statute expressly provides for the use of the rules of civil admiralty, as well as the use of the civil procedures of the customs law.⁹⁰ Congress chose not to prescribe in section 881 the steps to be followed in effectuating a forfeiture; instead, Congress

86. See *U.S. v. Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987) ("... [T]he Supreme Court, however, has never developed a principled explanation of the distinction between civil and criminal forfeiture. While the Court has made formalistic distinctions . . . this distinction has become difficult through application of certain constitutional safeguards to some forfeiture actions but not others").

87. *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989).

88. *Id.* at 1543.

89. *Id.*

90. *Id.* See also 21 U.S.C. § 881(b), (d).

incorporated by reference the procedures of forfeiture under an already existing body of civil forfeiture law—in this case, customs law.⁹¹ Further, some courts, such as the Fifth Circuit in *United States v. D.K.G. Appaloosas, Inc.*, point to the existence of 21 U.S.C. § 853, which is an express criminal forfeiture provision, which was added to Title 21 in 1984.⁹² The argument states that if § 881 was intended to provide for criminal forfeiture, then Congress would not have enacted § 853, specifically providing for criminal forfeiture. The *Santoro* court supported this theory and held that § 881 was civil.

Regarding the second step in the analysis as to whether the provision is criminal or civil, the court said the “clearest proof” must be shown that the effects of the statute are so punitive that the forfeiture cannot be treated as civil.⁹³ In the case of *Kennedy v. Mendoza-Martinez*, the Court listed factors which, while not dispositive, were helpful in determining whether an act of Congress is so punitive that it negates Congress’ intention that it be civil.⁹⁴ These factors included: 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.⁹⁵

The court in *Santoro* stated that although the punitive aspects of any forfeiture are self-evident, the remedial, non-punitive purposes of 21 U.S.C. § 881 were extremely strong.⁹⁶ The court felt that only two of the above mentioned criteria could really support the defendant’s contention that 21 U.S.C.

91. *United States v. D.K.G. Appaloosas, Inc.*, 866 F.2d 532, 543 (1987).

92. *Id.*

93. *Id.* at 543.

94. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). (Pursuant to section 401(j) of the Nationality Act of 1940, *Mendoza-Martinez* was ordered deported as an alien on the ground that he had lost his citizenship by remaining outside of the jurisdiction of the United States in time of war for the purpose of evading or avoiding service in the nation’s armed forces. He sued for relief claiming that section 401(j) was unconstitutional. The Court agreed, holding that section 401(j) was punitive and as such could not constitutionally stand, because it lacked the procedural safeguards which the Constitution commands.

95. *Id.* at 168-69.

96. *Santoro*, 886 F.2d at 1543.

§ 881 is a criminal statute. First of all, it does have a deterring effect and second, its operation was triggered by Mrs. Santoro's criminal conduct. However, the court found neither of these facts to be persuasive. Instead, they focused on the "remedial" aspects of the statute. The court said, "[t]hese remedial purposes include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of ill-gotten gains, stripping the drug trade of its instrumentalities, including money, and financing Government programs designed to eliminate drug-trafficking."⁹⁷ Therefore, the court concluded that in light of these broad, overriding remedial purposes, the effects of the provision were not so punitive as to negate the clear intention of Congress that 21 U.S.C. § 881 provide civil sanctions.⁹⁸

The discussion above (section II) established that civil forfeiture does indeed exact a penalty. Because it exacts a penalty, § 881, is, at least in part, penal in nature. But is § 881 more penal than remedial, such that an eighth-amendment proportionality analysis is required? The *Santoro* court, while acknowledging the punitive effects of the statute, held that the statute was, nevertheless, more remedial in nature than penal. However, the *Santoro* court was in error.

B. *The Bill of Attainder Cases*

Civil forfeiture statutes, as they are currently applied, are much more penal than remedial. "There is no bright-line test to determine whether a statute is criminal (penal) or civil (remedial) and of course, to an individual who loses his or her property through forfeiture, the loss is no less a punishment than is a criminal fine."⁹⁹ Courts have previously tried to ascertain the intent of Congress, considering Congressional intent to be the principle criterion for determining whether a particular penalty is civil or criminal. But this deference to Congress is a bit strange, as one commentator agrees, saying, "whether a particular penalty is civil or criminal in nature seems a question of legal philosophy that the Supreme Court is best equipped to address . . . it is odd, therefore, that the court would defer so

97. *Id.* at 1544.

98. For a good discussion as to how the factors set forth in *Mendoza-Martinez* apply to civil forfeiture, see Darmstadter & Mackoff, *supra* note 30, at 50. (arguing that forfeiture under section 881 involves an affirmative disability and punishment, the aims of retribution and deterrence are being promoted, and that section 881 applies to behavior that is already criminal.); *Fear*, *supra* note 9, at 1160-63.

99. Herpel, *supra* note 11, at 36.

heavily to Congress's classification of forfeiture as civil rather than criminal."¹⁰⁰

The intention of Congress, while helpful, is by no means dispositive. Congress may very well have intended § 881 to be a remedial statute, but Congress does not have the authority to circumvent the judicial process to inflict punishment, which is what happens under civil forfeiture. This principle is based on the system of checks and balances employed by our government. The system was envisioned as a protection against tyranny. "For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."¹⁰¹ With civil forfeiture Congress is overstepping its bounds and imposing punishment without the safeguards of the judicial process. Illustrative of this point, and analogous to the problems faced by civil forfeiture laws, is the prohibition on Bills of Attainder.

A Bill of Attainder, broadly speaking, is a legislative act inflicting punishment without judicial trial. Specifically, legislative acts that apply either to a named individual or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.¹⁰² In the bill of attainder cases, as in some of the civil forfeiture cases, the courts have attempted to determine whether the effect of the statutes in question was to punish.

At issue in *Cummings v. The State of Missouri*, was the constitutionality of an amendment to the Missouri Constitution of 1865, which provided that no one could engage in a number of specified professions (Cummings was a priest) unless he first swore that he had taken no part in the rebellion against the Union.¹⁰³ The Supreme Court struck down the provision as an impermissible bill of attainder. The Court said it was a legislative act which inflicted punishment on a specific group; clergymen who had taken part in the rebellion and therefore could not truthfully take the oath.¹⁰⁴ The State of Missouri argued that the provision only prescribed a qualification for holding certain offices, and practicing certain callings, and that it was

100. *Id.*

101. *United States v. Brown*, 381 U.S. 437, 443 (1965).

102. *Id.* at 448-49 (citing *United States v. Lovett*, 328 U.S. 303 (1946)).

103. *Cummings v. Missouri*, 71 U.S. 277 (4 Wall.) (1866).

104. *Id.*

therefore within the power of the state to adopt it.¹⁰⁵ The Court held, however, that such requirements have no possible relation to fitness for particular pursuits and professions. The Court said, "there can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft . . . and his fitness to teach the doctrines or administer the sacraments of his church."¹⁰⁶ The Court astutely noted that the oath was required not to ascertain whether parties were qualified for their respective callings or whether any of the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment.¹⁰⁷ The Court held that the disabilities created by the constitution of Missouri must be regarded as penalties — and constitute punishment.¹⁰⁸

In *United States v. Brown*, the respondent was convicted under § 504 of the Labor-Management Reporting and Disclosure Act of 1959, which made it a crime for one who belonged to the Communist party or who was a member of the party during the preceding five years willfully to serve as a member of the executive board of a labor organization.¹⁰⁹ The Supreme Court held the section was an unconstitutional bill of attainder.¹¹⁰ The Solicitor General argued that § 504 was not a bill of attainder because the prohibition it imposed did not constitute "punishment," urging that the statute was enacted for preventive rather than retributive reasons, and that its aim was not to punish.¹¹¹ The Court said it would be archaic to limit the definition of "punishment" to "retribution," noting that punishment serves several purposes: retributive, rehabilitative, deterrent — and preventive.¹¹² The Court said, "one of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."¹¹³

These cases vividly illustrate that Acts of Congress must be careful not to inflict punishment, for that is the province of the Judiciary. Through civil forfeiture Congress has exercised its right to designate punishable conduct in an impermissible way.

105. *Id.* at 318.

106. *Id.* at 319.

107. *Id.* at 320.

108. *Id.*

109. *United States v. Brown*, 381 U.S. 437 (1965).

110. *Id.*

111. *Id.* at 456.

112. *Id.* at 458.

113. *Id.*

There is essentially no difference between criminal and civil forfeiture, and "through the simple expedient of calling a particular forfeiture sanction 'civil,' Congress has effectively circumvented the Constitution in the application of that sanction."¹¹⁴ The effect, and aim, of civil forfeiture is to deter and to punish. In spite of the remedial purposes it may serve, the overriding result of civil forfeiture is the infliction of a penalty.

The rationale of the *Santoro* court, and others who argue that civil forfeiture is remedial in nature, would be sound were the statute confined in its application to situations where the forfeited property was clearly obtained with proceeds of ill-gotten gains or was an instrumentality of the drug trade. Unfortunately, the statute has been applied much more broadly to reach property which is not directly related to drug trafficking.¹¹⁵ This result occurs when ordinary citizens buy small quantities of drugs and subsequently forfeit their cars. The first time or casual user most likely did not purchase his or her car with the proceeds of ill-gotten gains, nor is he or she involved in drug trafficking. People can just as easily walk to the site where they will purchase the drugs. Just because they drive does not mean that their car becomes an instrumentality of the drug trade subjecting it to forfeiture.

C. *The Practical Problem of Characterizing § 881 as Civil*

The United States District Court, for the District of New Hampshire, in *U.S. v. One 1972 Datsun*, recognized this problem in the application of forfeiture statutes.¹¹⁶ The court first cited

114. Herpel, *supra* note 11, at 36.

115. A crucial distinction in this essay is made between those who are in the business of buying and selling drugs on a large scale and individuals who purchase drugs for personal consumption only. The former are referred to as "drug traffickers," a term which is used throughout this paper. This article does not attack forfeiture laws as applied to these people, but rather, it is aimed at the latter category of people, who's personal property that is subject to forfeiture is most often not substantially connected to their purchases of drugs.

116. *United States v. One 1972 Datsun Vehicle Id. No. LB 1100355950*, 378 F. Supp. 1200 (D.N.H. 1974). (The claimant's Datsun was seized in connection with his arrest for the sale of Lysergic Acid Diethylamide (LSD, a narcotic drug). The Government filed a Complaint for Forfeiture claiming that the car was used to facilitate the illegal sale of a controlled drug and that the car should, therefore, be forfeited to the United States under 21 U.S.C. § 881. The court did not allow forfeiture of the vehicle because it was not substantially connected to the commission of the underlying criminal activity.)

cases which established the principle that a vehicle, in order to be forfeited, must have some substantial connection to, or be instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent.¹¹⁷ The court said it was appropriate in every forfeiture to ask whether the use of the car as established by the record is so connected with the allegedly illicit activity as to subject the car to forfeiture.¹¹⁸

The *Datsun* court also said that forfeiture statutes were intended only to penalize those people significantly involved in a criminal enterprise.¹¹⁹ The court stated, “. . . one of the best ways to strike at commercialized crime is through the pocket-books of the criminals who engage in it. Vessels, vehicles, and aircraft may be termed the operating tools of [drug] peddlers, and often represent major capital investments . . . [f]orfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.”¹²⁰ The court relied on this analysis in finding that:

a purpose of vehicle forfeiture in the enforcement of narcotics laws is to prevent the flow of narcotics by depriving narcotics peddlers of the operating tools of their trade. That purpose will not be greatly furthered by forfeiture in this case. The Government has not alleged that claimant uses the Datsun as part of the modus operandi of an ongoing criminal narcotics enterprise, nor has it alleged that the Datsun has been specifically adapted for illicit narcotics activity. It is not clear that forfeiture of the vehicle will help to prevent the illegal sale of narcotics any more than forfeiture of any number of claimant's personal effects which facilitate his ability to deal with such commonplace and everyday problems as transportation.¹²¹

The court concluded that “it is important to require that derivative contraband be substantially and instrumentally connected with illegal behavior before it is subject to forfeiture. Otherwise, the Government, by electing to proceed against

117. *Id.* at 1203. The court noted two cases which established that an automobile used only for the personal convenience of the owner as transportation to the site of the illicit operation is not subject to seizure. *See also* U.S. v. Lane Motor Co., 344 U.S. 630 (1953) and United States v. Plymouth Coupe, 182 F.2d 180 (3rd Cir. 1950).

118. *Datsun*, citing *Simpson v. U.S.*, 272 F.2d at 230 (9th Cir. 1959).

119. United States v. One 1972 Datsun, citing U.S. v. U.S. Coin and Currency, 410 U.S. at 721-22 (1971).

120. 1950 U.S. CODE CONG. & ADMIN. NEWS, at 2953-54.

121. 378 F. Supp. at 1205.

suspects via the forfeiture route, could deprive citizens of the constitutionally-mandated safeguards which surround the criminal process."¹²²

VI. QUASI-CRIMINAL PROCEEDINGS

Unfortunately, the worries of the court in *Datsun* have become extremely real. Many citizens subject to forfeiture proceedings have not been given full Constitutional protection because of the "civil" label given to the proceedings. Some claimants have tried to argue that such forfeitures, if not viewed as "criminal" by the court, should be viewed as "quasi-criminal" because although it is a civil proceeding, clearly the object of a civil forfeiture proceeding, like its criminal counterpart, is to penalize for the commission of an offense against the law.¹²³

Courts often cite *Boyd v. United States*¹²⁴ in support of the proposition that all forfeitures are "criminal" in nature. This famous case stands for the principle that a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case."¹²⁵ The Court said that, because

suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this 'quasi-criminal' nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.¹²⁶

Although the decision in *Boyd* has not been extended beyond cases involving the fourth and fifth amendments,¹²⁷ the Court in *Boyd* implied that all constitutional safeguards should be applicable to forfeiture:

122. *Id.* at 1206.

123. *Boyd v. United States*, 116 U.S. 616 (1886); *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965).

124. *Boyd v. United States*, 116 U.S. 616 (1886).

125. *Id.* at 616.

126. *Id.* at 634-35.

127. *United States v. Regan* 232 U.S. 37 (1914) (According to the Court, *Boyd* is limited in scope to the fifth amendment's guarantee against compulsory self-incrimination). In *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965), the Court extended *Boyd* to the fourth amendment.

Although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defense; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense.¹²⁸

Nearly eighty years after the *Boyd* decision, the Supreme Court again addressed the argument that forfeiture proceedings are quasi-criminal in character and are directed toward penalizing a person for committing an offense against the law. In *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, a vehicle was forfeited after two law enforcement officials from the Pennsylvania Liquor Control Board stopped the car after observing that the car was quite low in the rear.¹²⁹ The officers searched the car and found in the trunk 31 cases of liquor not bearing Pennsylvania tax seals. The car and the liquor were subsequently seized and the driver was charged with violation of Pennsylvania law.¹³⁰ The Pennsylvania Court deemed this proceeding as civil in nature. However, the Supreme Court, relying on *Boyd*, said this was a quasi-criminal proceeding. Mr. Justice Goldberg, who delivered the Court's opinion, pointed out that a forfeiture proceeding is quasi-criminal in character because its object, like a criminal proceeding, is to penalize a person for the commission of an offense against the law.¹³¹ In this case, if the defendant had been convicted of any of the charges against him, the most he could have been fined would have been \$500, yet the car which he forfeited, regardless of his guilt or innocence, was valued at \$1,000.

In *United States v. United States Coin & Currency*,¹³² the defendant had been convicted of failing to register as a gambler and to pay the related gambling tax required by federal law.¹³³ Forfeiture proceedings were instituted to obtain \$8,674 which defendant had in his possession at the time of his arrest.¹³⁴ The Court, responding to the government's charac-

128. 116 U.S. 616, 638 (1886).

129. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965).

130. *Id.*

131. *Id.* at 698.

132. *United States v. United States Coin & Currency*, 401 U.S. 715 (1971).

133. *Id.* at 716 (Defendant was convicted under 26 U.S.C. §§ 4411, 4412, 4901).

134. *Id.*

terization that this was a civil proceeding wrote, "[f]rom the relevant constitutional standpoint there is no difference between a man who 'forfeits' \$8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of \$8,674 as a result of the same course of conduct."¹³⁵ The Court reasoned that the privilege against self-incrimination under the fifth amendment was equally applicable in both situations. The government contended that the guilt or innocence of the owner of the money was irrelevant. In this case we again see the bizarre notion that the property itself is guilty. Indeed it was the money in this case which was the formal respondent and the government's complaint charged the money with the commission of an actionable wrong.¹³⁶ The Court too, recognized that it was fiction to believe that inanimate objects themselves can be guilty of wrongdoing.¹³⁷ The Court ultimately held that the fifth amendment privilege could properly be invoked in this case.¹³⁸ The Court said that the forfeiture statutes, when viewed in their entirety, are intended to penalize only persons significantly involved in a criminal enterprise.¹³⁹

Unfortunately the Supreme Court has been reluctant to give full scope to *Boyd*.¹⁴⁰ The *Boyd* decision has remained limited to questions involving the fourth and fifth amendments. However, this reasoning can, and should, be applied to eighth amendment issues as well. If forfeitures such as the ones previously discussed are "criminal" enough in nature that they are deserving of scrutiny and protection under the fourth and fifth amendments, they should get eighth amendment scrutiny and protection as well.

The characterization of certain forfeiture proceedings as "quasi-criminal" is thus troublesome. It has led to adjudication of forfeiture cases on an ad hoc basis. The Court should explain why it applies some Constitutional provisions, and not others. If the Constitution does not create a hierarchy among

135. *Id.* at 718.

136. *Id.* at 720, n. 5 ("The libel charged that '[o]n one or more of the aforementioned dates . . . aforesaid respondents [i.e., the money] had been used and were intended to be used in violation of the Internal Revenue Laws of the United States of America . . . WHEREFORE FRANK E. McDONALD, United States Attorney for the Northern District of Illinois . . . prays . . . That aforesaid respondents be adjudged and decreed forfeited to the UNITED STATES OF AMERICA.' App. 5-6").

137. *Id.* at 719.

138. *Id.* at 722.

139. *Id.* at 721-22.

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

the various rights provided to a criminal defendant, why should the courts?¹⁴¹ During criminal proceedings the court is not allowed to pick and choose which constitutional provisions it will apply to each case; every defendant is entitled to the application of every Constitutional provision.

If courts such as those in *Boyd* and *Plymouth Sedan*, determine that a forfeiture proceeding is criminal in nature, then the defendant should be awarded the protection of all Constitutional rights due a criminal defendant.¹⁴² On the other hand, if a court determines that the forfeiture proceeding is civil then that court is, as one author so succinctly put it, "engaging in unjustifiable activism by awarding such rights to the civil claimants."¹⁴³

Clearly, forfeiture is a penalty; it is a penalty imposed on a person based upon a showing of guilt using the lowest standard of proof available. Should the person be indicted and go to trial, he will be prosecuted using criminal proceedings and will be subject to criminal sanctions if found guilty. It just does not make sense to say that seizing a car is "civil" in nature, but everything that happens afterwards is "criminal" in nature.

VII. THE RELUCTANCE TO APPLY THE DISPROPORTIONALITY ARGUMENT

The classification of certain forfeitures as civil has extremely important ramifications. Exempting such proceedings from the eighth amendment results in penalties which, in many cases, are disproportionate to the offense committed. In many forfeiture cases the defendants have asserted that the forfeiture of their car, boat or other property was violative of the eighth amendment. However, courts have been able to circumvent this problem by simply saying that the forfeiture is civil and therefore, the eighth amendment does not apply.¹⁴⁴

A few courts have admitted the viability of the eighth amendment argument, but hold that regardless of whether it is applicable or not, the seizing of a car, boat, even land, is simply not "harsh enough" to invoke the eighth amendment privilege.¹⁴⁵ Indeed, one court said, "we find the proportionality

141. See *Fear*, *supra* note 9, at 1160.

142. *Id.*

143. *Id.*

144. See cases discussed *supra* at note 52.

145. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-87 (1974). (Forfeiture of \$20,000 yacht based on discovery of single marijuana cigarette on board under Puerto Rican Statute modeled after 21 U.S.C. § 881); *United States v. 1985 BMW 635 CSI*, 677 F. Supp. 1039 (C.D.

between the value of the forfeited property and the severity of the injury inflicted by its use to be irrelevant."¹⁴⁶ One case illustrative of this approach is *United States v. 1985 BMW*.¹⁴⁷ The defendant admitted to transporting 6.23 grams of cocaine and 2.78 grams of marijuana in her vehicle, in violation of 21 U.S.C. § 881(a)(4). This statute, as mentioned earlier, provides for forfeiture of property, including vehicles, "which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances."¹⁴⁸

The defendant argued that the court should impose a monetary penalty in lieu of forfeiture due to the small amounts of drugs involved and the high value of the automobile.¹⁴⁹ The court said there was no statutory authority for such an alternative.¹⁵⁰ More importantly, said the court, there is ample authority holding that the amount of controlled substances involved is not relevant and that even a very small amount will not prevent the automobile from being seized.¹⁵¹ This notion was established firmly in *United States v. One 1976 Porsche 911S*, which upheld the forfeiture of an expensive vehicle which was transporting only 226 milligrams of marijuana. The court cited many cases holding that a vehicle is subject to forfeiture no matter how small the quantity of contraband.¹⁵²

Cal. 1987); *United States v. One 1982 28' Int'l Vessel*, 741 F.2d 1319 (11th Cir. 1984); *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979); *U.S. v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978); *United States v. One Clipper Bow Ketch NISKU*, 548 F.2d 8, 11 (1st Cir. 1977).

146. *United States v. Twelve Thousand Five Hundred Eighty Five and No/100 (\$12,585.00) in U.S. Currency*, 869 F.2d 1093 (8th Cir. 1989). (The court said there was no merit in any *de minimis* argument that the sale of a relatively small amount of cocaine does not warrant forfeiture of the house. All that is required to warrant forfeiture is a sufficient connection between the house and illegal activity. The so-called nexus test is not a measure of the amount of drugs or drug trafficking, therefore, proportionality is irrelevant.)

147. *United States v. 1985 BMW*, 677 F. Supp. 1039 (C.D. Cal. 1987).

148. 21 U.S.C. § 881(a)(4).

149. *BMW*, at 1040. The amount of drugs was 6.23 grams of cocaine and 2.78 grams of concentrated cannabis. The claimant asserted that the value of the automobile was approximately \$35,000.

150. *Id.*

151. *BMW*, 677 F. Supp. at 1039.

152. *United States v. One 1976 Porsche 911S, Etc.*, 670 F.2d 810 (9th Cir. 1979). (The courts have uniformly held that a vehicle is subject to forfeiture no matter how small the quantity of contraband found. *E.g.*, *United States v. One 1957 Oldsmobile*, 256 F.2d 931, 933 (5th Cir. 1958); *United States v. One 1971 Porsche Coupe Auto*, 364 F. Supp. 745, 748-49 (E.D. Pa. 1973)).

A more recent case solidifying this precept is *United States v. One 1986 Mercedes Benz*.¹⁵³ Under New York law, the possession of less than 25 grams of marijuana has been decriminalized.¹⁵⁴ Nevertheless, the court upheld the forfeiture of a Mercedes, although all that was found in the car were the remains of one marijuana cigarette.¹⁵⁵ This result is the same as in the *Plymouth* case, where the value of the defendant's forfeited car was double the maximum amount he would have been fined had he been subsequently convicted. Regardless of what this type of proceeding is labeled, such results are inequitable because they are disproportionate.

Defendant's second argument in the *BMW* case was that imposing forfeiture would violate the eighth amendment's ban on cruel and unusual punishment. It is not surprising that the court avoided this by saying that this statute provides for a forfeiture proceeding that is civil and remedial as opposed to criminal and punitive, and thus an eighth amendment analysis is not required. The court said that even if an eighth amendment argument was appropriate, there would be no basis to deny forfeiture. The applicable test, the court said, was the one applied by the Ninth Circuit, which is whether "the interest ordered forfeited is . . . grossly disproportionate to the offense committed . . .'"¹⁵⁶ The court found that forfeiting a \$35,000 automobile which was used to transport 6.23 grams of cocaine and 2.78 grams of marijuana was not "grossly disproportionate to the offense committed.'"¹⁵⁷

VIII. ADDITIONAL PROBLEMS WITH CURRENT FORFEITURE LAW

This essay addresses the fundamental problem with current civil forfeiture laws, which is that many forfeitures result in a loss of property that is disproportionate to the offense. There are some additional problems with forfeiture laws worth noting. This section will briefly address a few other concerns with civil forfeiture.

153. *United States v. One 1986 Mercedes Benz*, 846 F.2d 2 (2nd Cir. 1988).

154. N.Y. PENAL LAW §§ 221.05, 221.10 (McKinney 1982).

155. 846 F.2d at 4-5.

156. 677 F. Supp. at 1042, quoting *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987).

157. 677 F. Supp. at 1040. (The court stated, "[i]t can hardly be said that such a forfeiture amounts to either 'cruel' or 'unusual' punishments.")

A. Broadened Scope

As mentioned before, forfeiture has been available as a tool for law enforcement officials for a long time. When legislation enabling civil forfeitures was first enacted it was primarily aimed at drug traffickers.¹⁵⁸ Congress' purpose in enacting § 881 was to take the profit out of the drug trade.¹⁵⁹ Due to the sweeping language of most statutes, however, the scope of legislation has broadened to encompass individuals who certainly do not derive their livelihood from the drug trade and "courts have been fairly unanimous in concluding that they should follow the broad language of the statute even in cases involving personal users."¹⁶⁰ As Florida Circuit Judge Lance Andrews puts it, "[I]t's really gotten a little ridiculous . . . [t]he whole intent was to use this thing against organized crime at all levels - not against people who can't chew gum and walk at the same time."¹⁶¹

A primary reason for expanding forfeiture statutes to reach beyond drug traffickers may be the recognition by officials that the most effective way to fight the war on drugs is to curb demand, in addition to trying to stop the supply. In the 1980's the so-called "zero tolerance program" was instituted as an all out attack on the demand side of the drug industry.¹⁶² Prior to this, the government had focused its efforts on the supply side. Fighting the demand for drugs is extremely important if the war on drugs is to be won. However, if the government focuses the majority of its energy on forfeiting private property that is not instrumental in furthering the drug trade, (i.e. property used only as a means of transportation) it not only decreases the amount of resources available to fight drug sellers and lessens the likelihood that the dealers will get caught,

158. See *Fear, supra* note 9, notes 35-40 and accompanying text.

159. 1970 U.S. CODE CONG. & ADMIN. NEWS 4624-25. Revisions to the Comprehensive Drug Abuse and Control Act of 1984. See *United States v. One Clipper Bow Ketch NISKU*, 548 F.2d at 12 (1st Cir. 1977). ("While it is true that Congress' expressed concern was with trafficking, this does not preclude the possibility that other conduct was also intended to fall within the statutes.") The court also said that it could not be denied that drug trafficking was at the core of the conduct at which the forfeiture statutes are directed, and the justification for imposing forfeiture in cases involving solely possession of contraband for personal use is far less apparent. However, the court did not feel it had discretion in the matter as "the uniform course of judicial decisions indicates that it is not the role of the courts to mitigate the harshness of these statutes."

160. *Fear, supra* note 9, at 1178.

161. Strasser, *supra* note 10, at 26, col. 3.

162. *Fear, supra* note 9, at 1151.

but it means that the statute is not serving the remedial purposes for which it was intended.

B. *Innocence is not a Defense*

One criticism of civil forfeiture is that many times the true owner of the forfeited property is innocent of any wrongdoing. Examples of this include lessors of boats, and friends or parents of children borrowing cars. However, the guilt or innocence of the owner of the property is irrelevant, because, the traditional rationale has been that the property itself, not the owner, is guilty. "Innocence [of the claimant,] in and of itself, is an insufficient defense to forfeiture"¹⁶³ and "has almost uniformly been rejected."¹⁶⁴ It should be remembered, though, that sometimes in the law, traditional rationales must give way in order that equity and justice be achieved.

C. *Law Enforcement Problems*

A growing criticism of the forfeiture policy is that it provides incentives for law enforcement personnel to focus their energies on asset forfeiture, to the detriment of efforts spent fighting other types of crime. Such a practice results in a high number of arrests and a large amount of seized assets, but fails to address the crucial issue of drug use itself. One newspaper said, "[l]aw enforcement agencies can become so dependent on the millions of dollars in cash and other assets they get forfeited from drug dealers that the seizures become more important than fighting drug abuse"¹⁶⁵ Another newspaper said, "[f]orfeiture is a useful sanction, [b]ut it could easily be preserved without causing dollar signs to dance before the eyes of local police."¹⁶⁶

In Florida, Circuit Judge Lance Andrews says, "[w]e don't do big drug cases down here . . . [w]hy spend time building a big wiretap case and following people around when you can run out on the street and grab 20 cars in a night?"¹⁶⁷ Not only does a high number of forfeitures look good for law enforcement agencies, but when the agencies themselves get to keep the assets they seize, there is substantial incentive in pursuing

163. *United States v. One (1) 1957 Rockwell Acro Commander 680 Aircraft*, 671 F.2d 414, 417 (10th Cir. 1982).

164. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 684 (1974).

165. *U.S.A. Today*, April 11, 1990, at 3A, col. 1.

166. *Anderson*, *supra* note 4.

167. *Strasser*, *supra* note 10, at 6, col. 3.

forfeitures. Unfortunately this may result in fewer resources being devoted to other types of crime, which need just as much attention as the drug problem. Arthur Nehrbass, the chief of the Dade County, Florida Police Department's organized crime unit, realized this potential danger and warned, "there's nothing that can destroy a forfeiture statute faster than the legislature's opinion that it's made officers bounty hunters."¹⁶⁸

One commentator has noted, "although there is superficial justice in rewarding local initiative, the law, perversely, makes police departments financially dependent on the drug dealing they are supposed to curtail."¹⁶⁹ Further, since law enforcement personnel do not have the resources to arrest every violator, there is the possibility of selective enforcement. "[I]t certainly could cloud the judgment of local police, leading them to investigate suspects based on their assets rather than their threat to the community."¹⁷⁰ "An increase in police discretion results in the police having more power to make unreviewable decisions. Policy decisions should be made by judges and legislators rather than by individual officers."¹⁷¹

IX. CONCLUSION

While criminal forfeiture is increasingly being subjected to eighth amendment scrutiny,¹⁷² civil forfeiture has survived eighth amendment challenge. This essay has attempted to demonstrate that the basis for this immunity, the guilty property fiction, is merely a relic of a bygone era, and is solely a mechanism used to accomplish in a civil proceeding, what may not be accomplished in a criminal one.

As applied to drug traffickers and drug rings, forfeiture should be used very aggressively to deprive these people of any property they have obtained through their business of peddling illicit substances. In addition to acting as a deterrent, forfeiture used in this way serves important remedial purposes. Stripping drug dealers of the instruments used in the drug trade will cer-

168. *Id.* at 27, col. 1. (The article also listed some specific concerns in this area: the lower burden of proof required in a civil case, combined with the benefits of forfeiture, can lull law enforcement into lax investigative standards on criminal cases, agents can be sidetracked into profitable forfeiture actions rather than pursuing convictions, informants can be critically compromised if they have testified, agencies can become more reluctant to share information that may now have an actual monetary value).

169. Anderson, *supra* note 4.

170. *Id.*

171. *Fear*, *supra* note 9, at 1179.

172. *Controversial*, *supra* note 50, at 5, col. 3.

tainly help prevent such items from being used in the future. This rationale justifies forfeiture of equipment used to manufacture drugs, property where drugs are processed and stored, any means of transportation, and money. This was the original purpose of forfeiture statutes and should not be curtailed in any way. However, in certain instances the policy must be reformed where it exceeds the bounds of fairness.

Consider this hypothetical case. On his lunch hour, a young executive drives, in his BMW, to purchase 5 grams of marijuana. A policeman subsequently pulls him over; discovers the drugs, and his car, valued at over \$50,000, is forfeited. The man who sold the young executive drugs drives a Mercedes, which he purchased using the proceeds from his drug-related activities. He has been the major supplier of drugs in the area for two years. When he is caught, he too, will forfeit his car. In the former case, the forfeiture is not warranted, in the latter, it is. Assume that both men were convicted. The maximum fine the young executive would pay under criminal law is \$2,000, yet he lost property valued at twenty-five times that amount! In the case of the drug dealer, however, he would have lost his car anyway because it was purchased with illegally obtained "drug money," and would have been forfeited under criminal statutes. It is precisely this type of scenario which calls for a proportionality analysis.

The two offenders are vastly different, yet they both suffer the same penalty. Where an individual's only connection to drugs is through personal consumption, forfeiture of property does not serve any compelling remedial interest. The interests truly being served are those of deterrence and retribution. Such forfeitures are criminal punishment, they have been characterized as "quasi-criminal" by this nation's highest court, and, accordingly, should receive the full protection of the Constitution.¹⁷³

173. Darmstadter and Mackoff, *supra* note 30, at 52 ("regarding cases where the only connection between the owner of the vehicle and drugs is that of personal consumption . . ." In these cases, property taken is generally a conveyance that has been used to transport or conceal small amounts of drugs. The forfeiture of such property serves no purpose other than deterrence and retribution. Seizure of an expensive automobile . . . serves no remedial purpose, and is far greater than any criminal sanction that would be imposed. In contrast with the case of the dealer in controlled substances, it is a simple matter to conceive of less burdensome alternatives to forfeiture of a possessor's property. Confiscation of such property must be regarded as criminal punishment and should require the full constitutional protection associated with such a proceeding.")

Over one hundred years ago the Supreme Court said, "the character of a sanction imposed as punishment is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."¹⁷⁴ Now, one hundred years later the Supreme Court has acknowledged that, "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only also serving either retributive or deterrent purposes, is punishment."¹⁷⁵ In spite of the asserted remedial benefits of forfeitures, the overriding purpose and effect of civil forfeitures is deterrence and punishment, regardless of the form in which they are executed. Where such forfeitures result in disproportionate punishment, the effect is an intrusion on a Constitutionally protected right. As one court put it, "[t]he eighth amendment does not provide a bright line separating punishment that is permissible from that which is not. But a court may not turn its back on a constitutional constraint simply because it is difficult to apply."¹⁷⁶

Certain forfeitures offend the common sense notion of fairness, as is the case when a \$50,000 car is forfeited upon a finding of a minuscule amount of drugs or when a 2.5 million dollar yacht is seized upon a finding of less than one-tenth of an ounce of marijuana.¹⁷⁷ Fair play and equity can be achieved under civil forfeiture if forfeitures are not allowed that will result in the kind of gross disproportionality described above.

The proposed amendment to § 881 would alleviate the problem of disproportionate forfeitures, in certain cases. Before property is forfeited under § 881, a myriad of factors must be considered: what quantity of drugs is involved, the past record of the offender, the value of the property forfeited, the connection between the property and the drug trade and whether the individual is a drug trafficker, or habitual seller of drugs, or a citizen buying drugs for personal consumption. Where the quantity of drugs is large, the person has been convicted for previous drug offenses, and the property is substantially related to the "drug business," or has been purchased with drug money, the law would require forfeiture. Where, however, the quantity of drugs is small, the person has no prior convictions for drug-related offenses and the property is not directly connected to the drug business, but is merely a form of transportation, forfeiture should not be allowed. Of course,

174. *United States v. Chouteau*, 102 U.S. 603, 611 (1881).

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

176. *United States v. Busher*, 817 F.2d 1416 (9th Cir. 1987).

177. *Luxury Yacht is Seized with Bit of Marijuana*, N.Y. Times, May 8, 1988, at 16, col. 6.

many cases will fall within the "gray" area in between these extremes. When someone regularly purchases small quantities of drugs from his or her home, the home may be said to be directly related to the drug business, but buying a few grams of marijuana now and then for personal use does not warrant the forfeiture of a person's home.

This article cannot establish an exact proportionality scale to be applied in all forfeiture cases. However, it is possible to determine that a certain forfeiture is disproportionate in light of the surrounding circumstances. Many people would agree, using nothing more than common sense, that many of the forfeitures discussed in this essay are disproportionate. Legislatures must enact civil forfeiture laws which provide guidelines for courts to follow in determining whether a forfeiture is disproportionate.

Such a system would be similar to the sentencing guidelines set up for criminal cases. For a given quantity of drugs the statute would specify, in terms of dollars, a minimum and maximum amount of property which could be forfeited. This system would give the court a range to work with in deciding individual cases. The courts would then look at the other relevant factors and would decide if a given forfeiture is disproportionate.

In 1988, Milton Friedman wrote a letter to drug czar William Bennett, warning about the threat to freedom posed by proposals to expand the role of the criminal justice system and the military in the war on drugs.¹⁷⁸ One author concluded that, "through their impact on property rights, the drug forfeiture laws have already eroded fundamental freedoms. The fact that this has occurred so easily, with barely a whimper of protest from the courts and virtually no opposition from thoughtful commentators, gives real credence to Friedman's warnings about where the war on drugs may take us."¹⁷⁹

This essay challenges civil forfeiture by arguing that not only is it based on a fictional doctrine and fundamentally unfair, but that civil forfeiture is an unwarranted infringement on the property rights of private citizens and an impermissible erosion of the eighth amendment. This essay attempts to limit civil forfeiture by providing a practical amendment to § 881.¹⁸⁰

178. Herpel, *supra* note 11, at 35.

179. *Id.*

180. This Article was completed before *Harmelin v. Michigan*, 59 U.S.L.W. 4839 (U.S. June 23, 1991), was handed down. *Harmelin* casts some doubt on the continuing vitality of *Solem v. Helm*, 463 U.S. 277 (1983), a case on which the author relies on pp. 856, 860-61 *supra*.

