

2000

Can Anyone Stop Big Brother? New York's Drunk Driving Laws Do Not Pass the Constitutional Test

Michael J. Langer

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Langer, Michael J. (2000) "Can Anyone Stop Big Brother? New York's Drunk Driving Laws Do Not Pass the Constitutional Test," *Hofstra Law Review*: Vol. 28: Iss. 4, Article 9.
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol28/iss4/9>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

NOTE

CAN ANYONE STOP BIG BROTHER? NEW YORK'S DRUNK DRIVING LAWS DO NOT PASS THE CONSTITUTIONAL TEST

I. INTRODUCTION

At midnight on February 22, 1999, New York City implemented a new policy to seize cars from individuals arrested for drunk driving offenses.¹ Nassau County² followed its New York City counterpart and implemented its own and almost identical policy the next day.³ In both jurisdictions, the vehicles seized would be subject to forfeiture.⁴ This new police action has invoked existing law, reinterpreted to combat the high rate of drunk driving offenses.⁵ Yet it is questionable whether such action succeeds in overcoming the Constitutional framers' hurdles created to protect individual liberty from the overreaching arms of government. As the United States Supreme Court so eloquently held:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they

1. See Dan Morrison, *DWI Car Seizures to Start*, NEWSDAY (Queens), Feb. 21, 1999, at A37.

2. Nassau County is a jurisdiction within New York. It is on Long Island, just outside of New York City.

3. See Al Baker & Barbara J. Durkin, *DWI War Nets 4 Cars/Criticism Leveled as Nassau Starts Get-Tough Policy on Drunk Drivers*, NEWSDAY (Nassau), Feb. 25, 1999, at A5.

4. See Al Baker, *Seize and Desist: Nassau to Impound Most Cars After Arrest for DWI*, NEWSDAY (Nassau), Feb. 24, 1999, at A3. Seizure of the vehicle would take place upon arrest and then the forfeiture proceedings would commence shortly thereafter. See *id.*

5. See N.Y. CITY ADMIN. CODE § 14-140 (1999) (describing the appointment, duties, and security functions of the property clerk); NASSAU COUNTY, N.Y., ADMIN. CODE § 8-7.0 (1966) (describing the functions of the property clerk). These laws have been on the books for a number of years. The government simply applied them to the offense of driving while intoxicated ("DWT").

were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.⁶

This new policy of forfeiture, while a commendable effort to deter people from driving drunk, has serious Constitutional implications. However, since this is such a new issue, there has only been one case that has had the opportunity to consider it.⁷ Interestingly enough, the First Department of the Appellate Division of New York upheld the new policy, holding that it withstands Constitutional muster.⁸ This opinion, as will be seen throughout this Note, is riddled with flaws. There have been no other challenges thus far.

Concededly, there is a strong policy argument in favor of seizure and/or forfeiture. Drunk driving is a serious social problem which needs law to intervene and implement a workable solution. Yet, the current forfeiture policy effectively lets the police seize a defendant's car upon arrest. The defendant cannot get the car back until there is a disposition in the criminal proceeding. The defendant is thus deprived of his vehicle from the moment of arrest, despite not being convicted of any crime. As will be seen throughout this Note, allowing the government to intrude in this fashion violates specific Constitutional protections.

Part II commences with a brief examination of the history of forfeiture generally, including the New York forfeiture statutes in question. It also briefly examines *Grinberg v. Safir*,⁹ the only New York case in which a court has rendered a decision on the issue of the forfeiture of vehicles subsequent to a drunk driving arrest. Parts III, IV, and V, focus on three Constitutional provisions and their application to the statutes—due process,¹⁰ excessive fines,¹¹ and double jeopardy,¹² respectively. Each section includes an analysis of the leading cases on each issue. They also incorporate an analysis of *Grinberg* in light of the leading cases.¹³ Serious doubt is raised as to the validity of the *Grinberg* decision.

6. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnotes omitted).

7. *See Grinberg v. Safir*, 694 N.Y.S.2d 316 (Sup. Ct. 1999), *aff'd*, 698 N.Y.S.2d 218 (App. Div. 1999).

8. *See Grinberg*, 698 N.Y.S.2d at 219.

9. 694 N.Y.S.2d 316.

10. *See* U.S. CONST. amend. XIV.

11. *See* U.S. CONST. amend. VIII.

12. *See* U.S. CONST. amend. V.

13. Part V does not provide an analysis of *Grinberg* because Mr. Grinberg did not challenge the law on double jeopardy grounds. *See Grinberg*, 694 N.Y.S.2d at 322. Therefore, the *Grinberg*

II. A BRIEF BACKGROUND

A. History of Forfeiture

Forfeiture laws have been applied throughout the centuries.¹⁴ Their original form and derivation appears to come from the Bible, in the Book of Exodus: "And if an ox gore a man or a woman, that they die, the ox shall be surely stoned, and its flesh shall not be eaten; but the owner of the ox shall be quit."¹⁵ The "stoned ox" is the analog of today's forfeited property. Actions against non-human transgressors were treated as crimes against the community as a whole, and the community was considered the "common executioner."¹⁶ Therefore, the public needed to participate in the act of eradication as a demonstration of consciously and effectively restoring the order that had been disturbed.¹⁷

This form of punishment survived the ancient times and was known in early English law as a "deodand."¹⁸ "The word 'deodand' derives from the Latin phrase 'deo dandum,' which literally means "'given to God.'"¹⁹ Early cases adjudged certain inanimate objects that caused deaths to be deodands.²⁰ "Thus, for example, a boat that capsized, causing a fisherman to die, was beached, cursed, and allowed to rot, and a horse that carried a man over a cliff or into water, drowning him, was forfeited."²¹ The concept of finding objects guilty was adopted in the United States in early Supreme Court cases, ensuring that the tradition would endure.²²

court did not make anything other than a conclusory double jeopardy analysis and did not base its holding on double jeopardy principles. *See id.*

14. For a discussion on the history of forfeiture, see Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1, 18-31 (1999).

15. Exodus 21:28. The word "quit," when used as an adjective, means "released from obligation, charge, or penalty." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1867 (1993). Thus, the ox responsible for the goring was forfeited, and its owner subject to no other penalty.

16. *See* Berman, *supra* note 14, at 24.

17. *See id.*

18. *Id.* at 25.

19. *Id.*

20. *See id.* at 26. This included trees, ships, boats, carts, horses, oxen, and mill wheels. *See id.*

21. *Id.* (citation omitted).

22. *See id.* at 31.

B. The Forfeiture Statutes

Two statutes that are currently being utilized to implement the drunk driving vehicle forfeitures are introduced in this section. The first is section 14-140 of the New York City Administrative Code ("NYCAC"),²³ and the second is its Nassau County counterpart, section 8-7.0 of the Nassau County Administrative Code ("NCAC").²⁴ Both laws authorize the property clerk in each respective jurisdiction to retain the vehicle, and in the proper circumstances, to commence an action to forfeit such vehicle.²⁵

For example, section 14-140(4)(b) states that "all property . . . suspected of having been used as a means of committing crime or employed in aid or furtherance of crime . . . [shall come] into the custody of and [be] kept by the property clerk."²⁶ This section applies to property taken from the "person or possession" of a prisoner.²⁷ Arguably, an individual's car is within his possession when he is driving it, and therefore, is subject to this provision. Section 14-140(4)(e)(2) further states that when "property . . . has been used as a means of committing crime or employed in aid or in furtherance of crime . . . any such property may be used or converted to use for the purpose of the [police] department or any city, state or federal agency."²⁸ This was precisely the statute that gave the New York City police department the authorization to seize Pavel Grinberg's 1988 Acura.²⁹

The Nassau County statute is very similar. It provides that the property clerk may take charge of all property "[t]aken from the person of a prisoner."³⁰ It also allows the county to commence a civil forfeiture action when the property is the instrumentality of a misdemeanor crime.³¹ Under New York law, a first time conviction for driving while

23. See N.Y. CITY ADMIN. CODE § 14-140 (1999).

24. See NASSAU COUNTY, N.Y., ADMIN. CODE § 8-7.0(b)(2) (1966).

25. See N.Y. CITY ADMIN. CODE § 14-140; NASSAU COUNTY ADMIN. L. § 8-7.0.

26. N.Y. CITY ADMIN. CODE § 14-140(4)(b).

27. *Id.*

28. *Id.* § 14-140(4)(e)(2).

29. See *Grinberg v. Safir*, 694 N.Y.S.2d 316, 319-20 (Sup. Ct. 1999), *aff'd*, 698 N.Y.S.2d 218 (App. Div. 1999).

30. NASSAU COUNTY, N.Y., ADMIN. CODE § 8-7.0(b)(2).

31. See *id.* § 8-7.0(g)(2)-(3). Instrumentality of a crime is defined as "any property, other than real property . . . whose use contributes directly and materially to the commission of any offense." *Id.* § 8-7.0(g)(1)(d).

intoxicated³² ("DWT") is a misdemeanor,³³ while subsequent convictions are felonies.³⁴

C. *The Grinberg Decision*

In *Grinberg v. Safir*,³⁵ Pavel Grinberg's car was seized at the time of his drunk driving arrest.³⁶ Subsequently, he brought a mandamus proceeding³⁷ to compel the police commissioner of the City of New York, Howard Safir, and the property clerk, to return his car to him.³⁸

The court in *Grinberg* held that the New York City forfeiture provision did not violate any constitutional safeguards.³⁹ It held specifically that, *inter alia*, there was no violation of the Eighth Amendment's Excessive Fines Clause nor of the Fourteenth Amendment's Due Process Clause.⁴⁰ However, the court did not make anything other than a conclusory double jeopardy analysis because Mr. Grinberg did not challenge the law on such grounds.⁴¹ As will be seen in each respective individual section, both the due process and excessive fines analyses are suspect.

III. DUE PROCESS—FOURTEENTH AMENDMENT CHALLENGE

A. *Possibility of Pre-Deprivation Hearings*

The first part of the analysis concerns due process implications. The Fourteenth Amendment of the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property,

32. "Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person's blood . . . , breath, urine, or saliva . . ." N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1996).

33. *See id.* § 1193(1)(b).

34. *See id.* § 1193(1)(c). As a felony offense, the state can choose to execute a forfeiture proceeding. *See* N.Y. C.P.L.R. § 1311(1)(a)-(b) (McKinney 1997). That forfeiture provision is not being challenged in this Note.

35. 694 N.Y.S.2d 316 (Sup. Ct.), *aff'd*, 698 N.Y.S.2d 218 (App. Div. 1999).

36. *See Grinberg*, 694 N.Y.S.2d at 319-20.

37. New York's mandamus proceeding falls within Article 78 of the Civil Practice Law and Rules. *See* N.Y. C.P.L.R. §§ 7801-7806 (McKinney 1994).

38. *See Grinberg*, 694 N.Y.S.2d at 316.

39. *See id.* at 328.

40. *See id.* at 323-28. Mr. Grinberg also argued that the seizure violated his right against unreasonable seizures, based on the Fourth Amendment of the United States Constitution and Article I, section 12 of the New York State Constitution. *See id.* at 322-23. The court rejected that argument holding that no such violation occurred. *See id.* at 323. This Note, however, does not focus on those grounds.

41. *See id.* at 322 n.5.

without due process of law.”⁴² The New York State Constitution has almost identical language.⁴³

When the Government seizes property to assert ownership and control over the property, the Government action must comply with the Due Process Clause.⁴⁴ It is clear that the function of the drunk driving forfeiture statutes is to achieve the goal of asserting ownership and control over property.⁴⁵ “[E]ven the temporary or partial impairments to property rights . . . are sufficient to merit due process protection.”⁴⁶ Therefore, due process protection must exist when the government attempts to forfeit a vehicle.

Central to the Constitution’s command of due process is the right to prior notice and a hearing.⁴⁷ “The purpose of this requirement is not only to ensure abstract fair play to the individual . . . [but also] to protect his use and possession of property from arbitrary encroachment [and] to minimize substantively unfair or mistaken deprivations of property.”⁴⁸

However, this is not without exception. These limited instances are tolerated when there are “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”⁴⁹ Therefore, it is possible to delay notice and a hearing until after the deprivation if the right circumstances exist. The Supreme Court, in *Fuentes v. Shevin*,⁵⁰ laid out the following framework for instances when pre-deprivation hearings were dispensed with:

First, [when] the seizure has been directly necessary to secure an important governmental or general public interest. Second, [when] there has been a special need for very prompt action. Third, [when] the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a *narrowly drawn statute*, that it was necessary and justified in the particular instance.⁵¹

42. U.S. CONST. amend. XIV.

43. See N.Y. CONST. art. I, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”).

44. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 52 (1993).

45. See *supra* notes 26-30 and accompanying text.

46. *Connecticut v. Doeher*, 501 U.S. 1, 12 (1991).

47. See *James Daniel Good Real Property*, 510 U.S. at 53.

48. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

49. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

50. 407 U.S. 67 (1972).

51. *Id.* at 91 (emphasis added).

This framework was actually a summary of the reasons of earlier decisions where the Court had declared that the due process requirements had been satisfied even though there was no pre-deprivation hearing.⁵²

Some examples of postponement of notice and hearing until after the seizure are: circumstances necessary to protect the public from contaminated food,⁵³ from misbranded drugs,⁵⁴ and from the economic disaster of a bank failure.⁵⁵ Other instances of postponement occurred when there were exigencies to meet the needs of a national war effort,⁵⁶ and to aid in the collection of taxes.⁵⁷ Notably, these situations were, for the most part, truly extraordinary.

The Court stretched this concept in 1974 in *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁵⁸ when it allowed the seizure of a yacht involved in drug offenses.⁵⁹ There, it took the framework from *Fuentes*, decided two years earlier, and formulated it into a working test for due process.⁶⁰ In *Calero-Toledo*, the Court held that the seizure permitted (the government of) Puerto Rico to assert *in rem* jurisdiction over the property.⁶¹ Asserting *in rem* jurisdiction over the yacht was considered to be a "significant governmental purpose" and therefore satisfied the first *Fuentes* prong.⁶² The Court further held that the seizure without a hearing was necessary because a yacht would "often be of a sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."⁶³ This effectively created a special need for prompt action and thus satisfied the second *Fuentes* prong.

The Court based its assertion of jurisdiction argument on an earlier Supreme Court case.⁶⁴ In *Ownbey v. Morgan*,⁶⁵ defendant Ownbey, a non-resident of Delaware, contested the actions of Delaware residents when they attached his personal property located within Delaware for

52. See *id.* at 91-92.

53. See *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 315 (1908).

54. See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 601 (1950).

55. See *Coffin Bros. v. Bennett*, 277 U.S. 29, 31 (1928).

56. See *United States v. Pfitsch*, 256 U.S. 547, 552-53 (1921).

57. See *Phillips v. Commissioner*, 283 U.S. 589, 597 (1931).

58. 416 U.S. 663 (1974).

59. See *id.* at 669.

60. See *id.* at 678-79.

61. See *id.* at 679.

62. *Id.*

63. *Id.*

64. See *id.* at 679 n.13.

65. 256 U.S. 94 (1921).

payment on a debt.⁶⁶ The Court in *Ownbey* allowed the attachment based on the exclusive jurisdiction and sovereignty that each state has over the persons and property within its borders—a fundamental and early-recognized jurisdictional principle.⁶⁷ When the Court applied this analysis to *Calero-Toledo* it may have been justified because of the “removability” of the yacht. It does not take a scholar to recognize that a yacht, allegedly involved in drug transport, will most likely not be available for forfeiture if it is not seized immediately. This is due in part because of a yacht’s ability to be moved anywhere on the globe, to the multi-national aspect of the drug trade, and to the high penalties for drug offenses.

Yet, it is questionable if the same concerns realistically exist in the case of a drunk driving forfeiture. The *Grinberg* court’s suggestion that a car is similar to the yacht in *Calero-Toledo* is borderline ridiculous.⁶⁸ While it is technically true that a car used in a drunk driving offense may be “‘removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given,’”⁶⁹ it is much less likely that this would occur than it would in the case of a yacht used in illegal drug transport. Critics may charge this statement as naïve; therefore, a further comparison between the two is necessary.

Take the hypothetical situation of a drug dealer who uses a yacht to transport drugs from one state, or country, to another. Drug crimes are

66. See *id.* at 99.

67. See *id.* at 111.

In *Pennoy v. Neff*, 95 U.S. 714, 722-724, it was shown that the process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each State over persons and property within its borders.

....

[A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed . . . to consent that the State may subject such property to judicial process to answer demands made against him in his absence.

Id. at 109-11.

68. See *Grinberg v. Safir*, 694 N.Y.S.2d 316, 325 (Sup. Ct. 1999). The judge in *Grinberg* cites to *State v. Konrath*, 577 N.W.2d 601 (Wis. 1998), a Wisconsin case, suggesting that the major issue in *Konrath* was the inability of the police to execute a seizure order of a convicted drunk driver because the vehicle could not be located. See *id.* While that is true, the issues litigated in that case were actually very similar to the due process and double jeopardy discussions of this Note. See *id.* In *Konrath*, the defendant was charged and convicted of his fifth DWI offense. See *id.* at 603. Because the forfeiture statutes provided alternatives to forfeiture and were limited to specific circumstances, they were held, *inter alia*, to not violate due process. See *id.* at 613. For example, forfeiture is an option only after two previous convictions; additionally, alternatives such as immobilization or ignition interlock devices are available, as well as hardship provisions. See WIS. STAT. ANN. § 346.65(6)(a)(1) (West 1999).

69. *Grinberg*, 694 N.Y.S.2d at 325 (quoting *Calero-Toledo*, 416 U.S. at 679).

serious offenses with serious consequences.⁷⁰ It is highly unlikely that the yacht will wait around to be forfeited unless it is immediately seized. The transitory nature of a boat is therefore much greater than a car because of the car's inability to move off of the land mass that it travels upon. Boats travel across international boundaries very quickly, thus necessitating the need for attachment. Contrast that with a drunk driver charged with his first offense, a misdemeanor under New York law.⁷¹ Drunk driving is not the type of offense that would make people flee from the jurisdiction. While any defendant who posts bail may flee the jurisdiction to avoid prosecution of *any* crime, it is much less likely that a defendant would do so upon being charged with drunk driving. Additionally, a safeguard provision could allow the prosecuting county to put a lien on the vehicle, relieving the need for prolonged seizure without a hearing. Therefore, the *Calero-Toledo* yacht is not the same as the *Grinberg* car.

Moreover, application of the third *Fuentes* factor also indicates that due process is not satisfied under New York law when there is no pre-deprivation hearing. Regardless of the fact that the person charged with initiating the forfeiture is a government official and not a private party, the standards are not under a *narrowly drawn statute*.⁷² Contrast the Wisconsin drunk driving forfeiture statute⁷³ with the New York forfeiture procedural provisions.⁷⁴ Section 346.65(6)(a)(1) of the Wisconsin Statute authorizes forfeiture only in specific instances such as when there has been two previous drunk driving convictions.⁷⁵ It also provides for alternatives to forfeiture such as immobilization of the vehicle⁷⁶ or an ignition interlock device.⁷⁷ There is also a hardship provision.⁷⁸

70. See, e.g., N.Y. PENAL LAW §§ 220.00–220.45 (McKinney 2000) (grading drug offenses from class A misdemeanor to class A-I felony).

71. See N.Y. VEH. & TRAF. LAW § 1193(1)(b) (McKinney 1996).

72. See *supra* text accompanying note 50.

73. See WIS. STAT. ANN. § 346.65(6)(a)(1) (West 1999).

74. See N.Y. CITY COMP. R. & REGS. tit. 38, § 12-36 (1999).

75. See WIS. STAT. ANN. § 346.65(6)(a)(1) (West 1999). However, forfeiture is not mandatory. “[T]he court may order a law enforcement officer to seize a motor vehicle . . .” *Id.* (emphasis added).

76. “‘Immobilization device’ means a device or mechanism which immobilizes a motor vehicle, making the motor vehicle inoperable.” *Id.* § 340.01.

77. “‘Ignition interlock device’ means a device which measures the person’s alcohol concentration and which is installed on a vehicle in such a manner that the vehicle will not start if the sample shows that the person has a prohibited alcohol concentration.” *Id.* § 340.01.

78. See *id.* § 346.65(6)(a)(1). “The court shall not order a motor vehicle equipped with an ignition interlock device or immobilized if that would result in undue hardship or extreme inconvenience or would endanger the health and safety of a person.” *Id.* (emphasis added). But see sec-

No such provisions exist under the New York City forfeiture procedure statutes.⁷⁹ Section 12-36 of the New York City Rules and Regulations ("NYCRR") is very bare compared with Wisconsin law.⁸⁰ Essentially, NYCRR section 12-36 spells out the procedures for forfeiture effected by NYCAC section 14-140, which contains the substantive forfeiture provisions.⁸¹ NYCRR section 12-36 does not provide any alternatives, nor does it provide for a hardship exception. Furthermore, it does not matter what type of crime it is or whether or not it is a first offense. Most notably, however, is the fact that under NYCRR section 12-36 the property clerk (who has custody of the vehicle) must bring a forfeiture proceeding within twenty-five days of the *claimant's demand*.⁸² Therefore, if a claimant cannot or does not make a claim (e.g., because of lack of funds for an attorney, etc.), the statute does not demand the property clerk to take any action. Such a provision surely cannot be said to provide proper due process protection. The government, in effect, can seize an individual's vehicle without a pre-deprivation hearing, and does not even have to show that it had the right to seize under the particular circumstances, unless that individual makes a claim.⁸³ Upon seizing the vehicle, the government can remain inactive until the owner takes action. In Nassau County, the only protection afforded to a defendant is that the forfeiture action must be brought within 120 days,⁸⁴ and, upon acquittal the vehicle must be returned to the defendant.⁸⁵ Thus, it is clear that these are not the narrowly drawn statutes that *Fuentes* requires.

In contrast, the Wisconsin statute mandates "the district attorney . . . [to] commence an action to forfeit the motor vehicle within 30 days after the motor vehicle [was] seized."⁸⁶ It also lists what needs to be proven at the hearing.⁸⁷ The New York statutory scheme is obviously lacking in this regard because it does not mention anything of the sort.

Additionally, New York law authorizes the immediate suspension of the defendant's license by the judge at arraignment.⁸⁸ However, the

tion 346.65(6)(a)(2) where in certain specific circumstances, the forfeiture is mandatory and there is no immobilization or ignition interlock alternative nor is there a hardship provision.

79. See N.Y. CITY COMP. R. & REGS. tit. 38, § 12-36 (1999).

80. See *supra* text accompanying notes 73-79.

81. See N.Y. CITY ADMIN. CODE § 14-140(b), (e)(2).

82. See N.Y. CITY COMP. R. & REGS. tit. 38, § 12-36(a) (1999).

83. See *id.*

84. See NASSAU COUNTY, N.Y., ADMIN. CODE § 8-7.0(g)(5) (1990).

85. See *id.* § 8-7.0(g)(7).

86. WIS. STAT. ANN. § 346.65(6)(c) (West 1999).

87. See *id.* § 346.65(6)(d).

88. See N.Y. VEH. & TRAF. LAW § 1193(2)(e)(7)(a)-(b) (McKinney 1999).

defendant has the right at that juncture to request a hardship privilege.⁸⁹ If granted, this would allow the defendant to drive to school or work, or to receive medical treatments.⁹⁰ The relevant text of the hardship provision reads:

“[E]xtreme hardship” shall mean the inability to obtain alternative means of travel to or from the licensee’s employment, or to or from necessary medical treatment for the licensee or a member of the licensee’s household, or if the licensee is a matriculating student enrolled in an accredited school, college or university travel to or from such licensee’s school, college or university if such travel is necessary for the completion of the educational degree or certificate.⁹¹

Forfeiture without a hearing would render the hardship privilege moot. If there is a hardship privilege for a license suspension, there should at least be a hardship privilege for a forfeiture. A driver’s license is issued by the state and is a privilege. A person must pass a driver’s test before he can obtain a license and that license can be revoked or suspended if the licensee does not behave properly. Thus, ownership of property—a fundamental property right—should, *a fortiori*, merit even greater protection. Therefore, the New York statutes in question simply do not provide adequate due process protection without a pre-deprivation hearing under *Fuentes* and must fail under the circumstances.

B. *The Mathews Factors*

In *Mathews v. Eldridge*,⁹² a three-part test for due process was announced.⁹³ In *Mathews*, the plaintiff was receiving disability payments from the government.⁹⁴ The government decided to terminate the payments.⁹⁵ The plaintiff then sued, challenging the administrative procedures as violative of due process, and sought reinstatement of the payments.⁹⁶ While the Supreme Court ultimately upheld the procedures as comporting with the requirements of due process, the Court outlined three distinct factors to be considered in making its determination.⁹⁷

89. *See id.* § 1193(2)(e)(7)(e).

90. *See id.*

91. *Id.*

92. 424 U.S. 319 (1976).

93. *See id.* at 335.

94. *See id.* at 323.

95. *See id.* at 324.

96. *See id.* at 324-25.

97. *See id.* at 335.

These factors have been the focus of due process inquiries since their announcement in 1976.⁹⁸

The first factor under *Mathews* considers the private interest that will be affected by the official action.⁹⁹ Addressing the private individual's interest is a natural and fair starting point in the analysis. "[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" ¹⁰⁰ Next, a court must consider the risk of erroneous deprivation of such private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.¹⁰¹ Risk of erroneous deprivation of that interest vis-à-vis the procedure further emphasizes the non-technical nature of what due process is supposed to protect. The clause concerning "probable value, if any, of additional or substitute procedural safeguards"¹⁰² gives the individual an opportunity to argue that reasonable alternatives are available. Lastly, "the Government's interest [must be considered], including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁰³ This provides the government with an opportunity to prove that the functional value of the procedure is high, and that the alternatives are too burdensome under the circumstances.

In *Grinberg v. Safir*,¹⁰⁴ the court refrained from conducting a *Mathews* analysis. Instead, in a footnote, the court noted that if it "were to apply *Mathews*, the balance would weigh heavily in the [government's] favor."¹⁰⁵ Yet under a proper *Mathews* analysis, the balance would clearly weigh against the government.

The private interest of an individual whose automobile is seized is undoubtedly high. In *Fuentes v. Shevin*,¹⁰⁶ the Supreme Court held that the loss of kitchen appliances and household furniture was significant enough to warrant a pre-deprivation hearing.¹⁰⁷ In *Connecticut v.*

98. This test has been utilized in all types of due process concerns. See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (concerning forfeiture of real property for drug offenses); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 848-49 (1977) (discussing removal of foster children from foster home).

99. See *Mathews*, 424 U.S. at 335.

100. *Id.* at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

101. See *id.* at 335.

102. *Id.*

103. *Id.*

104. 694 N.Y.S.2d 316 (Sup. Ct.), *aff'd*, 698 N.Y.S.2d 218 (App. Div. 1999).

105. *Grinberg*, 694 N.Y.S.2d at 325 n.11.

106. 407 U.S. 67 (1972).

107. See *id.* at 89.

Doehr,¹⁰⁸ the Court held that a state statute authorizing prejudgment attachment of real property without prior notice or hearing was unconstitutional.¹⁰⁹ A pre-deprivation hearing was mandated even though the attachment did not interfere with the owner's use and possession, nor did it substantially affect the receipt of rental income from existing leases.¹¹⁰

[T]he State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property; *their impact is less than the perhaps temporary total deprivation of household goods or wages . . .* Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process."¹¹¹

In *United States v. James Daniel Good Real Property*,¹¹² the Court held the statute unconstitutional as it did in *Doehr*, particularly because the attachment *did* substantially affect the owner's fundamental property rights.¹¹³ Thus, even though a deprivation may be temporary, there is enough of a private interest to merit due process protection.

Seizing an automobile deprives its owner of the right of ownership, sale, use, and enjoyment of the vehicle. Even though there has been no criminal conviction, the vehicle owner can no longer use the car for his own particular interest, whether it be transportation to employment or education, access to necessary medical treatment, or even just a pleasure drive or shopping. Even when public transportation is available as an alternative, it is entirely possible that the use of public transportation is not a reasonable alternative. For example, public transportation may not directly access the desired destination, or the individual may have medical problems, or it is simply too expensive (or more expensive than driving one's own car) to commute or travel to the particular location via public transportation. It is also impossible for the owner to sell the car, and in the case of a financed vehicle, the owner would still be liable for payments. Additionally, while the cars are impounded they are likely to be damaged in the county lots in which they are stored. Moreover, since the forfeitures may not take place for some time, the car's value

108. 501 U.S. 1 (1991).

109. *See id.* at 18.

110. *See id.* at 16.

111. *Id.* at 12 (emphasis added).

112. 510 U.S. 43 (1993).

113. *See id.* at 54.

will greatly depreciate.¹¹⁴ Therefore, it is absolutely clear that the individual's private property interest is substantial.

The risk of erroneous deprivation under these circumstances is also high. While the NCAC provides some protection by requiring the property clerk to return the vehicle if the defendant is acquitted,¹¹⁵ it still does not address the problem of a potentially lengthy erroneous deprivation without some type of hearing. A statutorily mandated hearing would help prevent against improper deprivation.

The New York City forfeiture statutes provide even less protection; there is no provision requiring the return of the vehicle upon an acquittal.¹¹⁶ Thus, there is no available protection against questionable police conduct or improper application of the law that could lead to an invalid seizure. Indeed, Mayor Rudolph Giuliani of the City of New York has indicated that he will pursue seizure of the car, even if the arrested person is later acquitted of the criminal charge.¹¹⁷ This is evidence that abuse of the system could, and does, occur. In fact, New York City requires the property clerk to bring a forfeiture proceeding *only* if the claimant makes a demand.¹¹⁸ Claiming that the present statutory scheme effectively prevents against erroneous deprivation is simply not supportable.

A comparison should be made with the New York State forfeiture provisions as found in Article 13-A of the Civil Practice Law and Rules ("CPLR").¹¹⁹ Article 13-A's forfeiture provisions are activated upon the commission of a felony offense.¹²⁰ There are many procedural safeguards found within the body of Article 13-A of the CPLR.¹²¹ For example, there exists the right to a trial by jury on any issue of fact.¹²² It also sets forth the requisite burdens of proof needed to sustain a forfei-

114. In Nassau County, it was found that after a year of the implementation of the forfeiture and seizure of 700 vehicles, *none* of the cars had been sold. See Stephanie McCrummen, *Lots of Seized Cars: Nassau's DWI Crackdown Has Yet to Yield a Sale at Auction*, NEWSDAY (Nassau), Mar. 21, 2000, at A3.

115. See NASSAU COUNTY, N.Y., ADMIN. CODE § 8-7.0(g)(5) (1990).

116. See N.Y.C. COMP. R. & REGS. tit. 38, § 12-36 (1999); N.Y.C. ADMIN. CODE § 14-140(b), (e)(2) (1999).

117. See Al Baker, *Seize and Desist: Nassau to Impound Most Cars After Arrests for DWI*, NEWSDAY (Nassau), Feb. 24, 1999, at A3.

118. See N.Y.C. COMP. R. & REGS. tit. 38, § 12-36 (1999).

119. See N.Y. C.P.L.R. §§ 1310-1348 (McKinney 1997).

120. See *id.* §§ 1310(5)-(6), 1311(1)(a)-(b).

121. See, e.g., §§ 1311(2), (3)(a)-(b), 1312(3) (setting forth a number of procedural safeguards for the property owner).

122. See *id.* § 1311(2).

ture proceeding.¹²³ It establishes guidelines for provisional remedies, and requires that the 'claiming authority' (here, the government) prove that:

[t]here is a substantial probability that the claiming authority will prevail on the issue of forfeiture and that failure to enter the order may result in the property being destroyed, removed from the jurisdiction of the court, or otherwise be unavailable for forfeiture . . . [and that] the need to preserve the availability of the property through the entry of the requested order *outweighs the hardship on any party against whom the order may operate.*¹²⁴

Additionally, the CPLR requires that when property is attached without notice, the claiming authority move for an order confirming the order of attachment within five days.¹²⁵ If the claiming authority fails to comply, the order of attachment is to be vacated,¹²⁶ but the claiming authority has the opportunity to correct any defect.¹²⁷ In either case, the claiming authority has the burden of establishing the grounds for the attachment, the need for continuing the levy, and the probability of the claiming authority's success on the merits.¹²⁸ This elaborate statutory scheme, as found in Article 13-A of the CPLR, has been held to comport with the requirements of due process.¹²⁹

Therefore, when dealing with a statutory scheme with none of these protections, a statutorily mandated hearing has a high value as a safeguard. It would help protect against potential erroneous deprivation and be a reasonable and effective way to comply with the requirements of due process. "Procedural due process recognizes that when the power of the government is to be used against an individual, there is a right to a fair procedure to determine the basis for, and the legality of, such action."¹³⁰

While the government undoubtedly has a strong interest in keeping drunk drivers off the streets, a mandated hearing would not constitute much of an additional administrative burden on the government. A

123. See *id.* § 1311(3)(a)-(b).

124. *Id.* § 1312(3) (emphasis added).

125. See *id.* § 1317(2).

126. See *id.*

127. See *id.* § 1329(1).

128. See *id.* § 1329(2).

129. See *Morgenthau v. Citisource, Inc.*, 508 N.Y.S.2d 152 (1986). In that case, New York's highest court upheld the New York State forfeiture statutory scheme found in Article 13-A of the New York Civil Practice Law and Rules ("CPLR"). See *id.* at 158. "[T]he 'statutory procedure effects a constitutional accommodation of the conflicting interests of the parties' such that procedural due process is satisfied." *Id.* (citations omitted) (emphasis added).

130. *Id.* at 156.

hardship hearing for the license suspension is already available,¹³¹ and there would not be any need to recreate or overhaul the system, especially because such hearing is already in place.¹³² Even if a hardship privilege is not requested,¹³³ requiring a hearing does not add such a burden, especially in light of the serious lack of due process protection that currently exists. Therefore, it is clear that under a *Mathews* analysis, the present New York City and Nassau County statutory scheme falls short of providing a defendant with the necessary due process protections.

IV. EXCESSIVE FINES—EIGHTH AMENDMENT CHALLENGE

A. *Invoking the Excessive Fines Clause*

This part of the analysis focuses on the Eighth Amendment's Excessive Fines Clause. The Excessive Fines Clause provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹³⁴ Here again, the New York State Constitution contains very similar language.¹³⁵

The inquiry involves a "punitive versus remedial" analysis.¹³⁶ If the forfeiture is in some way considered to be a punishment (and therefore punitive), then the Excessive Fines Clause is triggered.¹³⁷ Once the Excessive Fines Clause is activated, then another inquiry must be made to determine if the punishment is excessive.¹³⁸

If the forfeiture amounts to a "payment to a sovereign as *punishment* for some offense," then it will invoke Eighth Amendment protection.¹³⁹ There is also a distinction between *in rem* civil forfeitures and *in personam* criminal forfeitures. The latter, especially those criminal forfeitures in the form of a fine, will almost always trigger Eighth Amendment protection.¹⁴⁰ In contrast, the *in rem* civil forfeitures usually

131. See N.Y. VEH. & TRAF. LAW § 1193(2)(e)(7)(e) (McKinney 1999).

132. Cf. *Rivera v. Marcus*, 696 F.2d 1016, 1028 (2d Cir. 1982) (recognizing an existing state procedure already in place for ascertaining the removal of children from foster care).

133. Or unavailable, as it will be repealed on Nov. 1, 2000. See 1997 N.Y. Laws ch. 131, § 7.

134. U.S. CONST. amend. VIII.

135. See N.Y. CONST. art. I, § 5. ("Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.").

136. See *Austin v. United States*, 509 U.S. 602, 621-22 (1993).

137. See *id.* at 622.

138. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

139. *Austin*, 509 U.S. at 622 (emphasis added) (citation omitted).

140. See *Alexander v. United States*, 509 U.S. 544, 559 n.4 (1993).

initially require the “punitive versus remedial” analysis to determine if they fall within the scope of the Eighth Amendment.¹⁴¹

In *Austin v. United States*,¹⁴² the government advanced two arguments, both unsuccessful, in an attempt to persuade the Court that a forfeiture of a mobile home and body shop (based on drug offenses) was remedial.¹⁴³ The first argument was founded upon the idea that removal of the instruments of the drug trade will protect the community from the threat of continued drug dealing.¹⁴⁴ This was rejected on the grounds that there was nothing illegal about owning such property.¹⁴⁵ The second argument was founded upon the theory that such forfeitures served to compensate the government for the expenses of law enforcement and expenditures in society “such as urban blight, drug addiction, and other health concerns resulting from the drug trade.”¹⁴⁶ This argument was similarly rejected.¹⁴⁷ The Court held that “forfeiture of property [in general is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.”¹⁴⁸ In addition, the Court went on to hold that “[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment,”¹⁴⁹ and therefore, subject to the limitations of the Eighth Amendment.¹⁵⁰ Therefore, if a sanction has any punitive element as its goal, then that sanction falls within the scope of the Excessive Fines Clause.¹⁵¹

Indeed, the forfeiture statutes as applied to drunk driving offenses do not have any application other than for the goals of retribution or

141. See *Austin*, 509 U.S. at 621-22.

142. 509 U.S. 602 (1993).

143. See *id.* at 620-21.

144. See *id.* at 620.

145. See *id.* at 621.

146. *Id.* at 620 (citation omitted).

147. See *id.* at 621.

148. *Id.* (citation omitted).

149. *Id.*

150. See *id.* at 622.

151. See *id.*

deterrence. Public officials,¹⁵² as well as the *Grinberg* court, have conceded to this.¹⁵³

Since it has been determined that the vehicle forfeiture triggers the Excessive Fines Clause, it must be analyzed for excessiveness.¹⁵⁴ However, in *Austin*, the Court specifically declined to formulate a test for excessiveness, and instead deferred that question to the lower courts.¹⁵⁵ As a result, several tests have developed. Some courts have adopted the proportionality test,¹⁵⁶ while other courts follow the instrumentality test,¹⁵⁷ and still others adhere to a hybrid known as the nexus test.¹⁵⁸ The *Grinberg* court held that under any of the three tests, forfeiture, as applied in the *Grinberg* situation, was not excessive.¹⁵⁹

B. Excessiveness

1. The Proportionality Test

In 1998, the United States Supreme Court in *United States v. Bajakajian*¹⁶⁰ applied the Excessive Fines Clause and utilized the proportionality test to determine if the sanction was in fact excessive.¹⁶¹ The proportionality test focuses on the proportion between the amount and nature of the forfeiture and balances it against the gravity of the offense.¹⁶²

152. See Baker & Durkin, *supra* note 3, at A5; Morrison, *supra* note 1, at A37; Nassau County Press, *Gulotta: Unveils DWI Car Seizure Option* (Mar. 11, 1999) <<http://www.co.nassau.ny.us/3-11-99.htm>>; Nassau County Press, *Nassau County Executive Thomas S. Gulotta - 1999 State of the County Address* (visited Oct. 10, 1999) <<http://www.co.nassau.ny.us/state.html>>.

153. "The . . . DWI forfeiture policy is punitive for Eighth Amendment purposes under *Austin*: It has an 'escape hatch' for innocent owners; it links the forfeited property directly to the charged crime; it lacks specific correlation between the property's value and the crime's social cost." *Grinberg v. Safir*, 694 N.Y.S.2d 316, 327 (Sup. Ct. 1999). The *Grinberg* court bases its reasoning on the principles announced in *Austin*. Yet it is interesting to note that the judge in *Grinberg* questions the "current vitality" of *Austin* in an earlier paragraph. See *id.* at 321 n.3. Notwithstanding the judge's criticism, the United States Supreme Court, in a recent case, specifically pointed to *Austin* as one of the leading cases for Eighth Amendment excessive fines analyses. See *Hudson v. United States*, 522 U.S. 93, 103 (1997).

154. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

155. See *Austin v. United States*, 509 U.S. 602, 622 (1993).

156. See *Bajakajian*, 524 U.S. at 334.

157. See *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994).

158. See *United States v. Milbrand*, 58 F.3d 841, 847 (2d Cir. 1995).

159. See *Grinberg v. Safir*, 694 N.Y.S.2d 316, 327 (Sup. Ct. 1999).

160. 524 U.S. 321 (1998).

161. See *id.* at 334.

162. See *id.*

Mr. Bajakajian attempted to transport \$357,144 out of the United States without disclosing it to the proper authorities.¹⁶³ Transporting more than \$10,000 out of the country without disclosure to the United States government violates federal law.¹⁶⁴ The trial court found that the entire \$357,144 was subject to forfeiture.¹⁶⁵ The Supreme Court held that this forfeiture fell under the protection of the Excessive Fines Clause, and employed the proportionality test.¹⁶⁶ However, it is not a strict proportionality test; instead, the test requires a forfeiture to be *grossly* disproportional to the gravity of the offense.¹⁶⁷ Not suprisingly, the *Bajakajian* court held that a fine of \$357,144 was grossly disproportional to the gravity of such conduct.¹⁶⁸

Applying the proportionality test of the Excessive Fines Clause, the *Grinberg* court found that the forfeiture was not excessive.¹⁶⁹ Mr. Grinberg's 1988 Acura was found to have a value of \$2000.¹⁷⁰ Indeed, at first blush, forfeiture of a car worth approximately \$2000 does not seem to be grossly disproportional since the maximum fine for a first-time DWI offender is \$1000.¹⁷¹ Yet it does not seem correct that the government has the authority to force an individual to relinquish a property right in a vehicle. The Second Circuit held that a forfeiture of a condominium worth \$145,000 (where the owner-defendant had a \$68,000 equity interest) was not grossly disproportionate to a sale of narcotics in the amount of \$250.¹⁷² However, consider the principles the Second Circuit used in reaching its decision:

[T]he distribution of narcotics, even in quantities as small as those sold by [the defendant], is a grave offense, for which a defendant could be fined \$50,000 under New York law, \$100,000 under Vermont law, and \$1 million under federal law. We concluded that in light of this range of possible fines, a forfeiture of \$68,000 was "not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence."¹⁷³

163. *See id.* at 324.

164. *See id.*; *see also* 31 U.S.C. § 5316(a)(1)(A) (1997).

165. *See United States v. Bajakajian*, 524 U.S. 321, 325 (1998).

166. *See id.* at 334.

167. *See id.*

168. *See id.* at 324.

169. *See Grinberg v. Safir*, 694 N.Y.S.2d 316, 327-28 (Sup. Ct. 1999).

170. *See id.* at 328.

171. *See N.Y. VEH. & TRAF. LAW* § 1193(1)(b) (McKinney 1996).

172. *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 32, 38 (2d Cir. 1992).

173. *United States v. Milbrand*, 58 F.3d 841, 847 (2d Cir. 1995) (discussing *38 Whalers Cove Drive*).

Granted, drunk driving is a social problem with serious consequences. However, the offense of DWI is a strict liability crime; no mens rea is required.¹⁷⁴ Thus, an offender's vehicle is subject to forfeiture under this policy, even if that offender did not *intend* to drive while intoxicated.¹⁷⁵ As a first-time offense, the offender is charged with a crime, yet it is only a misdemeanor.¹⁷⁶ Notwithstanding the fact that even misdemeanors can be serious, the State legislature could have, but did not, respond to the drunk driving problem by increasing the penalty.¹⁷⁷ Therefore, forfeiture of a first-time offender's vehicle under *any* circumstances is grossly disproportional to the offense.

A more serious implication is raised in this context. Assuming that a forfeiture of a car worth \$2000 is not excessive, a question arises as to where the line should be drawn. Using an example for illustrative purposes, assume that the threshold for excessiveness under proportionality is \$20,000. This would set the threshold at twenty times greater than the maximum fine for the offense. Under this scenario, the law would effectively discriminate against individuals whose car is under \$20,000 and insulate individuals from forfeiture whose cars are worth over \$20,000. Such a biased application cannot promote uniform application of the law, nor does it provide equal protection under the law. Clearly stated, any forfeiture under the current statutory scheme violates the proportionality test.

2. The Instrumentality Test

The instrumentality test, rejected by the Court in *United States v. Bajakajian*,¹⁷⁸ focuses on the "guilt of the property" or the extent to which the property was used in the offense, and not its value.¹⁷⁹ This test, outlined in *United States v. Chandler*,¹⁸⁰ considers:

I. The nexus between the offense and the property, and the extent of the property's role in the offense. In measuring the strength and extent between the property and the offense, a court may take into account the following five factors:

174. See N.Y. VEH. & TRAF. LAW § 1192(2).

175. See *id.*

176. See *id.* § 1193(1)(b). A lesser violation, driving while ability impaired, is only a traffic infraction and not a misdemeanor. See *id.* § 1193(1)(a). The maximum fine is \$500. See *id.*

177. There are, however, heightened penalties for subsequent offenses. A second offense of DWI increases the charge to a class E felony. See *id.* § 1193(c)(i). A third offense increases the charge to a class D felony. See *id.* § 1193(c)(ii).

178. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

179. See *United States v. Chandler*, 36 F.3d 358, 364 (4th Cir. 1994).

180. See *id.* at 365.

(i) Whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous;

(ii) Whether the property was important to the success of the illegal activity;

(iii) The time during which the property was illegally used and the spacial extent of its use;

(iv) Whether its illegal use was an isolated event or had been repeated; and

(v) Whether the purpose of acquiring, maintaining or using the property was to carry out the offense.

II. The role and culpability of the owner; and

III. The possibility of separating offending property that can be readily separated from the remainder.¹⁸¹

No one factor is dispositive, and to sustain a challenge under the excessive fines analysis, a “court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense.”¹⁸²

The *Grinberg* court did not properly employ the instrumentality test. Instead of considering the above-mentioned factors of the instrumentality test, the court simply held that the vehicle was the *sine qua non* of the offense, and ended the analysis.¹⁸³ The court’s conclusory analysis with no regard for the proper test is hardly persuasive. “[Pavel Grinberg’s] vehicle is the instrumentality of a charged crime, inseparable from it, and its prerequisite. [Mr. Grinberg] owns the car and drove it at the time of the alleged offense. The owner’s role and his use of the property were temporally and spatially coextensive with the offense charged.”¹⁸⁴

Had there been a correct analysis under the instrumentality test, the *Grinberg* court would have found that even though the car may have been the *sine qua non* of the offense, it was not the “instrumentality” of the crime. It would therefore follow that the forfeiture was improperly excessive.

Furthermore, consider the application of the instrumentality test in *United States v. Chandler*.¹⁸⁵ *Chandler* involved the forfeiture of a home.¹⁸⁶ Yet this was not just a regular, average home. It was secluded,

181. *See id.*

182. *Id.*

183. *See Grinberg v. Safir*, 694 N.Y.S.2d 316, 320 (Sup. Ct. 1999).

184. *Id.* at 327.

185. 36 F.3d 358, 365 (4th Cir. 1994).

186. *See id.* at 360.

had a long driveway with a lookout, a security camera, and served as the situs for over 130 drug transactions that spanned over a period of years and involved thousands of dollars.¹⁸⁷ This and other evidence showed that the drug use permeated to the basement, kitchen, garage, and the long driveway.¹⁸⁸ Further, the property was maintained and improved by payments made with drug money.¹⁸⁹ Therefore, the use of the property was deliberate and necessary to the success of the drug transactions. These transactions took place repeatedly over a long period of time, and the entire property was exploited for such usage. A significant purpose of maintaining and using the property was to facilitate drug sales. Thus, it is not difficult to see why the Fourth Circuit held that this was the proper nexus between the property and the offense.¹⁹⁰

With regards to the second factor (the role and culpability of the owner), the defendant in *Chandler* bought the drugs personally, stored them on his property, paid his employees with drugs, and sold drugs to others.¹⁹¹ The court held that “[Chandler] was not merely aware, but actively involved, in the commission of the illegal conduct.”¹⁹² Nor was it possible to separate the offending property from the remainder because a significant amount of the property was used in the crime.¹⁹³ Therefore, the court had little difficulty finding that the home was a substantial and meaningful instrumentality, and that forfeiture of the home did not violate the Excessive Fines Clause.¹⁹⁴

Compare the *Chandler* home with the *Grinberg* car. It is highly doubtful that a drunk driver’s use of a vehicle is “deliberate and planned.” More likely, it is merely an incidental and fortuitous usage. Additionally, even though the vehicle was a necessary part of the crime, it was not important to the “success” of drunk driving. Drunk driving has no “economic success” under *Chandler*’s reasoning. Moreover, there was no evidence that Pavel Grinberg had driven while intoxicated at other times. If he had (and been prosecuted), he would have been charged with a felony offense for this particular incident.¹⁹⁵ Further-

187. See *id.* at 366.

188. See *id.*

189. See *id.*

190. See *id.*

191. See *id.*

192. *Id.*

193. See *id.*

194. See *id.*

195. A second offense of DWI increases the charge to a class E felony. N.Y. VEH. & TRAF. LAW § 1193(c)(i) (McKinney 1996). A third offense increases the charge to a class D felony. See *id.* § 1193(c)(ii).

more, it is doubtful that Pavel Grinberg's purpose of acquiring, maintaining, or using his car was to drive while intoxicated. Therefore, under *Chandler*, it is not likely that there was much of a nexus between Pavel Grinberg's car and the drunk driving, even if it was the *sine qua non* of the offense.

There was no intentional violation of the law on Grinberg's part. New York's drunk driving laws do not require any *mens rea*.¹⁹⁶ Therefore, no culpable mental state is required. Even though Grinberg was driving the car, there was no evidence that he *intended* to drive drunk. Thus, it is clear that a car is not the "instrumentality" of a drunk driving offense under these circumstances, and its forfeiture violates the Excessive Fines Clause under this test.

3. The Nexus Test

The nexus test, a hybrid of both the instrumentality and proportionality tests, was announced in *United States v. Milbrand*.¹⁹⁷ This is also a multi-factor test, and it combines principles from both of the tests.¹⁹⁸ The nexus test considers:

- (1) the harshness of the forfeiture (*e.g.*, the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.¹⁹⁹

Factors two and three of the nexus test are the same as factors one and two of the instrumentality test. Thus, the analysis under each is the same.²⁰⁰ However, factor one of the nexus test requires some development.

The forfeiture of one's car is indeed harsh, especially when compared with the gravity of the offense—the first time offense of DWI is a misdemeanor.²⁰¹ The first time offense of the lesser charge of driving

196. See *id.* § 1192(2).

197. 58 F.3d 841 (2d Cir. 1995).

198. See *id.* at 847-48.

199. *Id.*

200. See *supra* text accompanying notes 178-96.

201. See N.Y. VEH. & TRAF. LAW § 1193(1)(b) (McKinney 1996).

while ability impaired ("DWAI") is only a traffic infraction.²⁰² The maximum penalties that are imposed for these offenses are: one year in jail and a \$1000 fine for DWI,²⁰³ and fifteen days in jail and a \$500 fine for DWAI.²⁰⁴ As noted earlier, excessiveness based on the value of the vehicle would be unfair, shielding those with expensive cars and exposing to forfeiture those with lesser-valued cars.

Additionally, there are alternatives to forfeiture currently available. New York law imposes a license suspension upon arrest, pending prosecution.²⁰⁵ The provision gives New York State the authority to immediately suspend an individual's license at the arraignment.²⁰⁶ Other possible alternatives could include revocation of the license plates, registration and inspection of the vehicles of the individual or of the vehicle used in the offense.²⁰⁷ Therefore, under the circumstances, the forfeiture of a car is clearly excessive.

V. DOUBLE JEOPARDY—FIFTH AMENDMENT CHALLENGE

A. *The Two-Prong Test*

The third part of the Constitutional analysis considers the current understanding of the Double Jeopardy Clause. The Double Jeopardy Clause of the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"²⁰⁸ The New York State Constitution has almost identical language.²⁰⁹

"A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding."²¹⁰ Thus, it is necessary to focus on the specific type of forfeiture provision, and whether it is remedial or punitive.²¹¹

202. See *id.* § 1193(1)(a).

203. See *id.* § 1193(1)(b).

204. See *id.* § 1193(1)(a).

205. See *id.* § 1193(2)(e)(7)(a)-(e).

206. See *id.* § 1193(2)(e)(7)(b).

207. These solutions have not been mandated and are only the author's suggestions.

208. U.S. CONST. amend. V.

209. "No person shall be subject to be twice put in jeopardy for the same offense" N.Y. CONST. art. I, § 6.

210. *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994).

211. See *Hudson v. United States*, 522 U.S. 93 (1997); *United States v. Ursery*, 518 U.S. 267 (1996). But see Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 682-88 (1999) (suggesting that the most effective and workable approach is to discard the extremely polar "criminal vs. civil" test and instead adopt a "middleground jurisprudence" theory).

Some remedial civil forfeiture proceedings may be considered to be so punitive in purpose or effect that such forfeiture is the equivalent of a criminal proceeding.²¹² It is these forfeitures that are subject to the protections afforded by the Double Jeopardy Clause.²¹³ Therefore, even though certain penalties or forfeitures are intended to be civil in nature, they can be viewed as criminal for the purposes of double jeopardy as a matter of federal constitutional law.

Thus, the question that remains to be answered is whether or not a "civil" forfeiture, in its application, can be so punitive that it is actually considered to be "criminal." Determining which category the forfeiture falls into requires an in-depth two-step analysis.

First, the statute's legislative intent must be examined.²¹⁴ This is to determine if the legislature intended the particular forfeiture to be civil or criminal.²¹⁵ Whether a particular punishment is criminal or civil is therefore, initially, a matter of statutory construction.²¹⁶

The second step is rather complex. If a statute is intended to be civil, then a further evaluation must be made to determine whether the forfeiture is so punitive that it "transform[s] what was clearly intended as a civil remedy into a criminal penalty."²¹⁷ In making such an evaluation, seven factors are to be used as "guideposts" in the analysis.²¹⁸ However, no one factor should be dispositive or controlling.²¹⁹ The seven factors are as follows:

- (1) "[w]hether the sanction involves an affirmative disability or restraint";
- (2) "whether it has historically been regarded as a punishment";
- (3) "whether it comes into play only on a finding of *scienter*";
- (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";
- (5) "whether the behavior to which

"[This would] permit certain punitive sanctions to be imposed in civil actions with heightened procedural protections." *Id.* at 682-83.

212. See *Hudson*, 522 U.S. at 99.

213. See *Ursery*, 518 U.S. at 289-90 n.3.

214. See *id.* at 288.

215. It is interesting to note that the Court does not explicitly rule as to what happens when a forfeiture proceeding is *intended* to be criminal. It might be assumed, however, that a forfeiture that is intended to be criminal (and therefore punitive) would, *a fortiori*, almost certainly be subject to constitutional attack. Yet this is not the case unless there is an "imposition of multiple criminal punishments for the same offense . . . and then *only when such* [imposition] *occurs in successive proceedings.*" *Hudson*, 522 U.S. at 99 (citations omitted) (emphasis added).

216. See *id.*

217. *Id.* (citations omitted).

218. See *id.* These seven factors come from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

219. See *Hudson*, 522 U.S. at 101.

it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."²²⁰

"These factors must be considered in relation to the statute on its face,' and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."²²¹

It is worth mentioning that even Chief Justice Rehnquist noted a caveat that the court in *Kennedy v. Mendoza-Martinez*²²² had foreseen when it created the seven factors. "But as we emphasized in *Kennedy* itself, no one factor should be considered controlling as they 'may often point in differing directions.'"²²³ Thus, such a test, while a good basis for analysis, can be subject to multiple interpretations. It is not difficult to foresee that judges will weigh certain factors more than other factors, most likely on their subjective viewpoint of the issue. Because it is the current test, an analysis under it must be conducted.

Another very important point worth mentioning at this juncture is that there is a consideration of whether the forfeiture has some purpose other than the traditional goals behind criminal prosecution: retribution and deterrence. It has been held that forfeiture can serve a deterrent purpose that is remedial and not punitive.²²⁴ This would, for example, involve an economic penalty.²²⁵ As the Supreme Court has opined, "[f]orfeiture of property prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior *unprofitable*.'"²²⁶ Many cases in which the forfeitures were upheld involved similar reasoning.²²⁷

Yet the statutes used to seize an individual's car after an arrest for drunk driving are completely different. No such economic benefit can

220. *Id.* at 99-100 (quoting *Kennedy*, 372 U.S. at 168-69).

221. *Id.* at 100 (internal citations omitted).

222. 372 U.S. 144 (1963).

223. *Hudson*, 522 U.S. at 101 (citation omitted).

224. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

225. *See id.*

226. *Id.* (second alteration in original) (emphasis added).

227. *See, e.g., Hudson v. United States*, 522 U.S. 93, 105 (1997) (promoting the stability of the banking industry); *United States v. Ursery*, 518 U.S. 267, 291 (1996) (removing the profit from distributing illegal drugs); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (discouraging unregulated commerce in firearms); *Van Oster v. Kansas*, 272 U.S. 465, 466 (1926) (upholding forfeiture of vehicle to prohibit illicit transportation of alcohol during Prohibition).

be gained from the illegal use of a car in a drunk driving offense.²²⁸ Indeed, public officials concede that the only use of these statutes is to deter the conduct.²²⁹ No economic reason or goal exists at all. Take, however, the goals behind forfeitures for the smuggling of drugs or weapons. When a person's car or home is seized because of those types of charges, that person is effectively prevented from using that car or home to make money from the illegal activity.²³⁰ Consider the example of the drug dealer who conducts his illicit business from his vehicle. Under this reasoning, the law would allow a drug dealer's car to be forfeited if the drug dealer did in fact use the car to make drug transactions. Forfeiture would effectively prevent the dealer from using that car to conduct further drug transactions, thereby imposing an economic penalty. This undoubtedly makes the illegal behavior unprofitable (it removes the profit from the drug deal) and fits within the Supreme Court's reasoning. Since the goal of drunk driving forfeitures is only to deter, it fails the "profit" test, and is arguably punitive for double jeopardy purposes. Therefore, under the framework established by the Supreme Court, the argument for violation of double jeopardy is much stronger in drunk driving forfeiture cases.

B. The Leading Cases

1. *United States v. Ursery*

In *United States v. Ursery*,²³¹ the defendants were charged with drug and money laundering offenses.²³² The United States attempted to forfeit defendants' property that was used in facilitating these crimes.²³³ The Supreme Court held that the civil forfeitures in question did not constitute punishment for the purposes of the Double Jeopardy Clause.²³⁴

In answering the initial "intent" question, the Court pointed to several factors and principles. First, these forfeiture statutes were entitled

228. Unless however, the individual is someone who earns a living from making deliveries.

229. See Morrison, *supra* note 1, at A37.

230. See cases cited *supra* note 227; see also cases cited *infra* note 243.

231. 518 U.S. 267 (1996).

232. See *id.* at 271. The case was actually a consolidation of two separate cases with similar facts and similar claims. See *id.* at 270.

233. See *id.* at 272.

234. See *id.* at 270-71.

"civil forfeiture."²³⁵ Second, the Court found the statutes to be *in rem*, and not *in personam*, because the forfeitures were specifically structured to be impersonal by targeting the property itself.²³⁶ Apparently, the Court made a theoretical distinction between a proceeding "against a thing" (*in rem*) and a proceeding "against a person" (*in personam*). Third, the Court held that forfeitures designated by Congress to be civil, which proceed *in rem*, are presumptively not subject to double jeopardy constitutional protection.²³⁷ Thus, these particular statutes were, for the purposes of the "intent" question, considered civil. The Court then turned to the second prong of the analysis.

The Court noted that when the "clearest proof" indicates that an *in rem* civil forfeiture is so punitive either in purpose or effect as to be equivalent to a criminal proceeding, the Double Jeopardy Clause will take effect, regardless of legislative intent.²³⁸ Applying the *Kennedy* factors, the Court found that the burden of "clearest proof" had not been met.²³⁹

The Court also considered several other factors in making its determination. First, it held that it was "absolutely clear" that *in rem* civil forfeiture had not been historically regarded as punishment.²⁴⁰ Second, it held that there was no requirement in the statutes at issue that the government demonstrate scienter; the property may be subject to forfeiture, even though the government never demonstrates any connection between the property and a particular person.²⁴¹

However, most important to the *Ursery* court was the fact that the forfeiture statutes at issue, while having certain punitive aspects, also served an important remedial goal.²⁴² The remedial goal to which it was referring was that such forfeitures imposed an economic penalty on the

235. See *id.* at 288. However, this is not entirely correct. See 18 U.S.C. § 981 (1994); see also 21 U.S.C. § 881 (Supp. 1998). The title of 18 U.S.C. § 981 is labeled "Civil [F]orfeiture." Contrary to the Court's opinion, the title of 21 U.S.C. § 881 is only labeled as "Forfeitures." In addition, in the section dealing with the disposition of such forfeited property, the statute reads: "Whenever property is civilly or criminally forfeited under this subchapter . . ." *Id.* § 881(e)(1) (emphasis added).

236. See *Ursery*, 518 U.S. at 289.

237. See *id.* at 289 n.3.

238. See *id.*

239. See *id.* at 290-92.

240. See *id.* at 291. This is *Kennedy* factor number two.

241. See *id.* at 291-92. This is *Kennedy* factor number three. See also 21 U.S.C. § 881(a)(6) (Supp. 1998) and 18 U.S.C. § 981(a)(1)(A) (1994) which are the forfeiture statutes at issue in the case. No connection is required between the property and any individual in either section 881(a)(6) or section 981(a)(1)(A).

242. See *Ursery*, 518 U.S. at 290. This is *Kennedy* factor number six.

offender. Such a penalty, the court reasoned, ensured that offenders would not profit from their illegal acts.²⁴³ This is the same recurring theme that occurs in the line of double jeopardy cases.²⁴⁴

2. *Hudson v. United States*

In 1992, in *Hudson v. United States*,²⁴⁵ criminal charges were brought against the defendants, three years after they paid fines to the United States government for their role in a bank fraud scheme.²⁴⁶ In the 1989 action, the defendants were also barred from participating “in the affairs of any banking institution” without the written authorization of the Office of the Comptroller of the Currency and other relevant regulatory agencies.²⁴⁷ The 1992 criminal charges were grounded upon the same transactions in which the 1989 fines and debarment rested.²⁴⁸ The issue was whether or not the 1989 proceeding amounted to “criminal” sanctions.²⁴⁹ If it did, then the government would have been precluded from the 1992 criminal prosecution.²⁵⁰ Ultimately, the Supreme Court held that such penalties were not violative of the Double Jeopardy Clause.²⁵¹

Regarding the “intent” question, the Court held that the 1989 action was civil and not criminal.²⁵² It based its holding on a similar analysis as the one in *Ursery*. The *Hudson* court held that the statutes were civil because the authority to issue the debarment orders was conferred upon the “appropriate Federal banking agencies.”²⁵³ “That such authority was conferred upon administrative agencies is *prima facie* evidence that Congress intended to provide for a civil sanction.”²⁵⁴ This was the case

243. See *id.* at 291. This was the backbone of the Court’s “clearest proof” analysis. See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (discussing forfeiture of a motor vehicle where it was used to facilitate prostitution); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (describing how forfeiture prevented smuggling merchandise into the United States); see also *supra* note 215.

244. See *supra* notes 227, 243.

245. 522 U.S. 93 (1997).

246. See *id.* at 93 The trial court dismissed the indictment and the government appealed, resulting in a reversal. See *id.* The United States Supreme Court affirmed the Tenth Circuit Court of Appeals decision. See *id.* at 98.

247. *Id.* at 97.

248. See *id.* at 97-98.

249. See *id.* at 98.

250. See *id.*

251. See *id.* at 105.

252. See *id.* at 103.

253. See *id.*

254. *Id.* (emphasis added).

in light of the fact that there was no specific language that explicitly stated that such penalties were "civil."²⁵⁵

Moving to the second prong of the analysis, the Court found that there was little evidence, much less any of the required "clearest proof" to suggest that any of the penalties were criminal.²⁵⁶ The Court applied the *Kennedy* factors in making its determination. First, it held that money penalties and disbarment had not been historically viewed as punishment.²⁵⁷ Second, it held that the sanctions did not involve an "affirmative disability or restraint."²⁵⁸ Although Mr. Hudson was prohibited from further participating in the banking industry, this was "certainly nothing approaching the 'infamous punishment' of imprisonment."²⁵⁹ "Third, neither sanction comes into play 'only' on a finding of scienter."²⁶⁰

As seen in *Ursery*, the existence of economic reasoning plays a major role. Here, the Court held that the fines and debarment served to promote the stability of the banking industry.²⁶¹ The Court reasoned that if such sanctions were found violative of double jeopardy, it would "severely undermine the Government's ability to engage in effective regulation of institutions such as banks."²⁶²

C. *The New York Statutes and Double Jeopardy*

1. The "Intent" of the Statutes

Turning to the New York statutes in question, an analysis is necessary in light of the previously mentioned factors and considerations. Clear arguments can be made that these laws violate double jeopardy principles under the particular framework established by *Ursery* and *Hudson*.

255. *See id.*

256. *See id.* at 104.

257. *See id.* This is *Kennedy* factor number two. "[R]evocation of a privilege voluntarily granted,' such as a debarment, 'is characteristically free of the punitive criminal element.' Similarly, 'the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforceable by civil proceedings since the original revenue law of 1789.'" *Id.* (second and third alteration in original) (citations omitted).

258. *See id.* This is *Kennedy* factor number one.

259. *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

260. *Id.* This is *Kennedy* factor number three. The statutes at issue in *Hudson* were 12 U.S.C. §§ 93(b)(2), 504(b), 1818(e) (1994).

261. *See Hudson*, 522 U.S. at 105.

262. *Id.*

As previously mentioned, the first prong of the double jeopardy analysis involves both legislative intent and statutory construction.²⁶³ However, the most persuasive argument for violation of double jeopardy with respect to the New York statutes is demonstrated in the second prong.

The New York City statute at issue, NYCAC section 14-140, authorizes the police commissioner to “use” or “convert to use” a person’s vehicle when that vehicle has been used in committing a crime.²⁶⁴ In *Ursery*, the Court held that *in rem* forfeiture statutes, designated as “civil,” are presumptively not subject to double jeopardy.²⁶⁵

Nowhere in NYCAC section 14-140 are the words “civil forfeiture” used. This, however, is not controlling.²⁶⁶ On the other hand, NYCAC section 14-140 targets property and therefore applies *in rem* principles.²⁶⁷ Therefore, even though it is arguable that the forfeiture is intended to be criminal because the statute authorizes action by the *police commissioner*,²⁶⁸ and not an administrative agency,²⁶⁹ it is unlikely that section 14-140 could fail on double jeopardy grounds at this stage.

The argument for violation of double jeopardy with respect to the Nassau County statute at this stage is even weaker. The statute, NCAC section 8-7.0, authorizes Nassau County to “commence a *civil* action for forfeiture.”²⁷⁰ Thus, under *Ursery*, it is even less likely that forfeiture under this statute would be considered to be criminal at this stage.

2. So Punitive to be Criminal?

At this point, it is necessary to conduct an analysis to determine whether the forfeitures under these two statutes are so punitive that the civil remedy is transformed into a criminal penalty. If so, then under this second prong of the double jeopardy analysis, an intended civil forfeiture will be deemed criminal and violate double jeopardy. An examination of the *Kennedy* factors²⁷¹ applied to the New York statutes is therefore pertinent.

263. See *supra* notes 214-16 and accompanying text.

264. See N.Y.C. ADMIN. CODE § 14-140(e)(2) (1999).

265. See *United States v. Ursery*, 518 U.S. 267, 289 n.3 (1996).

266. See *Hudson*, 522 U.S. at 103.

267. See N.Y.C. ADMIN. CODE § 14-140(e)(2), (b).

268. See *id.* § 14-140(e)(2).

269. As in *Hudson*. See *Hudson*, 522 U.S. at 103.

270. See NASSAU COUNTY, N.Y., ADMIN. CODE § 8-7.0(g)(3) (1990) (emphasis added); see also § 8-7.0(g)(5) (“A *civil* action seeking forfeiture brought under this section . . .”) (emphasis added).

271. See *supra* notes 220 and accompanying text.

In their application, no one factor should be dispositive or controlling.²⁷² The *Hudson* Court also noted an inherent fault in the *Kennedy* factor analysis: these factors “may often point in differing directions.”²⁷³ Indeed, such is the case here. As applied to the New York statutes, *Kennedy* factors one,²⁷⁴ two,²⁷⁵ three,²⁷⁶ and five²⁷⁷ do not suggest a violation of double jeopardy. In contrast, factors four,²⁷⁸ six,²⁷⁹ and seven²⁸⁰ suggest that a violation of double jeopardy does exist.

An affirmative disability or restraint does not exist here. An individual whose vehicle is seized can still work, socialize, and perform all other functions. Even in *Hudson*, where the defendants were prohibited from further participation in the banking industry, the Court held that no such disability or restraint existed.²⁸¹ The Court has also generally held that *in rem* civil forfeiture has not been historically regarded as punishment.²⁸² Nor does the forfeiture apply only upon a finding of scienter. When the “property may be subject to forfeiture even if . . . the Government never shows any connection between the property and a particular person,” then there is no requirement of scienter.²⁸³ Finally, even though the behavior to which the forfeiture applies is already a crime, it has been held that the Government can impose a civil and a criminal penalty with respect to the same conduct.²⁸⁴

272. See *Hudson*, 522 U.S. at 101 (citation omitted).

273. *Id.* (citation omitted).

274. “Whether the sanction involves an affirmative disability or restraint.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

275. “[W]hether [the sanction] has historically been regarded as a punishment.” *Id.*

276. “[W]hether [the sanction] comes into play only on a finding of scienter.” *Id.*

277. “[W]hether the behavior to which [the sanction] applies is already a crime.” *Id.*

278. “[W]hether [the sanction’s] operation will promote the traditional aims of punishment—retribution and deterrence.” *Id.*

279. “[W]hether an alternative purpose to which it may rationally be connected is assignable for it.” *Id.* at 168-69.

280. “[W]hether [the sanction] appears excessive in relation to the alternative purpose assigned.” *Id.* at 169.

281. See *Hudson v. United States*, 522 U.S. 93, 104 (1997). According to the Court, it would seem that the only kind of disability or restraint that would meet the threshold would be imprisonment. See *id.* “While petitioners have been prohibited from further participating in the banking industry, this is ‘certainly nothing approaching the “infamous punishment” of imprisonment.’” *Id.*

282. See *United States v. Ursery*, 518 U.S. 267, 291 (1996).

283. *Id.* at 291-92.

284. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). Yet if the Court is suggesting that the Government can impose a civil and a criminal penalty with respect to the same conduct in *all* cases, then the Court is effectively eliminating this factor from the analysis. But see *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784 (1994). In that case, it was held that a drug tax based on the commission of a crime was the second punishment of a criminal offense and hence, violative of the double jeopardy clause. See *id.* “[T]his [penalty] is

Yet, as we have already seen, even though the penalty may be called civil, it is really a punitive measure. Examining the statutes and their application leads one to the conclusion that they promote the traditional aims of punishment: retribution and deterrence.²⁸⁵ Moreover, public officials concede this fact.²⁸⁶ Indeed, the only rational purpose behind such a policy is to deter individuals from drinking and driving, by making them pay for such conduct.²⁸⁷ Alternative purposes do not exist. Simply stated, the goals are to achieve a lower rate of DWI offenses (deterrence) and to make offenders pay a heavier debt to society (retribution). Therefore, on its face, this clearly supports a strong argument that double jeopardy is violated.

Additionally, consider the following cases in which the double jeopardy argument has not prevailed. Notice that in each one, the goal of the penalty was economic, not punitive. For example, in *Hudson v. United States*,²⁸⁸ the Court upheld the sanctions because they promoted the stability of the banking industry.²⁸⁹ In *United States v. Ursery*,²⁹⁰ the forfeiture was upheld because it removed the profit from distributing illegal drugs.²⁹¹ In *Bennis v. Michigan*,²⁹² the forfeiture of a motor vehicle was upheld where it was used to facilitate prostitution.²⁹³ In *United States v. One Assortment of 89 Firearms*,²⁹⁴ the forfeiture was upheld because it discouraged unregulated commerce in firearms.²⁹⁵ In *One Lot Emerald Cut Stones v. United States*,²⁹⁶ the forfeiture was upheld because it prevented smuggling merchandise into the United States.²⁹⁷ In *Van Oster v. Kansas*,²⁹⁸ the forfeiture was upheld because it helped prohibit illicit transportation of alcohol during the Prohibition era.²⁹⁹ In all of these cases, the forfeiture or sanction was upheld because it took away the profit from the criminal act. This reveals the common thread

conditioned on the commission of a crime. That condition is 'significant of penal and prohibitory intent rather than the gathering of revenue.'" *Id.* at 781.

285. See sources cited *supra* note 152.

286. See sources cited *supra* note 152.

287. See sources cited *supra* note 152.

288. 522 U.S. 93 (1997).

289. See *id.* at 105.

290. 518 U.S. 267 (1996).

291. See *id.* at 291.

292. 516 U.S. 442 (1996).

293. See *id.* at 443.

294. 465 U.S. 354 (1984).

295. See *id.* at 364.

296. 409 U.S. 232 (1972).

297. See *id.* at 237.

298. 272 U.S. 465 (1926).

299. See *id.* at 466.

that lies at the core of these decisions. Therefore, it is absolutely clear that the existence of an economic penalty is a major factor. It is also just as clear that when there is a complete lack of economic penalty, as is the case here, double jeopardy is violated.

VI. CONCLUSION

While seizing an individual's car upon arrest for a drunk driving offense may seem praiseworthy, it is necessary to consider the extremely important and unavoidable Constitutional protections that the Founding Fathers created. At present, the New York City and Nassau County forfeiture statutes are severely lacking in Due Process protection, and also violate the Excessive Fines Clause and Double Jeopardy Clause of the United States Constitution. It follows that they contravene the analogous sections of the New York State Constitution as well.

Even if it might be argued, however, that the Federal Constitution is not violated, the New York State Constitution should provide a higher standard of protection for its citizens from such authority. The *Grinberg* decision argues to the contrary, suggesting that New York's Constitution is not often interpreted more broadly than the Federal Constitution.³⁰⁰ Yet this is not the case. As stated by New York's highest court in 1992, "[a]n independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights that our citizens have long assumed to be part of their birthright."³⁰¹ Therefore, it would not be unusual nor out of the ordinary for New York's highest court to hold that the current forfeiture statutes are violative of New York's Constitution.

Additionally, if this case were ultimately to reach the United States Supreme Court, it is not unlikely that the Court would hold that the statutes are violative. This is due especially to the recent push in Congress to provide greater due process protections for owners of property seized by the government in civil actions.³⁰² The 'Civil Asset Forfeiture Reform Act' reflects the growing concern that our forfeiture laws are being used in terribly unjust ways and depriving citizens of their property without

300. See *Grinberg v. Safir*, 694 N.Y.S.2d 316, 326 (Sup. Ct. 1999).

301. *People v. Scott*, 583 N.Y.S.2d 920, 934 (1992).

302. See Rhonda McMillion, *Getting a Grip on Seizure Laws: Bill Seeks Greater Due Process Protections in Civil Asset Forfeiture Cases*, A.B.A. J., Sept. 1999, at 92.

any measure of due process.³⁰³ This Act has been passed by the House of Representatives overwhelmingly,³⁰⁴ and is still pending in the Senate.³⁰⁵

Indeed, our application of forfeiture law has drifted in the direction of the extreme. Recently, the Mayor of New York proposed a new policy, authorizing the seizure and forfeiture of vehicles in which the motorist has been charged with driving *recklessly*.³⁰⁶ The criteria for seizure in these cases is based on the commission of multiple (three or more) traffic infractions.³⁰⁷ Some examples of infractions include speeding, unsafe lane changing, and following too closely.³⁰⁸ Such a radical application is nothing more than executive abuse of our system. When the New York City and Nassau County forfeiture statutes are applied, George Orwell's *1984* does not seem to be that far away.

*Michael J. Langer**

303. *See id.*

304. *See id.*

305. *See* S. 1931, 106th Cong. (1999).

306. *See* Dan Janison & Robert Polner, *In His City . . . / Giuliani's Outline for the Future*, *NEWSDAY* (Queens) Jan. 14, 2000, at A5.

307. *See* Sean Gardiner, *Cops May Seize Cars of Reckless*, *NEWSDAY* (Queens), Jan. 14, 2000, at A33.

308. *See id.*

* This Note is dedicated to the two most important people in my life: my father, Pinchas Langer, whose unending and untiring support has allowed me to strive and fulfill all of my achievements, both academic and otherwise; and my fiancée, Kari Kaplan, whose continuous support for my ideas and values has instilled confidence in me and helped me endure the struggle of life. Without either of them, this Note would not have been possible. Additionally, I would like to thank Professor David Diamond for his excellent and invaluable suggestions, ideas, and constructive criticism. Also, I would like to thank Judge Paul E. Kowtna and Gerard Zuckerman for their comments as well as their help publicizing this Note. Lastly, I would like to thank Bettina Elstroth, Notes and Comments Editor of the *Hofstra Law Review*, who personally devoted countless hours reviewing this Note and assisting in its perfection, as well as other editors and staff members of the *Hofstra Law Review*, who have made this publication possible.

