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ARTICLES

ASSET FORFEITURE, BURDENS OF PROOF AND THE WAR ON DRUGS

MARC B. STAHL*

I. INTRODUCTION

The public perceives drug abuse to be one of society's most pressing problems,¹ and our legal system has catered to these sentiments.² In particular, civil forfeiture schemes have been increasingly employed in the "war on drugs." In 1985, the Department of

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¹ In September 1989, a Gallup Poll reported that more than 60% of Americans cited illegal drugs as the most important problem facing the nation. Randolph Ryan, *A Poverty Paint Job*, BOSTON GLOBE, July 31, 1990, at 11. As the economy soured, that number dropped to 30% in April 1990, and 18% in July 1990 (at which time 21% mentioned the federal budget deficit as the number one problem). *Id.*; Michael R. Kagay, *Deficit Raises as Much Alarm as Illegal Drugs, a Poll Finds*, N.Y. TIMES, July 25, 1990, at A9. Despite this shift in priorities, American attitudes toward illegal drugs, as well as alcoholic beverages and tobacco cigarettes, indicate an intense and widespread public intolerance. In December 1990, the National Household Survey on Drug Abuse reported that among 18- to 25-year-olds, the percentage who had used cocaine in the last month went from 9% in the peak year of 1979 to 2%. Gina Kolata, *Temperance: An Old Cycle Repeats Itself*, N.Y. TIMES, Jan. 1, 1991, § 1 at 35. The percentage who had used any illegal drug in the last month went from 37% in 1982 to 15%. *Id.* A December 1990 USA Today survey of 16- to 24-year-olds found that 77% favored random drug testing, 78% thought that marijuana should remain illegal and 58% identified drugs as the most important problem they faced. Karen S. Peterson, *Young Adults Are Leaning to the Right*, USA TODAY, Dec. 13, 1990, at 1D.

² In March 1988, the Reagan Administration announced a shift in drug policy, directing efforts at the demand as well as supply side of the drug trade and adopting a "zero tolerance" strategy. *See, e.g.*, Ruth Marcus, *Customs: No Leniency for Drugs at Borders*, WASH. POST, Mar. 19, 1988, at A3; John Kendall, *U.S. to Charge Smugglers of Even Small Drug Amounts*, L.A. TIMES, Apr. 7, 1988, at A33; Barbara Bradley, *Users Now Prime Targets in U.S. Antidrug Offensive*, CHRIST. SCI. MONITOR, May 4, 1988, at 1. The more extreme proposals in early 1988 included mandatory drug testing of all persons arrested and almost all persons employed. *See Meese Is Seeking to Require Drug Testing in All Arrests*, N.Y.

Justice created the National Assets Seizure and Forfeiture Fund and collected \$27 million from drug-related forfeitures. The yearly acquisitions have grown to almost \$500 million in 1990.³ At least \$1.4 billion more in real and personal property has been seized and currently awaits forfeiture.⁴ These efforts will doubtless continue in earnest since they are supported by the highest levels of authority. President Bush has boasted that “[a]sset forfeiture laws allow us to take the ill-gotten gains of drug kingpins and use them to put more cops on the streets and more prosecutors in court.”⁵

TIMES, Apr. 27, 1988, at A16; Bill McAllister, *Meese Asks Drug Tests for 'Most' Workers; Mayors Assail Federal Efforts as Poorly Run, Underfunded*, WASH. POST, Apr. 27, 1988, at A1.

The new approach included stepped-up efforts at asset forfeiture. See, e.g., *75 Cars Seized by Customs in Border Drug Crackdown*, CHI. TRIB., Apr. 26, 1988, § 1 at 4; *542 Drug Vehicles in 5 Weeks Seized by Customs Service*, L.A. TIMES, May 1, 1988, at A32; Matt Lait, *Research Ship Seized in 'Zero Tolerance' Drug Raid*, WASH. POST, May 20, 1988, at A12; Ruth Marcus, *Vehicle Seizures Stepped Up in Drug War; Truck, Several Mercedes Confiscated Under 'Zero Tolerance' Policy*, WASH. POST, May 10, 1988, at A9; Laura Parker, *Yacht Seized Over .1 Ounce of Marijuana; Vessel to Be Sold Under Tough Policy*, WASH. POST, May 9, 1988, at A1.

The “zero tolerance” strategy is only the most prominent manifestation of the government’s increasing concern over the dangers of illegal drugs. Judge Greenberg of the Third Circuit has described recent legislative efforts:

[C]ongress has been stiffening the penalties for drug related offenses in an effort to combat a national drug problem of epidemic proportion. In legislation ranging from the Controlled Substances Penalties Amendments Act of 1984, to the Narcotics Penalties and Enforcement Act of 1986, and to the Anti-Drug Abuse Act of 1988, Congress has sent out a clear message that narcotics offenses are to be dealt with harshly. Congress’s provision for civil forfeiture of real property in the Comprehensive Crime Control Act of 1984 is a critical part of its legislative drive to wipe out drug trafficking. [We are] in the midst of a national blizzard of anti-drug legislation and activity

United States v. 6109 Grubb Rd., 890 F.2d 659, 665-66 (3d Cir. 1989) (Greenberg, J., dissenting).

³ Sean P. Murphy, *10 Sites Are Seized in U.S. Drug Sweep*, BOSTON GLOBE, Mar. 8, 1991, at 17.

⁴ *Use Drug Profits to Treat Addicts*, NEWSDAY, Aug. 18, 1991, at 37. The federal government collected \$94 million from these efforts in 1986, \$178 million in 1987, \$207 million in 1988 and \$358 million in 1989. See *Federal Seizure of Illegal Assets Nets Government \$1.5 Billion Since 1985*, U.S.L.W. — Daily Ed. (Feb. 4, 1991); Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. TIMES, Jan. 7, 1990, § 1 at 18; see also Murphy, *supra* note 3; Christine Kukka, *Selling Drug Dealers' Seized Properties*, N.Y. TIMES, Sept. 8, 1991, § 10 at 5; Michael Isikoff, *Drug Raids Net Much Valuable Property — and Legal Uproar*, WASH. POST, Apr. 1, 1991, at A1; Sam V. Meddis, *Supplies of Cocaine Up; Price Down*, USA TODAY, Jan. 28, 1991, at 1A. These sources give slightly varying figures. In addition, similar figures are attributed to civil forfeitures for drug-related activities, all forfeitures for drug-related activities and all forfeitures.

The Justice Department has predicted that it will generate \$700 million in forfeiture proceeds during 1991. Isikoff, *supra* this note. Due to the decline in the real estate market, receipts from asset forfeitures have slowed and the final figure for 1991 might be closer to \$500 million. Kukka, *supra* this note; see also *Seizure Laws Victimize the Innocent, Report Says*, UPI, Aug. 12, 1991 (available in LEXIS, Nexis Library, UPI File).

⁵ President George Bush, *Remarks By President Bush to Attorney General's Summit on Law Enforcement: Responses to Violent Crime*, Fed. News Serv., Mar. 5, 1991 (available in LEXIS, Nexis Library, FEDNEW File). Former Attorney General Richard Thornburgh once

Most civil forfeitures directed at drug activity occur under the aegis of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (hereinafter "the Act").⁶ Section 881 of the Act originally declared the following to be forfeitable: all controlled substances,⁷ all raw materials and equipment used to manufacture controlled substances⁸ and all vehicles used to distribute controlled substances.⁹

quipped, "Our new message to drug profiteers is, 'You make it, we'll take it.'" *Federal Seizure of Illegal Assets*, *supra* note 4.

⁶ 21 U.S.C. § 881 (1992). Civil forfeitures for drug-related criminal conduct are also allowed under 49 U.S.C. §§ 781-782 (1992) (hereinafter "§ 781") and a number of state statutes. *See, e.g.*, ILL. REV. STAT. ch. 56 1/2, para. 1671-1683 (1991) (probable cause standard). Almost all of these civil forfeiture provisions provide for forfeitures with limited procedural protections and are susceptible to the constitutional challenges described in this article. *But see* N.Y. CIV. PRAC. L. & R. § 10:421 (McKinney 1991) (state bears burden of proof by preponderance of evidence after criminal conviction and by clear and convincing evidence before criminal conviction). The language in § 781, for example, is nearly identical to that in the Act's provisions for the forfeiture of vehicles — § 881(a)(4). Section 781 expressly permits forfeiture via the customs laws, employing the same procedures as § 881. 49 U.S.C. §§ 782-784 (1992). Section 881's provisions for forfeiture of vehicles, however, have been interpreted more broadly than § 781. *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500, 502 (5th Cir. 1981).

Criminal forfeiture for drug-related criminal conduct is provided for in 21 U.S.C. §§ 848, 853 (1992). Section 853 is more general in its coverage than either of the federal civil forfeiture provisions, applying to "[a]ny property constituting or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation [and] any . . . property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation." 21 U.S.C. § 853(a)(1)-(2). In order to permit forfeiture under § 853, however, a criminal conviction for violation of drug laws is a necessary predicate. 21 U.S.C. § 853(a); *United States v. Sandini*, 816 F.2d 869, 876 (3d Cir. 1987). Even after a guilty verdict in a criminal case, the government must prove beyond a reasonable doubt that the particular property was involved in illegal activities to affect a forfeiture under § 853. *United States v. Elgersma*, 929 F.2d 1538, 1544-48 (11th Cir. 1991). *But see Sandini*, 816 F.2d at 876.

The civil forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act are the federal government's primary means of permanently seizing drug-related property.

⁷ 21 U.S.C. § 881(a)(1), (8). Section 881 initially declared forfeitable "[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title." 21 U.S.C. § 881(a)(1). In 1984, § 881 was amended to include "[a]ll controlled substances which have been possessed in violation of this title." 21 U.S.C. § 881(a)(8).

⁸ 21 U.S.C. § 881(a)(2) reads: "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."

21 U.S.C. § 881(a)(9) reads: "All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III."

⁹ 21 U.S.C. § 881(a)(4) reads in part: "All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to

The reach of § 881 has been widened. In 1978, Congress added § 881(a)(6), which permits the forfeiture of all profits from the drug trade and all assets purchased with such proceeds.¹⁰ The 1978 amendments also cover assets intended to be given in exchange for controlled substances,¹¹ allowing the forfeiture of property never actually involved with illegal activities.

In 1984, Congress added § 881(a)(7), which authorizes the forfeiture of all real property used in any manner to facilitate a violation of drug laws.¹² The statute applies to entire tracts of land and all improvements, regardless of what portion of the property facilitated the illegal activities.¹³ Improvements added to the real estate

facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9)”

A related provision applies to property used as a container for illegal drugs or items used to produce or distribute illegal drugs. 21 U.S.C. § 881(a)(3) reads: “All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).”

¹⁰ 21 U.S.C. § 881(a)(6) reads in part: “All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title”

¹¹ *Id.*

¹² 21 U.S.C. § 881(a)(7) reads in part: “All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title”

¹³ The language of the statute is explicit, permitting forfeiture of “[a]ll real property . . . in the whole of any lot or tract of land and any appurtenances or improvements” 21 U.S.C. § 881(a)(7) (emphasis added). Courts have given the statute a broad reading. See *United States v. .697 Acres of Land*, No. 90-6060, 1991 U.S. App. LEXIS 3900, at *4 (4th Cir. Mar. 11, 1991) (“Should the claimant fail to discharge his burden then the entire tract of land is subject to forfeiture despite the fact that only a portion was used unlawfully.”); *United States v. 2 Burditt St.*, 924 F.2d 383, 385 (1st Cir. 1991) (“The law is well settled that, in a forfeiture proceeding under § 881(a)(7), property in its entirety is forfeitable even if only a portion of it was used for illegal purposes.”); *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1556-57 (11th Cir. 1991); *United States v. 141st St. Corp.*, 911 F.2d 870, 880 (2d Cir. 1990) (“[T]he plain language of the statute indicates Congress’ intent that an entire parcel of land may be subject to forfeiture even if only part of it is directly connected to drug activity.”); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400 (3d Cir. 1990) (“When it is invoked by the government it embraces all of a unitary tract although only part is used in violation of the provision of § 881(a)(7).”); *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 45 (1st Cir. 1989) (“Both the statute and the case law authorize forfeiture proceedings against the entire tract of land, regardless of the magnitude of the infraction.”); *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989) (“[W]e reject appellants’ argument that only the smaller portion of the property, where the cocaine sales actually occurred, can be forfeited This property, although divided by a road, is legally described as a single, undivided tract We adopt the reasoning of the court below that the ‘whole of any lot or tract of land’ must be determined from the duly recorded instruments and documents filed in the county offices where the defendant property is located. Conse-

after the commission of the predicate act but before the forfeiture suit are also covered.¹⁴

Section 881 affords defendants substantially less procedural protections than traditional criminal prosecutions. Particularly striking is the contrast in burdens of proof. In order to impose criminal sanctions, the government must prove its case beyond a reasonable doubt.¹⁵ A civil forfeiture action brought under the Act, however, places the burden of proof on the defendant. Once a court finds probable cause to believe that property was involved in a drug crime, the claimant must prove by a preponderance of the evidence that the property was not involved in any illegal activities.¹⁶ Currency, buildings, land, automobiles, airplanes, ships and other significant pieces of property have been taken by the government.¹⁷ Homes and even public housing leaseholds have been forfeited.¹⁸

quently, the 26-acre parcel, in its entirety, is subject to this forfeiture.") (citations omitted); *United States v. 300 Cove Rd.*, 861 F.2d 232, 233, 235 (9th Cir. 1988) (\$90,000 home forfeited when marijuana plants found growing on less than 200 square feet of property); *United States v. 16 Clinton St.*, 730 F. Supp. 1265, 1269-70 (S.D.N.Y. 1990) ("Because the statute distinguishes neither between leaseholds within the fee interest and the entire interest, nor between part of the property and the whole, plaintiff's argument that the activity took place within separate leaseholds is inconsistent with any reasonable interpretation of the statute.").

¹⁴ In *2 Burditt St.*, 924 F.2d at 383, \$42,000 in improvements were made to the property after the illegal conduct occurred and before the forfeiture proceedings began. Although the improvements increased the value of the property beyond its worth at the time of the illegal conduct, reimbursement for the value of the improvements was denied. *Id.* at 384-85.

¹⁵ See *infra* note 71 and accompanying text.

¹⁶ See *infra* notes 52-54 and accompanying text.

¹⁷ See, e.g., *United States v. One Parcel of Real Property*, 900 F.2d 470 (1st Cir. 1990); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d at 396; *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989); *United States v. \$5,644,540 in United States Currency*, 799 F.2d 1357 (9th Cir. 1986); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432 (9th Cir. 1985); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982); *United States v. Fleming*, 677 F.2d 602 (7th Cir. 1982).

¹⁸ The Federal District Court for Rhode Island has described the harsh results of forfeiting public housing leaseholds:

The forfeiture of the apartment and the federal housing assistance payments which subsidize it would take from defendant her home and the *only* means by which she can obtain housing for herself and her children at this time. Such a forfeiture is fundamentally different in nature from the forfeiture of land or a house, whether owned outright or leased. An order of forfeiture here would be, in effect, a sentence of homelessness for the defendant and her three young children.

United States v. Robinson, 721 F. Supp. 1541, 1544 (D.R.I. 1989) (criminal forfeiture proceeding found to violate the Eighth Amendment). See also *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991); *United States v. Leasehold Interest in 850 S. Maple*, 743 F. Supp. 505 (E.D. Mich. 1990); *United States v. Leasehold Interest in 900 E. 40th St., Apartment 102*, 740 F. Supp. 540 (N.D. Ill. 1990); *Richmond Tenants Org. v. Kemp*, 753 F. Supp. 607 (E.D. Va. 1990), *aff'd*, 956 F.2d

Section 881 produces devastating consequences based upon minimal proof.

In today's "drug war" climate, the broader implications of civil forfeiture laws have escaped close scrutiny. This article will argue that § 881's placement of the burden of proof violates the Due Process Clause. First, the Act's statutory requirements for affecting a forfeiture will be analyzed.¹⁹ The article will then discuss burdens of proof in judicial proceedings.²⁰ In particular, the differences between civil and criminal sanctions will be explored.²¹ Finally, the article will conclude that forfeitures of vehicles, real property and monetary instruments allegedly used to promote illegal activities constitute criminal punishment.²² Thus, § 881 should not be applied to affect such forfeitures unless the government proves its case beyond a reasonable doubt.

II. PROCEDURAL STEPS FOR AFFECTING A FORFEITURE

A. SEIZURE OF PROPERTY

Section 881 offers law enforcement officials a variety of procedures for seizing property. First, property may be seized according to the Supplemental Rules for Certain Admiralty and Maritime Claims (hereinafter "Supplemental Admiralty Rules"). Section 881 states, "Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States hav-

1300 (4th Cir. 1992); D. Bryson & R. Youmans, *Crime, Drugs, and Subsidized Housing*, CLEARINGHOUSE REV. 440, 443 (1990).

On June 25, 1990, federal magistrates in 23 cities throughout the U.S. issued orders finding probable cause that various public housing residences had been used or had been intended to be used to commit felony violations of federal drug laws. *Kemp Plan: Evict Drug Dealers from Public Housing*, CHI. TRIB., May 16, 1990, § 1 at 14 [hereinafter *Kemp Plan*]. The next day, the tenants were notified that they had 30 days to respond if they chose to deny the accusations (20 days to claim a property interest and then 10 days to prepare their cases). See *121 Nostrand Ave.*, 760 F. Supp. at 1026; Information Release, U.S. Department of Justice, United States Attorney Northern District of Illinois, June 26, 1990; see also *Kemp Plan*, *supra* this note; Andrew Fegelman, *U.S. Law Helps CHA Fight Drugs*, CHI. TRIB., June 27, 1990, § 2 at 13. The forfeitures were part of the National Housing Asset Forfeiture Project, a program developed by Secretary of Housing and Urban Development Jack Kemp. Under the program, the government evicted residents through forfeiture rather than traditional forcible entry and detainer actions, which require proof by a preponderance of the evidence. *Id.*

¹⁹ See *infra* notes 23-70 and accompanying text.

²⁰ See *infra* notes 71-78 and accompanying text.

²¹ See *infra* notes 79-128 and accompanying text.

²² See *infra* notes 129-260 and accompanying text.

ing jurisdiction over the property.”²³ Subsequent amendments to the Supplemental Admiralty Rules provide for seizures without prior judicial approval.²⁴

Section 881 outlines alternative means for the government to seize property. A seizure may be made incident to an arrest or inspection.²⁵ Likewise, law enforcement officials may seize property when the Attorney General has probable cause to believe that the property is subject to forfeiture or is dangerous to health or safety.²⁶ The Act explains that “[t]he Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.”²⁷ Some courts have required the government to obtain a warrant prior to seizure, unless exigent circumstances are present.²⁸ On its face, however, the language does not require a warrant, and many courts have allowed warrantless seizures.²⁹

²³ 21 U.S.C. § 881(b). See also FED. R. CIV. P. SUPPLEMENTAL ADMIRALTY RULES C(3) (1988) [hereinafter SUPPLEMENTAL ADMIRALTY RULES]; *United States v. Turner*, 933 F.2d 240, 244 (4th Cir. 1991); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262-63 (2d Cir. 1989); *United States v. Leasehold Interest in 850 S. Maple*, 743 F. Supp. 505, 507 (E.D. Mich. 1990).

²⁴ SUPPLEMENTAL ADMIRALTY RULES C(3) begins:

Except in action by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service.

Id. (emphasis added). The advisory committee notes accompanying the 1985 amendments explain that “[r]equirements for prior court review . . . do not apply to actions by the United States for forfeitures” SUPPLEMENTAL ADMIRALTY RULES C(3) advisory committee note.

As § 881 provides for the U.S. government to seize property upon a violation of federal law, seizure is authorized without prior judicial approval. Courts have pointed out this language in § 881 actions. *E.g.*, *In re Warrant to Seize One 1988 Chevrolet Monte Carlo v. United States*, 861 F.2d 307, 310 (1st Cir. 1988); *United States v. South Side Fin., Inc.*, 755 F. Supp. 791, 799 (N.D. Ill. 1991); *United States v. 3400-3410 W. 16th St.*, 636 F. Supp. 142, 145 (N.D. Ill. 1986).

²⁵ 21 U.S.C. § 881(b)(1).

²⁶ 21 U.S.C. § 881(b)(3)-(4).

²⁷ 21 U.S.C. § 881(b).

²⁸ *E.g.*, *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262-63 (2d Cir. 1989); *One 1988 Chevrolet Monte Carlo*, 861 F.2d at 311; *United States v. Spetz*, 721 F.2d 1457, 1469-70 (9th Cir. 1983); *United States v. Pappas*, 613 F.2d 324, 330 (1st Cir. 1979); *United States v. Leasehold Interest in 850 S. Maple*, 743 F. Supp. 505, 507 (E.D. Mich. 1990).

²⁹ See, *e.g.*, *United States v. Turner*, 933 F.2d 240, 244 (4th Cir. 1991); *United States v. Hill*, No. 88-1176, 1991 U.S. App. LEXIS 5439, at *3 (9th Cir. Mar. 28, 1991); *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1302 (5th Cir. 1983); *United States v. Kemp*, 690 F.2d 397, 401-02 (4th Cir. 1982); *United States v. Bush*, 647 F.2d 357,

Section 881 also allows seizures pursuant to the customs laws.³⁰ Law enforcement officials must establish probable cause for seizure and secure a warrant from a federal magistrate or a state court in the same district as the property. Upon receiving such a warrant, the Attorney General or customs officials may seize the property.³¹

Finally, forfeiture proceedings may be instituted without a prior seizure of property. If the government prevails in the forfeiture action, § 881 allows subsequent seizure of the property.³²

The government need not provide prior warning to the owner in most § 881 seizures. The Seventh Circuit has succinctly stated that "pre-seizure hearings are not constitutionally required, so long as interested persons are given notice and an opportunity for a post-seizure hearing."³³

A home or residential leasehold, however, cannot be seized without prior notice and an opportunity to be heard.³⁴ The pre-seizure notice requirement provides only limited protection. Reasoning that an individual's interest in a home is unique, courts have explicitly held that notice is not necessary before a § 881 forfeiture of non-residential real estate.³⁵ Additionally, courts will approve a forfeiture even after a residence has been seized without pre-seizure notice.³⁶

367-68 (3d Cir. 1981); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157-58 (3d Cir. 1981); *United States v. Milham*, 590 F.2d 717, 720 (8th Cir. 1979); *United States v. 3400-3410 W. 16th St.*, 636 F. Supp. 142, 145 (N.D. Ill. 1986). See also *infra* note 91 and accompanying text.

³⁰ 21 U.S.C. § 881(d).

³¹ 19 U.S.C. § 1603(a) (1992); 21 U.S.C. § 881(d); FED. R. CRIM. P. 41. If customs officials execute the warrant, the U.S. attorney for the district in which the property is located must be promptly notified of the seizure. 19 U.S.C. § 1603(b).

³² 21 U.S.C. § 881(b)(2). See also *United States v. 73.26 Acres of Land Located at Town Rd. # 4*, 757 F. Supp. 17, 18-19 (D. Vt. 1991) (court has jurisdiction over real property prior to seizure).

³³ *Willis v. United States*, 787 F.2d 1089, 1094 (7th Cir. 1986). See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974); *United States v. South Side Fin., Inc.*, 755 F. Supp. 791, 800-01 (N.D. Ill. 1991).

³⁴ *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3d Cir. 1991); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989) ("[A] showing of exigent circumstances seems unlikely when a person's home is at stake, since, unlike some forms of property, a home cannot be readily moved or dissipated . . . Thus, pre-seizure notice and hearing would not frustrate the statutory purpose of § 881(a)(7)."); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1028-29 (E.D.N.Y. 1991); *Richmond Tenants Org. v. Kemp*, 753 F. Supp. 607 (E.D. Va. 1990), *aff'd*, 956 F.2d 1300 (4th Cir. 1992).

³⁵ *United States v. 141st St. Corp.*, 911 F.2d 870, 874-75 (2d Cir. 1990); *United States v. 16 Clinton St.*, 730 F. Supp. 1265, 1271-72 (S.D.N.Y. 1990).

³⁶ *92 Buena Vista Ave.*, 937 F.2d at 101; *4492 S. Livonia Rd.*, 889 F.2d at 1265.

B. INITIATION OF FORFEITURE PROCEEDINGS

Under § 881, ownership of the property vests in the government the moment the property is involved in a crime.³⁷ Despite its ownership of the property, the government must commence a forfeiture action within a reasonable length of time after seizure. If the property is seized pursuant to the customs laws or upon a finding of probable cause by the Attorney General, the U.S. Code requires forfeiture proceedings to begin in a timely fashion.³⁸

The provisions for seizure incident to arrest or inspection and pursuant to the Supplemental Admiralty Rules do not establish any time in which forfeiture proceedings must begin.³⁹ Three sources of authority, however, suggest that the government must proceed with a forfeiture action shortly after seizure under these procedures as well.

First, the customs laws govern the seizure and forfeiture of all property under § 881 to the extent that the customs provisions are consistent with the Act.⁴⁰ The customs laws demand prompt action by the government regardless of the seizure mechanism.⁴¹ Additionally, Congress mandated expedited procedures for the seizure of conveyances in 1988.⁴² These provisions guarantee quick action when a vehicle is seized, but do not provide any protection when other assets are involved. Under § 888 of Title 21 of the U.S. Code, the government must notify a vehicle owner of a seizure “[a]t the

³⁷ 21 U.S.C. § 881(h) explains: “All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.” Traditionally, most forfeiture statutes have been interpreted as providing for immediate forfeiture upon the commission of the predicate act. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989) (“[The forfeiture statute] reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture.”); *United States v. Stowell*, 133 U.S. 1, 16-17 (1890). The doctrine has been applied in § 881 litigation. *United States v. 2 Burditt St.*, 924 F.2d 383, 385 (1st Cir. 1991); *United States v. \$5,644,540 in United States Currency*, 799 F.2d 1357, 1364 (9th Cir. 1986).

³⁸ 19 U.S.C. § 1604 (1992) (“It shall be the duty of the Attorney General of the United States *immediately* to inquire into the facts of cases reported to him . . . [P]roper proceedings [are] to be commenced and prosecuted, *without delay*”) (emphasis added); 21 U.S.C. § 881(b) (“In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted *promptly*.”) (emphasis added).

³⁹ 21 U.S.C. § 881(b)(1); SUPPLEMENTAL ADMIRALTY RULES C. The Supplemental Admiralty Rules do place strict limits on the time for an answer and for discovery, suggesting that the forfeiture proceedings should begin soon after the seizure. *Id.* C(4), (6).

⁴⁰ 21 U.S.C. § 881(d).

⁴¹ See *supra* note 38.

⁴² 21 U.S.C. § 888 (1992).

earliest practicable opportunity after determining ownership."⁴³ Within sixty days of receiving a claim and cost bond, the government must commence a forfeiture action, show good cause for an extension or secure the consent of the claimant to delay the proceedings.⁴⁴

The Constitution also provides protection for property owners seeking speedy dispositions. The Due Process Clause of the Constitution prohibits unreasonable delays in the commencement of forfeiture proceedings.⁴⁵ The Ninth Circuit, dismissing a forfeiture claim after a twenty-one-month delay, stated that "[i]t is settled law that if a civil forfeiture is to succeed, it must be instituted with reasonable promptness after seizure of property. Delay in the institution of forfeiture proceedings must be justified. In the absence of such justification, an extended delay violates due process."⁴⁶ Although no hard and fast rules exist, the constitutional prohibition provides some protection against excessive delay.

Finally, formal forfeiture proceedings are not always necessary after a seizure. A summary procedure may be employed to forfeit controlled substances, vehicles used to transport or store controlled substances, monetary instruments or *any other* property worth less than \$500,000. To affect a summary forfeiture, the government must send written notice to each party that appears to have any interest in the property.⁴⁷ Upon notice, an interested party must file a claim asserting such interest within twenty days and must post "[b]ond to the U.S. in the penal sum of \$5,000 or 10% of the value of the claimed property."⁴⁸ If a party fails to file a claim and pay the bond, a customs officer may summarily declare the property forfeited.⁴⁹

If a party files a claim and posts the bond, the government must

⁴³ *Id.* § 888(b).

⁴⁴ *Id.* § 888(c). The 60-day limit has been applied strictly. *See, e.g.,* Dwyer v. United States, 716 F. Supp. 1337, 1340 (S.D. Cal. 1989) (62-day delay in mailing of seizure notice results in return of vehicle and prohibition of further forfeiture proceedings).

⁴⁵ *United States v. \$8,850 in United States Currency*, 461 U.S. 555, 556 (1983); *United States v. Turner*, 933 F.2d 240, 246 (4th Cir. 1991); *United States v. Thirteen Machine Guns*, 689 F.2d 861, 863 (9th Cir. 1982); *United States v. One 1973 Buick Riviera*, 560 F.2d 897, 901 (8th Cir. 1977); *United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1114 (1st Cir. 1975); *Skarkisian v. United States*, 472 F.2d 468, 472 (10th Cir. 1973).

⁴⁶ *Thirteen Machine Guns*, 689 F.2d at 863.

⁴⁷ 19 U.S.C. § 1607(a) (1992).

⁴⁸ 19 U.S.C. § 1608 (1992).

⁴⁹ 19 U.S.C. §§ 1608, 1609 (1992). *See also* *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 41 (1st Cir. 1991); *Chavis v. United States*, No. 91-7509, 1991 U.S. App. LEXIS 11043, at *2-3 (4th Cir. May 31, 1991); *Floyd v. United States*, 860 F.2d

pursue a forfeiture action in the federal district court for the district in which the property was seized.⁵⁰

C. BURDENS OF PROOF UNDER § 881

A civil forfeiture action offers the government substantial advantages over a traditional criminal prosecution. The government need only demonstrate probable cause to believe that the property facilitated illegal activities. Once probable cause has been established, the burden of proof shifts to the claimant to prove by a preponderance of the evidence that the property was not used in such a manner.⁵¹ Every federal circuit has interpreted § 881 as shifting the burden of proof to the claimant once the government establishes probable cause.⁵² The Federal Court of Appeals for the First Cir-

999, 1003-04 (10th Cir. 1988); *United States v. Wood*, 851 F.2d 185, 188 (8th Cir. 1988).

The First Circuit has described summary forfeiture under § 881 as an administrative rather than a judicial approach:

[One of] the discernible policy objectives of the forfeiture laws [is] keeping civil forfeiture actions of a certain size (under [\$500,000]) on the administrative rather than the judicial side. So read, the law conserves hard-pressed judicial resources and facilitates resort to simpler, quicker, less expensive administrative procedures which Congress thought it advisable to formulate.

In re Warrant to Seize One 1988 Chevrolet Monte Carlo v. United States, 861 F.2d 307, 310 (1st Cir. 1988). See also *Willis v. United States*, 787 F.2d 1089, 1091 (7th Cir. 1986).

The government may also summarily seize property that is perishable or subject to waste. The proceeds of any sale of perishable property are to be deposited with the U.S. district court until a final determination. 19 U.S.C. § 1612 (1992).

⁵⁰ 19 U.S.C. §§ 1604, 1610 (1992).

⁵¹ 21 U.S.C. § 881(d) provides that the customs laws govern the procedure for forfeitures under § 881. 19 U.S.C. § 1615 (1992) establishes the burden of proof in such forfeiture actions: "In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged by the court"

⁵² *United States v. Brock*, 747 F.2d 761, 762 (D.C. Cir. 1984); *United States v. 1933 Commonwealth Ave.*, 913 F.2d 1, 3 (1st Cir. 1990); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1267 (2d Cir. 1989) ("In a forfeiture proceeding brought under § 881, the burden is initially upon the government to establish its right to forfeiture by demonstrating probable cause To establish its case, the government must have reasonable grounds, rising above the level of mere suspicion, to believe that certain property is subject to forfeiture."); *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 12 (2d Cir. 1982); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989); *United States v. .697 Acres of Land*, No. 90-6060, 1991 U.S. App. LEXIS 3900, at *3-4 (4th Cir. Mar. 11, 1991); *United States v. 7715 Betsy Bruce Lane*, 906 F.2d 110, 111 (4th Cir. 1990) ("In a civil forfeiture proceeding the government must show probable cause that the property is subject to forfeiture. Once the government has made this showing, the burden shifts to

cuit has described the relative burdens:

[T]he government need only show probable cause to believe that the property was used for a specified illegal purpose. Probable cause to forfeit requires only a "reasonable ground for belief of guilt[,] supported by less than prima facie proof but more than mere suspicion" that the property is subject to forfeiture. Once the government makes this showing, the burden shifts to the claimant to prove by a preponderance of the evidence that the property was not used in violation of the statute.⁵³

The government need only establish a reasonable belief that the property was connected to an illegal drug transaction in some manner. The government may rely on hearsay, circumstantial evidence

the claimant to prove by a preponderance of the evidence 'that the factual predicates for forfeiture have not been met.'"); *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989); *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 997-98 (5th Cir. 1990); *United States v. \$364,960 in United States Currency*, 661 F.2d 319, 323 (5th Cir. 1981); *United States v. Route 1, Box 24, No. 90-3070*, 1991 U.S. App. LEXIS 597, at *3 (6th Cir. Jan. 15, 1991); *United States v. 526 Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1988); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 199 (6th Cir. 1978); *United States v. Fleming*, 677 F.2d 602, 609 (7th Cir. 1982); *United States v. One 1976 Mercedes Benz 280S*; 618 F.2d 453, 456 (7th Cir. 1980); *United States v. 3639-2nd St.*, 869 F.2d 1093, 1095 (8th Cir. 1989) ("[I]t was incumbent upon the government to establish the presence of probable cause. Probable cause in a forfeiture proceeding is 'a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.' . . . Once this initial showing has been made, the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that a defense to forfeiture is applicable."); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 526 (8th Cir. 1985); *United States v. One Parcel of Real Property*, 904 F.2d 487, 490-91 (9th Cir. 1990); *United States v. \$5,644,540 in United States Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976); *Bramble v. Richardson*, 498 F.2d 968, 970 (10th Cir. 1974); *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1556-57 (11th Cir. 1991); *United States v. \$3,686,000 in United States Currency*, 762 F.2d 895, 903 (11th Cir. 1985); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426-27 (11th Cir. 1983).

In the context of currency, the claimant's burden can be quite high. The government need not tie the proceeds to any particular drug transaction. *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 104 (3d Cir. 1991); *United States v. Parcels of Land*, 903 F.2d 36, 42 (1st Cir. 1990); *United States v. \$41,305 in Currency and Traveler's Checks*, 802 F.2d 1339, 1343 (11th Cir. 1986); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1435 n.4 (9th Cir. 1985); *United States v. Eighty-Eight Designated Accounts*, 740 F. Supp. 842, 845 (S.D. Fla. 1990); *United States v. 92 Buena Vista Ave.*, 738 F. Supp. 854, 857 (D.N.J. 1990), *rev'd on other grounds*, 937 F.2d 98 (3d Cir. 1991). In responding to the government's allegations, the claimant must establish a legitimate source and then must also prove that particular funds are directly traceable to that source. *See United States v. Price*, 914 F.2d 1507, 1513 (D.C. Cir. 1990); *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 90-92 (5th Cir. 1990); *Parcels of Land*, 903 F.2d at 42; *\$41,305 in Currency & Traveler's Checks*, 802 F.2d at 1345; *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158-63 (2d Cir. 1986); *United States v. \$83,320 in United States Currency*, 682 F.2d 573, 577-78 (6th Cir. 1982).

⁵³ *United States v. 28 Emery St.*, 914 F.2d 1, 3 (1st Cir. 1990) (brackets in original, citations omitted).

or facts learned after the seizure.⁵⁴ The standard effectively leaves claimants with the burden of proving their innocence or losing their homes and other property.

D. THE INNOCENT OWNER DEFENSE UNDER § 881

The statute provides that no vehicles, proceeds or real estate will be forfeited if the violation occurred without the knowledge or consent of the owner.⁵⁵ The "innocent owner" defense, however, provides minimal protection. First, the burden is on the owner to prove innocence.⁵⁶ The Federal District Court for the Northern

⁵⁴ *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991); *28 Emery St.*, 914 F.2d at 5; *Parcels of Land*, 903 F.2d at 38; *United States v. Four Parcels of Real Property*, 893 F.2d 1245, 1250 (11th Cir. 1990); *526 Liscum Drive*, 866 F.2d at 217 n.3; *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987); *\$41,305 in Currency and Traveler's Checks*, 802 F.2d at 1343; *\$5,644,540 in United States Currency*, 799 F.2d at 1362; *1982 Yukon Delta Houseboat*, 774 F.2d at 1434; *One 1976 Ford F-150 Pick-Up*, 769 F.2d at 526; *Brock*, 747 F.2d at 763; *United States v. One 56 Foot Yacht Named Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983); *United States v. One 1974 Porsche 911-S*, 682 F.2d 283, 286 (1st Cir. 1982); *Eighty-Eight Designated Accounts*, 740 F. Supp. at 845; *92 Buena Vista Ave.*, 738 F. Supp. at 857, *rev'd on other grounds*, 937 F.2d 98; *United States v. Route 2, Box 61-C*, 727 F. Supp. 1295, 1298 (W.D. Ark. 1990).

Claimants, on the other hand, are not allowed to rely on hearsay. The higher preponderance of the evidence standard faced by claimants demands more formal rules of evidence. *United States v. One 1968 Piper Navaho Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979); *In re 1957 S. Macon Way*, 704 F. Supp. 1025, 1026 (D. Colo. 1989).

⁵⁵ 21 U.S.C. § 881(a)(4)(C) guarantees that "[n]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. § 881(a)(6) and (7) each guarantee that "[n]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

⁵⁶ *United States v. Parcel of Land off Williamsville Rd., No. 91-1067*, 1991 U.S. App. LEXIS 5056, at *4 (1st Cir. 1991); *.697 Acres of Land*, 1991 U.S. App. LEXIS 3900 at *5 ("Under the correct standard, [the claimant] would have to prove by a preponderance of the evidence that she did not know of, or consent to, the improper use of her property."); *United States v. One Lot of United States Currency*, 927 F.2d 30, 32 (1st Cir. 1991); *Route 1, Box 24*, 1991 U.S. App. LEXIS 597 at *3; *United States v. Sixty Acres in Etowa County*, 930 F.2d 857, 859 (11th Cir. 1991); *Lot 9, Block 2 of Donnybrook Place*, 919 F.2d at 999; *28 Emery St.*, 914 F.2d at 3; *7715 Betsy Bruce Lane*, 906 F.2d at 111; *4492 S. Livonia Rd.*, 889 F.2d at 1267 (2d Cir.); *6109 Grubb Rd.*, 886 F.2d at 626; *United States v. \$4,255,000 in United States Currency*, 762 F.2d 895, 906-07 (11th Cir. 1985) ("[T]he claimant, and not the government, bear[s] the burden of proof on the 'innocent owner' defense."); *United States v. 3229 S.W. 23rd St.*, 768 F. Supp. 340, 347 (S.D. Fla. 1991); *Route 2, Box 61-C*, 727 F. Supp. at 1299; *1957 S. Macon Way*, 704 F. Supp. at 1026; *United States v. 3400-3410 W. 16th St.*, 636 F. Supp. 142, 146 (N.D. Ill. 1986) ("The plain meaning of this last clause of § 881(a)(7) clearly places the burden on the property owner to come forward at the forfeiture trial to prove his 'ignorance' defense.").

The text of § 881 supports this interpretation. All three innocent owner provisions

District of Illinois has explained, “[t]he claimants must prove by a preponderance of the evidence that whatever drug-related activity took place on their property was without their knowledge or consent.”⁵⁷

Even if the claimant provides evidence indicating lack of knowledge and consent,⁵⁸ the government can prevail by showing that it would be reasonable to believe that the owner was aware. The Federal District Court for the Northern District of Illinois noted:

[I]t is not the government’s burden in these actions to prove existence of actual knowledge, but the claimant’s burden to prove the absence of actual knowledge. . . . [I]n forfeiture actions, if a court finds it reasonable to infer from the objective evidence that the claimant had or must have had actual knowledge of the drug transaction, then the claimant cannot meet his or her burden of proof in opposing summary judgment simply by asserting ignorance. In other words, although courts have maintained that an innocent ownership defense turns on a claimant’s actual, and not constructive, knowledge of the illicit activity which gave rise to the forfeiture action, if the evidence supports a “reasonable inference” of actual knowledge and the claimant fails to come forward with anything more than a naked protestation that he or she really didn’t know of the illicit activity, the claimant’s defense of innocent ownership fails.⁵⁹

Thus, the burden is placed on the claimant and the standard makes its proof difficult. The claimant must prove a negative — the ab-

dictate that the innocence be “[e]stablished by that owner.” 21 U.S.C. §§ 881(a)(4)(C), (6), (7).

⁵⁷ *United States v. 8848 S. Commercial St.*, 757 F. Supp. 871, 880 (N.D. Ill. 1990).

⁵⁸ Some jurisdictions take the stance that either a lack of knowledge or a lack of consent is enough to invoke the innocent owner defense. *See United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990) (“Requiring a claimant to disprove both knowledge and consent ignores Congress’ desire to preserve the property of innocent owners and, as indicated, renders the phrase ‘or consent’ superfluous”); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 398 (3d Cir. 1990); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991); *Sixty Acres in Etowa County*, 727 F. Supp. at 1418-19; *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 50 (E.D.N.Y. 1989) (“Under normal canons of statutory construction, the court must give the effect to Congress’ use of the word ‘or’ by reading the terms ‘knowledge’ and ‘consent’ disjunctively.”).

Other jurisdictions have decided that the claimant must prove *both* lack of knowledge and lack of consent. *See .697 Acres of Land*, 1991 U.S. App. LEXIS 3900 at *4-5 (“The owner must show that she had no knowledge of, nor did she consent to, the unlawful use of her property.”); *United States v. One Parcel of Land, Known As Lot 111-B, Tax Map Key 4-4-03-71(4)*, 902 F.2d 1443, 1445 (9th Cir. 1990) (“[I]f the claimant *either* knew *or* consented to the illegal activities, the ‘innocent owner’ defense is unavailable.”) (emphasis in original); *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1514 (11th Cir. 1990); *United States v. 418 57th St.*, 737 F. Supp. 749, 750-51 (E.D.N.Y. 1990), *aff’d*, 922 F.2d 129 (2d Cir. 1991).

⁵⁹ *8848 S. Commercial St.*, 757 F. Supp. at 884 (N.D. Ill. 1990) (citations omitted).

sence of actual knowledge.⁶⁰

Finally, many jurisdictions have read an additional requirement into § 881's innocent owner defense. In addition to proving lack of knowledge and consent, the owner must also prove that he or she took all reasonable steps to prevent the violation.⁶¹ Thus, courts

⁶⁰ See *.697 Acres of Land*, 1991 U.S. App. LEXIS 3900 at *5; *Sixty Acres in Etowa County*, 930 F.2d at 859; *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990); *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 102 (2d Cir. 1990); *\$4,255,000 in United States Currency*, 762 F.2d at 906; *Route 2, Box 61-C*, 727 F. Supp. at 1299. Under the circumstances, claimants will face greater difficulty proving innocence than the government would face proving guilt. One commentator reflected on the dilemma:

The element of disproving knowledge presents a good example of the difficulty of proving a negative. The owner must stand in court and proclaim his lack of knowledge, yet there is rarely any hard evidence of this. On the other hand, if the government were to bear the burden of proof, as it does in a criminal case, it usually could produce *affirmative* evidence that the claimant knew of the intended criminal use of his property.

Peter Petrov, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 839 (emphasis in original).

⁶¹ Originally, this standard was enunciated as a constitutional minimum by the Supreme Court: "[I]t would be difficult to reject the constitutional claim . . . of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974).

Many jurisdictions have incorporated the "all that reasonably could have been done" requirement into the innocent owner defense of § 881, often grafting the requirement onto the "consent" prong. See, e.g., *United States v. 15603 85th Ave.*, 933 F.2d 976, 982 (11th Cir. 1991); *United States v. 418 57th St.*, 922 F.2d 129, 132 (2d Cir. 1991); *141st St. Corp.*, 911 F.2d at 879; *United States v. One 1980 Bertram 58 Foot Motor Yacht*, 876 F.2d 884, 888-89 (11th Cir. 1989); *United States v. 1966 Beechcraft Aircraft Model King Air A90*, 777 F.2d 947, 951-52 (4th Cir. 1985); *United States v. One 1987 Mercedes Benz Roadster 560 SEC*, No. 89-C3084, 1991 U.S. Dist. LEXIS 2757, at *11-12 (N.D. Ill. March 8, 1991); *121 Nostrand Ave.*, 760 F. Supp. at 1032-33 (incorporating an "all that reasonably could have been expected" standard into the "knowledge" prong of the innocent owner defense); *Route 2, Box 61-C*, 727 F. Supp. at 1299; *United States v. One 1985 BMW 318i*, 696 F. Supp. 336, 339-40, 344 (N.D. Ill. 1988).

Textually, it is difficult to read the additional requirement into § 881. Normally, consent means a state of mind, and attendant activities are relevant only to the extent that they indicate mental belief. BLACK'S LAW DICTIONARY explains, "Consent is an act of reason, accompanied with deliberation, the mind weighing as in balance the good and evil on each side. It means voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another." BLACK'S LAW DICTIONARY 305 (6th ed. 1990). The Act gives no reason to interpret the word "consent" any differently. See *107.9 Acre Parcel*, 898 F.2d at 398; *United States v. Lots 12, 13, 14, and 15, Keeton Heights Subdivision*, 869 F.2d 942, 947 (6th Cir. 1989); *United States v. \$4,250,000 in United States Currency*, 762 F.2d 895, 906 n.24 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *8848 S. Commercial St.*, 757 F. Supp. at 880 n.10 ("Federal courts have typically relied upon *Calero-Toledo* as the authority for an innocent ownership defense when the statutory provisions in question made no allowances for the innocent owner. However, the authority for the innocent ownership in this case is statutory [T]he statute makes no reference to the second

require property owners to take positive steps to prevent any possible violation of the law.⁶² The Federal Court of Appeals for the Second Circuit explained, "Unless an owner with knowledge can prove [that] every action, reasonable under the circumstances, was taken to curtail the drug-related activity, consent is inferred and the property is subject to forfeiture."⁶³ Citizens may be obligated to contin-

prong of the innocent ownership defense outlined in *Calero-Toledo*, i.e., the owner's reasonable efforts to prevent the illegal activity from occurring.") (citations omitted); *United States v. One Parcel of Real Estate Consisting of Approximately 4,657 Acres*, 730 F. Supp. 423, 427-28 (S.D. Fla. 1989); *United States v. 316 Units of Municipal Securities*, 725 F. Supp. 172, 180 (S.D.N.Y. 1989) ("The statutory 'innocent owner' defense was adopted after the judicial 'innocent owner' defense. While both are aimed at owners whose property is used by another for an illegal purpose, the statutory defense lessened the heavy burden established by the Supreme Court's *Calero-Toledo* decision. It requires only a showing of ignorance of the illegal transactions.").

The innocent owner provisions for vehicle forfeitures also include a "willful blindness" standard, requiring a higher threshold. 21 U.S.C. § 881(a)(4). Willful blindness can exist where consent and knowledge are lacking. See, e.g., *United States v. 1988 Toyota Supra*, No. 90-1345, 1991 U.S. App. LEXIS 223 (7th Cir. Jan. 7, 1991) (child was a known cocaine addict, excessive mileage accumulated on the car and parent did not know of any employment held by the child while child lived away from home). Even with this wider reach, however, the "all that reasonably could have been done" standard goes beyond the requirements of § 881. BLACK'S LAW DICTIONARY defines "willful blindness" as: "[A] term used to refer to a situation where the defendant tries to avoid knowing something that will incriminate. It is usually held in this situation that the defendant 'knows' anyway because he is aware of a high probability of existence." BLACK'S LAW DICTIONARY, *supra* this note, at 1600.

⁶² In *United States v. One 1987 Mercedes Benz Roadster 560 SEC*, 1991 U.S. Dist. LEXIS 2757, for example, a company car was used by an employee for business and personal transportation. The employee ingested cocaine while in the car. The court never reached the issues of whether the company's officers knew of or consented to drug use by its employees. Rather, the problem was that no positive actions were taken by the company to assure that drug use did not occur. The court authorized forfeiture, explaining that the company "[h]ad no corporate policy restricting illegal drug use by company officers in company cars, nor were any measures taken to prevent such drug use." *Id.* at *3.

Law enforcement officials have expressed the view that all property owners must actively contribute to the war on drugs. An Assistant U.S. Attorney for the District of Columbia has stated, "The responsibility of the property owner is not substantially different than the responsibility of every citizen to cooperate with the police in the war on drugs." H. Jane Lehman, *Expanded War on Drugs May Threaten Landlords; Property Seizure Activity Could Be Widened*, WASH. POST, Nov. 17, 1990, at E1. A representative of the Illinois Association of Realtors explained the extra burden: "You are compelling . . . property owner[s], in some cases, to place themselves physically at risk . . . [by telling owners] to turn these potentially dangerous people into the police or we are going to take your property." *Id.* See also David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 387 (1988); Susan J. Parcels, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 448 (1982). The positive steps requirement is consistent with the view that civil forfeiture statutes are intended to establish a regime of strict liability, encouraging property owners to take extreme precautions. See *infra* notes 86-87 and accompanying text.

⁶³ *418 57th St.*, 922 F.2d at 132. See also *121 Nostrand Ave.*, 760 F. Supp. at 1033 ("The civil forfeiture statute makes owners, including lessors, responsible for their

ually warn dependents and guests about the illegality of drug transactions,⁶⁴ to search through personal belongings of family members, to inquire into the criminal record of friends and business acquaintances,⁶⁵ and even to turn in spouses and children to the police.⁶⁶ Property owners must prove by a preponderance of the evidence that they have taken appropriate action in order to prevail at a civil forfeiture hearing.

F. REMISSION OR MITIGATION UNDER § 881

The opportunity for remission or mitigation also provides protection.⁶⁷ Under the relevant customs laws, a claimant may file a petition for remission or mitigation with the Attorney General. The Attorney General may return the property if he or she finds that the “[f]orfeiture was incurred without wilful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances.”⁶⁸

The remission procedure allows one to deal with the issue administratively, but it does not compensate for the shifted burden of

property. Owners must take ‘basic investigatory steps’ and not deliberately avoid knowledge of wrongdoing on the property.”).

⁶⁴ See *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1033 (E.D.N.Y. 1991).

⁶⁵ See 28 C.F.R. 9.5 (b)(4); *United States v. 31-33 York St.*, 930 F.2d 139, 140-41 (2d Cir. 1991) (“Evidence of appellant’s son’s arrests on drug charges is certainly relevant to whether appellant knew that narcotics activity was taking place at [the property] or was an innocent owner.”); *One 1987 Mercedes Benz Roadster 560 SEC*, 1991 U.S. Dist. LEXIS 2757 at *13-14; *418 57th St.*, 737 F. Supp. at 751-52; J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 480 (1976) (“[R]easonable care has apparently consisted of inquiring into the criminal record and reputation of lessees, mortgagors, buyers of goods subject to security interests, and other persons likely to use the property.”); Fried, *supra* note 62, at 387.

⁶⁶ See *United States v. Sixty Acres in Etowa County*, 930 F.2d 857, 860 (11th Cir. 1991) (obligation to act against spouse even after threats of physical violence); *31-33 York St.*, 930 F.2d at 140-41 (suggesting obligation to act against children); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 665 (3d Cir. 1989) (Greenberg, J., dissenting) (“I appreciate the fact that enforcement of the forfeiture laws may produce discord in some marriages since to preserve her property rights, a wife may have to advise the authorities of the activities of her husband.”); *United States v. One 1985 BMW 318i*, 696 F. Supp. 336, 344-45 (N.D. Ill. 1988) (suggesting obligation to act against spouse).

⁶⁷ 21 U.S.C. § 881(d).

⁶⁸ 16 U.S.C. § 1618 (1992). The customs laws dictate that the Secretary of the Treasury make such determinations, but § 881(d) provides the Attorney General with the authority when forfeitures are made pursuant to the Act.

19 U.S.C. § 1613 (1992) provides for “[r]emission of the forfeiture and restoration of the proceeds of such sale” if the property has already been sold. The petition for remission must be made within three months of the sale. *Id.*

Department of Justice’s “Criteria Governing Remission and Mitigation” give additional guidance:

proof. In a petition for remission or mitigation, the burden of proof remains on the claimant. The Attorney General even assumes that the initial showing of probable cause has been made.⁶⁹ Furthermore, the decision to grant full or partial remission is completely discretionary and outside the jurisdiction of any court.⁷⁰ If the government insists on pursuing a forfeiture, the petition for remission or mitigation provides minimal protection.

III. THE CONSTITUTION AND BURDENS OF PROOF

U.S. courts traditionally require a high standard of proof when the government accuses and threatens a person with a significant deprivation. Our society cherishes the principle that all persons are innocent until proven guilty beyond a reasonable doubt. The Supreme Court has flatly stated, "[p]roof of a criminal charge beyond a reasonable doubt is constitutionally required."⁷¹

(a) The Determining Official shall not consider whether the evidence is sufficient to support the forfeiture but shall presume a valid forfeiture.

(b) Remission. The Determining Official shall not remit a forfeiture unless the petitioner establishes: (1) That petitioner has a valid, good faith interest in the seized property as owner or otherwise; and (2) That petitioner had no knowledge that the property in which petitioner claims an interest was or would be involved in any violation of the law; and (3) That petitioner had no knowledge of the particular violation which subjected the property to seizure and forfeiture; and (4) That petitioner had no knowledge that the user of the property had any record for violating laws of the U.S. or of any State for a related crime; and (5) That petitioner had taken all reasonable steps to prevent the illegal use of the property.

(c) Mitigation. In addition to having the discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of discretion, mitigate forfeitures of seized property. This authority may be exercised in those cases where the petitioner has not met the minimum conditions precedent to remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship.

28 C.F.R. § 9.5(a)-(c) (1990).

⁶⁹ See 28 C.F.R. § 9.5(a)-(b) (quoted *supra* note 68); *6109 Grubb Rd.*, 886 F.2d at 625.

⁷⁰ *6109 Grubb Rd.*, 886 F.2d at 625; *United States v. \$41,305 in Currency and Traveler's Checks*, 802 F.2d 1339, 1346 n.13 (11th Cir. 1986); *United States v. One 1973 Buick Riviera*, 560 F.2d 897, 900 (8th Cir. 1977); *United States v. One 1972 Mercedes Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States v. One 1972 Toyota Mark II*, 505 F.2d 1162, 1165 (8th Cir. 1974); *United States v. One 1970 Buick Riviera Sedan*, 463 F.2d 1168, 1170 (5th Cir. 1972) ("The question of our authority to review the Attorney General's denial of the request for remission of the forfeiture is controlled by the long-standing, judge-made rule that the Attorney General has unreviewable discretion over petitions under [the remission and mitigation provisions of the customs laws].").

⁷¹ *In re Winship*, 397 U.S. 357, 362 (1970). See also *United States v. Salerno*, 481 U.S. 739, 763 (1987) (Marshall, J., dissenting); *Addington v. Texas*, 441 U.S. 418, 423-24 (1979) ("In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a

Despite constitutional questions, U.S. courts have uniformly upheld the constitutionality of procedures shifting the burden of proof in civil forfeiture proceedings. Although most courts applying § 881 have not examined the constitutional implications of the issue, courts that have rejected constitutional challenges have relied on the distinction between civil and criminal cases.⁷²

Burdens of proof illustrate the way our society wishes to allocate the risk of a mistake by a court. As civil cases generally involve interests of a lesser magnitude than those at stake in criminal proceedings, our society is willing to tolerate a higher risk of error in civil cases. The Supreme Court explained:

The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights are only ascertained.⁷³

Merely labeling a procedure as civil in nature does not eliminate the possibility that the interests involved necessitate a higher

reasonable doubt.”); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

⁷² *United States v. 418 57th St.*, 922 F.2d 129, 130 (2d Cir. 1991) (“Because it is a civil statute, § 881 imparts comparatively few of the traditional due process guarantees that attach upon criminal indictment. Individuals not involved in criminal activity may forfeit ownership based solely on a showing of probable cause that their property has been involved in some aspect of the drug trade.”); *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 900 (1st Cir. 1987); *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 12 (2d Cir. 1982); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976); *Bramble v. Richardson*, 498 F.2d 968, 973 (10th Cir. 1974). The Third Circuit has implied that it would reach this conclusion. *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987).

But see United States v. United States Currency, 626 F.2d 11, 18 (6th Cir. 1980) (Merritt, J., concurring) (“[T]he forfeiture of cash here is a penalty predicated upon a finding of the owner’s wrongful conduct We must therefore instruct the District Court that it must afford claimant the same safeguards he would be afforded in any other criminal trial. This includes the presumption of innocence [and] proof beyond a reasonable doubt.”); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (“On constitutional as well as policy grounds there is doubt about the propriety of shifting the burden of proof in quasi-criminal proceedings to leaseholders. Characterizing this action as civil by statute does not negate its essentially punitive nature as part of the broad initiatives to combat drugs.”). The majority opinion by the Sixth Circuit in *United States v. United States Currency* concerned the Fifth Amendment privilege against self-incrimination when a criminal prosecution was occurring simultaneously with a civil forfeiture action. The majority opinion never discussed the appropriate burden of proof in forfeiture proceedings. *United States Currency*, 626 F.2d at 11-17.

⁷³ *United States v. Regan*, 232 U.S. 37, 49 (1914) (quoting *Roberge v. Burnham*, 124 Mass. 277, 278 (1878)). *See also Addington*, 441 U.S. at 423; *Speiser*, 357 U.S. at 525-26.

burden of proof. In *In re Winship*,⁷⁴ for example, the Supreme Court applied the Due Process Clause's requirement of proof beyond a reasonable doubt to juvenile proceedings. The Court characterized such proceedings as civil, since they purport "not to punish, but to save the child."⁷⁵ Despite the remedial justification, however, the Court required a higher burden of proof because the interests at stake were deemed to be comparable to those of a criminal defendant.⁷⁶

As in the case of juveniles facing delinquency determinations, claimants contesting forfeitures stand to lose substantial interests.⁷⁷ Given the huge impact of civil forfeiture actions under § 881 and the courts' rejection of constitutional claims arising out of the shift of the burden of proof, one must wonder what distinguishes civil from criminal cases.⁷⁸

⁷⁴ *In re Winship*, 397 U.S. 357.

⁷⁵ *Id.* at 365 (quoting *In re Family Court*, 247 N.E.2d 253, 254 (N.Y. 1969)).

⁷⁶ *Id.* at 366-67.

⁷⁷ See *supra* notes 17-18 and accompanying text.

⁷⁸ Another way of going about the problem is to acknowledge the "civil" nature of a § 881 action and to litigate the Due Process Clause's protections in civil cases. The government's burden in a criminal case involving the Due Process Clause requires proof beyond a reasonable doubt. The burden of proof required in a civil action depends upon an application of the *Mathews* test:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In *Addington v. Texas*, for example, the Supreme Court applied the *Mathews* test when analyzing the risks of an erroneous decision in a civil commitment proceeding. Although civil commitment proceedings are civil in form and have the ostensibly remedial purposes of protecting the mentally ill and the public, the Court concluded that the Due Process Clause requires "clear and convincing" evidence before commitment is permissible. *Addington v. Texas*, 441 U.S. 418, 433 (1979).

Even if a high burden of proof is appropriate in some civil settings, the Court is reluctant to require proof beyond a reasonable doubt in non-criminal actions. The Court has explained, "[T]he 'beyond a reasonable doubt' standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the 'moral force of the criminal law,' and we should hesitate to apply it too broadly or casually in noncriminal cases." *Addington*, 441 U.S. at 428. Instead, civil actions are traditionally judged by a preponderance of the evidence standard. *In re Winship*, 397 U.S. 357, 368-69 (1970) (Harlan, J., concurring); *United States v. Regan*, 232 U.S. 37, 49 (1914) ("[T]he general rule applicable to civil suits [is] that proof by a reasonable preponderance of the evidence is sufficient.") (quoting *Roberge v. Burnham*, 124 Mass. 277, 278 (1878)).

In § 881 forfeiture actions, the government has an even greater advantage than traditional civil litigants; the government need only establish probable cause. The Federal Court of Appeals for the Ninth Circuit has recognized the incongruity:

IV. THE HISTORICAL DISTINCTION BETWEEN CIVIL AND CRIMINAL FORFEITURES

Historically, U.S. courts have distinguished between forfeiture actions *in personam* and forfeiture actions *in rem*. Litigation pursued against owners of property has been treated as criminal in nature. In these cases, the issue is the personal guilt or innocence of the owner, and forfeiture becomes a punishment of that individual. Actions against property have been labeled civil. In these cases, courts operate under the assumption that the issue is the guilt or innocence of the property itself.⁷⁹

There is disagreement over the exact origin of the formalistic

The civil forfeiture statute does, indeed, give the government substantial procedural advantages not enjoyed by litigants in other types of civil cases. Most significantly, the government in a civil forfeiture action need not prove that the defendant property was, in fact, involved in advancing a drug transaction. As noted above, the government need only show that there is probable cause to believe that such is the case; the burden then shifts to the claimant to disprove the proposition.

United States v. Lot 4, Block 5 of Eaton Acres, 904 F.2d 487, 491 (9th Cir. 1990).

Applying the *Mathews* test, § 881 forfeitures should demand a higher standard of proof than probable cause. First, claimants in § 881 actions stand to lose significant interests. See *supra* notes 17-18 and accompanying text. Second, a probable cause standard provides the most minimal of protections. Burdens of proof dictate the certainty with which guilt is established, thereby directly affecting the risk of erroneous deprivations. See *supra* note 73 and accompanying text. Finally, the government normally faces a preponderance of the evidence standard in civil actions. No special administrative needs exist to lessen that burden in § 881 litigation. Given the lack of special government interests and the risks of erroneous deprivation of property, the government should bear the burden of proving its case by at least a preponderance of the evidence in order to affect a § 881 forfeiture. See *United States v. Leasehold Interest in 121 Nosstrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991); *United States v. Veon*, 538 F. Supp. 237, 247 (E.D. Cal. 1982); *Petrov*, *supra* note 60, at 838-39; *Parcels*, *supra* note 62, at 458.

⁷⁹ In the context of a § 881 forfeiture, the Seventh Circuit has explained:

In many cases forfeiture is a harsh and oppressive procedure, depriving innocent owners of their property because it was used by other persons for unlawful purposes. . . . The seemingly harsh rule which permits condemnation of the [property] without regard to the owner's culpability, is explained by the fact that historically forfeiture is a civil proceeding *in rem*. The vehicle or other inanimate object is treated as being itself guilty of wrongdoing, regardless of its owner's conduct.

United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 454 (7th Cir. 1980). See also *United States v. Route 2, Box 61-C*, 727 F. Supp. 1295, 1297 (W.D. Ark. 1990). The American legal system adopted the admiralty model when implementing forfeiture provisions. *One 1976 Mercedes Benz 280S*, 618 F.2d at 459-61; *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 177 (E.D.N.Y. 1990). The first Congress levied customs duties and established forfeiture as an enforcement mechanism. The burden of proof was shifted in the original customs act adopted in 1789 as well as in prior resolutions of the Continental Congress. *One 1976 Mercedes Benz 280S*, 618 F.2d at 461. In 1827, for example, the Supreme Court described the seizure of a pirate vessel as a civil forfeiture. The ship was labelled the offender rather than the pirates. Justice Field emphasized the distinction: "The thing is the instrument of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed [P]roceedings *in rem* [are] wholly independent of, and unaffected by, the criminal pro-

distinction between civil and criminal forfeitures. Some argue that modern forfeiture law is the heir of the common law of deodand. At common law, property that caused death or great injury was considered to have committed an offense against God. The sovereign could forfeit the property, ostensibly for the purpose contributing the assets to the common good in the form of charitable donations or masses for the victim's soul.⁸⁰

Other sources trace the origin of forfeiture distinctions to an independently developed British admiralty law. In the seventeenth century, Great Britain became the premier maritime power. At least two difficulties arose with applying the common law to disputes between maritime traders. First, the owner of the property in question was often living in a foreign country, personally beyond the jurisdiction of the court. Second, ships and their cargo frequently belonged to several merchants, so that an independent action would have to be litigated against each individual with an interest in the assets. Courts developed an admiralty law separate from the common law to govern trade with other nations. The *in rem* classification eased commercial litigation by allowing simply one legal action over assets that are geographically within the jurisdiction of the court.⁸¹

Neither historical basis explains the lesser level of protection afforded claimants in § 881 actions. The concept of deodand hardly necessitated a lower standard of proof. The divergent burdens might be explained by the independence of the admiralty courts from the precedent of the common law, as well as the emphasis on speedy dispositions to satisfy their merchant "customers."⁸² Currently, however, law enforcement officials need not receive an advantage in terms of burdens of proof in order to avoid the requirement of filing claims against foreign or multiple owners.

ceedings against the person." *Miller v. United States*, 78 U.S. 268, 321-22 (1871) (Field, J., dissenting).

⁸⁰ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-81 (1974); *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971); *United States v. Seifuddin*, 820 F.2d 1074, 1076-77 (9th Cir. 1987); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987) ("*In rem* procedures enjoy a venerable history and existed in Mosaic law if not in other ancient codes as well. Blackstone speaks of the Biblical rule: 'When an ox gore a man or a woman to death, the ox must be stoned; its flesh may not be eaten.' In medieval times, the law of deodands required forfeiture of a chattel that had caused the death of a person."); Clark, *supra* note 65, at 476; OLIVER W. HOLMES, JR., *THE COMMON LAW* 24-30 (1881); Note, 88 COLUM. L. REV. at 390-91.

⁸¹ See *38 Whalers Cove Drive*, 747 F. Supp. at 177; George F. Steckley, *Merchants and the Admiralty Court During the English Revolution*, 22 AM. J. LEGAL HIST. 137, 151, 171 (1978); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1153-54 (1990); Petrov, *supra* note 60, at 825-26.

⁸² Steckley, *supra* note 81, at 172.

Furthermore, even if private civil plaintiffs were given procedural advantages to promote commercial trade, the government does not need these advantages.

Whatever the original impetus, the American legal system has been willing to accept the *in personam/in rem* line as the basis for distinguishing between “criminal” and “civil” forfeitures. The U.S. Supreme Court has repeatedly employed the distinction throughout the nineteenth and twentieth centuries.⁸³

Courts have often characterized civil forfeitures as remedial because their concern was whether the property had injured others, not whether any individual was morally culpable. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁸⁴ the Supreme Court approved the seizure of a yacht without any prior warning to the owners. The Court claimed that the forfeiture “[f]oster[ed] the public interest in preventing continued illicit use of the property.”⁸⁵ The aim of the forfeiture proceeding was not to punish the owner.

The Supreme Court has also implied that civil forfeiture statutes establish schemes of strict liability. Warned by the existence of such a statute, the owner should take special precautions to prevent any illegal use of the property.⁸⁶ The Court explained: “[C]ongress interposes the care and responsibility of [the property] owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.”⁸⁷

Regardless of the rationale, the civil label has been so consist-

⁸³ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *Goldsmith-Grant Co. v. United States*, 254 U.S. 504, 513 (1921); *United States v. Stowell*, 133 U.S. 1, 12 (1889); *Dobbins' Distillery v. United States*, 96 U.S. 395, 399 (1877); *The Palmyra*, 25 U.S. 1, 14 (1827).

⁸⁴ *Calero-Toledo*, 416 U.S. 663.

⁸⁵ *Id.* at 679; see also *Stowell*, 133 U.S. at 12 (“By now the settled doctrine of this court, statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant, but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.”).

⁸⁶ See *Calero-Toledo*, 416 U.S. at 687-88 (“To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.”); *Goldsmith-Grant Co.*, 254 U.S. at 510-11; Clark, *supra* note 65, at 477-78. The same argument has been forwarded in the context of § 881 actions. See, e.g., *United States v. Route 2, Box 61-C*, 727 F. Supp. 1295, 1299 (W.D. Ark. 1990).

⁸⁷ *Goldsmith-Grant Co.*, 254 U.S. at 510-11. The strict liability rationale appears to be criminal rather than civil in nature. First, the incentive for an owner to use “greater care” is the loss of the property — a deterrent. Additionally, a strict liability rationale impliedly condemns the actions (or inactions) of the individual owner. Forfeitures based

ently applied to certain forfeitures that the historical distinction has taken on a life of its own. Quoting the Supreme Court, the Federal Court of Appeals for the Third Circuit has reasoned, "However inapplicable its original justification may be today, *in rem*, or civil forfeiture, has become 'too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced.'"⁸⁸ The Ninth Circuit has similarly emphasized the mindlessness of the distinction:

Critics of the law may well ask why the law requires proportionality review for forfeitures when the government proceeds *in personam*, but not when the government proceeds *in rem*. The two proceedings are functionally equivalent (except when the *res* is contraband) and differ only in form. But the historical development of the two actions has led courts to continue the fiction that *in rem* proceedings are against the *res*, rather than against the individual, even when the result is to create new members of the homeless. Given the Supreme Court's willingness to underwrite this historical fiction, it is difficult to deny the government's conclusion that the Eighth Amendment's proportionality review requirement does not apply. "The life of the law has not been logic: it has been experience."⁸⁹

Despite the large amount of precedent supporting the civil label, one must wonder why it persists. Forfeitures of personal residences (even public housing leaseholds) are extreme evidence of the absurdity of the civil label. The government, after determining that a violation of penal laws has occurred, takes a person's home away. The historical acceptance of a formalistic distinction cannot justify the lack of procedural protections that would be afforded if *in rem* forfeitures were labelled criminal.

First, American courts have not consistently accepted the *in personam/in rem* difference as a means of indicating whether a forfeiture is civil or criminal in nature. The Supreme Court stated in *Boyd v. United States*:

[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture . . . consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the state As, therefore, *suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution, and of that por-*

on personal conduct are classified as *in personam*, not *in rem*. See Fried, *supra* note 62, at 386.

⁸⁸ *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987) (quoting *Goldsmith-Grant Co.*, 254 U.S. at 511) (citations omitted).

⁸⁹ *United States v. 300 Cove Rd.*, 861 F.2d 232, 234-35 (9th Cir. 1988) (citations omitted) (quoting HOLMES, *supra* note 80, at 1).

tion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.⁹⁰

The Court, by declaring *in rem* forfeiture statutes to be quasi-criminal, has selectively made possible application of some criminal procedure protections and rejection of others. Thus, the Fourth Amendment's prohibition against unreasonable searches,⁹¹ the Fifth Amendment's privilege against self-incrimination⁹² and the Due Process Clause's guarantee of speedy trial⁹³ have been applied to civil forfeiture schemes. For the purposes of other procedural protections, the Court has characterized *in rem* forfeitures as civil and has relaxed the standards.⁹⁴ The Court refused to apply the Double

⁹⁰ *Boyd v. United States*, 116 U.S. 616, 634 (1886).

⁹¹ *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 691, 701 (1965); *Boyd*, 116 U.S. at 634; *United States v. \$277,000 in United States Currency*, 941 F.2d 898, 902 (9th Cir. 1991) (evidence excluded in § 881 forfeiture action when police lacked probable cause to search an automobile); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982).

The Fourth Amendment is, however, not applied in § 881 cases with the same vigor as in traditional criminal prosecutions. Some also argue that the Fourth Amendment's prohibition against unreasonable seizures is not applied with as much force as the prohibition against unreasonable searches. See Michael E. Herz, Note, *Forfeiture Seizures and the Warrant Requirement*, 48 U. CHI. L. REV. 960, 990-91 (1981). The Supplemental Admiralty Rules and the provisions of § 881 provide mechanisms by which the government may seize property without a warrant, even if exigent circumstances do not exist. Many courts interpreting § 881 have permitted seizures without warrants. See *supra* notes 23-28 and accompanying text. The Third Circuit has noted, "[T]he body of law relating to unlawful searches, arrests and seizures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding." *United States v. \$1,058 in United States Currency*, 323 F.2d 211, 213 (3d Cir. 1963). Although it decided this case before the Supreme Court's decision in *One 1958 Plymouth Sedan*, 380 U.S. 691, the Third Circuit subsequently cited the decision to justify warrantless seizures pursuant to § 881. *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3d Cir. 1981) ("[I]t has long been established in this Circuit that a warrant is not required for seizure in a forfeiture action The only requirement for a seizure in a forfeiture action is probable cause. Accordingly, the [§ 881] (b)(4) exception allowing a warrantless seizure where supported by probable cause does not offend the Fourth Amendment.").

Several observers have criticized the exception to the warrant requirement. See, e.g., Schecter, *supra* note 81, at 1168-75; *Parcels*, *supra* note 62, at 449-53; Herz, *supra* this note, at 960; Note, *The Forfeiture Exception to the Warrant Requirement: A Distinction Without a Difference*, 67 VA. L. REV. 1035 (1981).

⁹² *Boyd*, 116 U.S. at 634; *United States v. U.S. Coin & Currency*, 401 U.S. 715, 722 (1971). In *Calero-Toledo*, the Court attempted to limit its decision in *United States Coin & Currency*. The *Calero-Toledo* Court argued that the forfeiture statute in *United States Coin & Currency* was truly criminal in nature, and constitutional procedural protections might not apply to a forfeiture statute that is truly civil in nature. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-89 (1974).

⁹³ *United States v. \$8,850 in United States Currency*, 461 U.S. 555, 556 (1983) (applying *Barker v. Wingo*, 407 U.S. 514 (1972), to an 18-month delay in filing a civil forfeiture proceeding).

⁹⁴ See *The Palmyra*, 25 U.S. at 12 ("The strict rules of the common law as to criminal prosecutions, have never been supposed by this Court to be required in informations of

Jeopardy Clause⁹⁵ and the Sixth Amendment's right to confrontation⁹⁶ to *in rem* forfeiture proceedings. Additionally, lower courts adjudicating § 881 actions have chosen not to apply the Ex Post Facto Clause,⁹⁷ the Eighth Amendment's prohibition against cruel and unusual punishment⁹⁸ and the Due Process Clause's requirement of proof beyond a reasonable doubt⁹⁹ to *in rem* forfeiture prosecutions. As one court explained,

[C]ongress may alter the traditional allocation of the burden of proof without infringing upon the litigant's due process rights unless the statute is criminal in nature. Although the Supreme Court has considered forfeiture statutes as criminal for the purpose of protecting certain fourth and fifth amendment rights, they are predominantly civil in nature. The Supreme Court, recognizing the historic civil nature of

seizure in the Admiralty for forfeitures, which are deemed to be civil proceedings *in rem*).

⁹⁵ *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) ("[N]either collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges.") (unanimous decision); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235-36 (1972) ("If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments . . . Forfeiture under [the statute] is a civil sanction."); *Helvering v. Mitchell*, 303 U.S. 391, 399-400 (1937). These precedents have been applied to § 881. *See, e.g., United States v. Price*, 914 F.2d 1507, 1512 (D.C. Cir. 1990).

⁹⁶ *United States v. Zucker*, 161 U.S. 475, 481 (1896). As a practical matter, courts adjudicating § 881 actions substantially diminish any right to confrontation by interpreting the requirement of proof by probable cause as being satisfied by hearsay. *See United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991); *United States v. 28 Emery St.*, 914 F.2d 1, 5 (1st Cir. 1990); *United States v. 526 Liscum Drive*, 866 F.2d 213, 217 n.3 (6th Cir. 1988); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 900 (1st Cir. 1987); *United States v. \$5,644,540 in United States Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1434 (9th Cir. 1985); *United States v. One 56 Foot Yacht Named Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983); *United States v. One 1974 Porsche 911-S*, 682 F.2d 283, 286 (1st Cir. 1982); *United States v. 92 Buena Vista Ave.*, 738 F. Supp. 854, 857 (D.N.J. 1990), *rev'd on other grounds*, 937 F.2d 98 (3d Cir. 1991); *United States v. Route 2, Box 61-C*, 727 F. Supp. 1295, 1298 (W.D. Ark. 1990). Additionally, the government's privilege of withholding the identity of informants is stronger in the civil setting. *One 1986 Chevrolet Van*, 927 F.2d at 43. Thus, the claimant is not only refused an opportunity to cross-examine witnesses, but is kept ignorant of who is making the accusation. Further complicating the situation, claimants are not permitted to rely on hearsay when proving their cases. *See infra* note 54.

⁹⁷ *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544-45 (5th Cir. 1987) ("Because § 881 is, therefore, in both purpose and effect primarily a remedial, civil forfeiture provision, we hold that the *ex post facto* clause of the Constitution does not apply to it."); *\$5,644,540 in United States Currency*, 799 F.2d at 1364 n.8 ("The *ex post facto* clause, however, applies only to criminal cases, and we are dealing with a civil forfeiture.") (citations omitted).

⁹⁸ *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1554 (11th Cir. 1991); *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989); *United States v. 300 Cove Rd.*, 861 F.2d 232, 235 (9th Cir. 1988).

⁹⁹ *See supra* note 72 and accompanying text.

forfeiture statutes has repeatedly refused to limit their application by imposing the full range of constitutional protections usually associated with criminal sanctions.¹⁰⁰

The formalistic distinction between civil and criminal forfeitures does not make up an unbroken line of precedent. If the consistent use of a common law doctrine justifies ignoring the Constitution, as some courts have implied,¹⁰¹ the *in personam/in rem* rationale in forfeiture law does not merit such holy treatment.

Further, if the mechanistic *in personam/in rem* distinction is the sole basis for declining to apply the Due Process Clause, then the rationale for declaring a forfeiture proceeding civil becomes implausibly circular. Objects do not possess free will and cannot by themselves violate the law. Forfeitures of objects are based on the activities of people who are personally affected by the loss of their property. The *in rem* label is merely a legal fiction that imposes punishment upon proof of criminal conduct.

A history of mistreatment hardly sanctifies continued abuse. The Supreme Court has criticized unthoughtful reliance on historic traditions in the area of forfeitures: "Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism."¹⁰²

¹⁰⁰ \$250,000 in *United States Currency*, 808 F.2d at 900. See also *United States v. Seifuddin*, 820 F.2d 1074, 1077 (9th Cir. 1987); *United States v. One 1970 Pontiac GTO*, 529 F.2d 65, 66 (9th Cir. 1976) ("Forfeiture statutes are deemed criminal for the purpose of protecting rights secured by the Fourth and Fifth Amendments (*Boyd v. United States*), but they are predominantly civil. Despite some dicta attacking their civil characterization (*United States v. United States Coin & Currency*), the Supreme Court has firmly refused to broaden the criminal aspect of forfeiture so as to encompass a wider range of constitutional protections.") (citations omitted); *Bramble v. Richardson*, 498 F.2d 968, 973 (10th Cir. 1974).

¹⁰¹ E.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681-83 (1974); *Goldsmith-Grant Co. v. United States*, 254 U.S. 504, 511 (1921); *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987).

¹⁰² *United States v. U.S. Coin & Currency*, 401 U.S. 715, 720-21 (1971). In a different context, the Supreme Court has declared, "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire nation's existence and indeed predicates it." *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 678 (1970). See also *Lynch v. Donnelly*, 465 U.S. 668, 718 (1984) (Brennan, J., dissenting) ("[H]istorical acceptance of a particular practice alone is never sufficient to justify a challenged government action.").

The Federal District Court for the District of Colorado has voiced similar concerns when enforcing § 881:

While forfeiture actions lend little, if anything, to intelligent discourse or established notions of fair play, the facts presented simply fail to provide any means by which the intervenor can escape their maw. [The claimant] may find some solace in knowing that this absurdity is not of modern invention but one which has its roots in medieval superstition and druidism.

The American legal system has extended the superstition much further than did the courts in Blackstone's time. Civil forfeiture of real estate as an instrumentality of crime did not exist at common law.¹⁰³ The historic explanations cannot justify current forfeiture law. Rather than relying on unthoughtful traditions to justify forfeitures under § 881, courts should apply constitutional principles to condemn them.

V. DISTINGUISHING BETWEEN CIVIL AND CRIMINAL PROSECUTIONS BY THE GOVERNMENT

A. SEVERITY OF THE IMPOSITION

The severity of the imposition is important in determining whether a prosecution is civil or criminal. The rationale for requiring proof beyond a reasonable doubt in criminal cases rests partly on the significance of the potential loss.¹⁰⁴ In *Speiser v. Randall*,¹⁰⁵ Justice Brennan described the importance of protecting any "interest of transcending value,"¹⁰⁶ referring to the liberty of a criminal defendant as but one example of such an interest. Similarly, the Court seems to condition the rights to counsel and jury trial on the

United States v. One 1976 Buick Skylark, 453 F. Supp. 639, 643 (D. Colo. 1978). See also United States v. 38 Whalers Cove Drive, 747 F. Supp. 173, 178 (E.D.N.Y. 1990); Fried, *supra* note 62, at 382-83.

¹⁰³ Examples given by Holmes include wild animals, falling trees, run-away carriages and a steam engine. HOLMES, *supra* note 80, at 24-26. Other historical interpretations have mentioned domesticated animals, ships and merchandise on ships. See *Calero-Toledo*, 416 U.S. at 681-83. The common law did permit the forfeiture of real property upon a finding of guilt in a criminal case, but these actions were *in personam*. *Calero-Toledo*, 416 U.S. at 682; Fried, *supra* note 62, at 329 n.1. The American legal system rejected this notion of criminal forfeiture. The Federal Court of Appeals for the Third Circuit has noted:

Criminal forfeiture of property was disfavored during this country's infancy. The Act of April 30, 1790, ch. 9, § 24, 1 Stat. 117, stated that "no conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate." The statutory proscription rejected the traditional forfeiture of all of a felon's property even if it had no connection with the crime. The colonists' experience with the English law of forfeiture created an antipathy toward its use, which was reflected in its prohibition by the First Congress.

Sandini, 816 F.2d at 873. See also, Fried, *supra* note 62, at 329 n.1.

Some support does exist for allowing *in rem* forfeiture of permanent structures on property. Holmes gave the example of a falling house, claiming that the critical element of an *in rem* forfeiture is the motion of the "guilty" object. Holmes explained, "A maxim of Henry Spigurnel, a judge of the time of Edward I, is reported, that 'where a man is killed by a cart, or by the fall of a house, or in other like manner, and the thing in motion is the cause of the death, it shall be deodand.'" HOLMES, *supra* note 80, at 25. Unless an earthquake causes a drug violation, however, the historic rationale cannot justify a § 881 action against real property.

¹⁰⁴ See *supra* note 73 and accompanying text.

¹⁰⁵ *Speiser v. Randall*, 357 U.S. 513 (1958).

¹⁰⁶ *Id.* at 525.

level of punishment.¹⁰⁷ As the Sixth Amendment guarantees these protections in all criminal prosecutions,¹⁰⁸ the petty/non-petty offense distinction shows the importance of severity in identifying criminal cases.

Many forfeitures would qualify as criminal under a severity test. Significant interests are at stake in forfeiture proceedings.¹⁰⁹ Despite the appeal of this rationale, however, the harshness of the forfeiture alone cannot decide the issue. A criminal fine in the same amount as a civil forfeiture involves additional considerations. In most instances, a criminal conviction also signifies personal responsibility or moral wrongdoing. The government labels a sanction criminal to achieve objectives other than only remedial ones.¹¹⁰

Decisions that stress the form of punishment are not so clear. In *Baldwin v. New York*, the basis for the petty/non-petty distinction concerned society's evaluation of the defendant's conduct. The level of punishment served merely as a proxy.¹¹¹ Thus, the defendant might be entitled to a jury even if the potential punishment is less than six months in prison, depending on the level of moral blameworthiness associated with a conviction.¹¹²

Examples can serve to demonstrate the limited relevance of the severity inquiry. If a herd of cattle contracts a contagious disease,

¹⁰⁷ *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized.").

¹⁰⁸ U.S. CONST. amend VI.

¹⁰⁹ See *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971) ("From 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."); *United States v. United States Currency*, 626 F.2d 11, 18 (6th Cir. 1980) (Merritt, J., concurring). But see *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 14 (2d Cir. 1982).

¹¹⁰ See *infra* note 124 and accompanying text.

¹¹¹ *Baldwin*, 399 U.S. at 68 ("In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria in the severity of the maximum authorized penalty.").

¹¹² Professors LaFave and Israel have explained the limits of *Baldwin*:

Well before *Baldwin* the Supreme Court had refused to view the maximum potential sentence as the sole criterion for determining whether or not an offense was petty for jury trial purposes. Rather, the Court looked to the nature of the offense, considering such factors as whether it was indictable at common law, whether it was morally offensive, and whether it was *malum in se* rather than *malum prohibitum*. *Baldwin* has been read as leaving these decisions undisturbed to the extent that they provide an additional basis for finding an offense to be other than petty. Consequently, courts have held, despite the low penalty involved, that such crimes as conspiracy to deceive immigration officials, driving under the influence and shoplifting fall within the jury trial guarantee.

WAYNE LAFAVE & JEROLD ISRAEL, *CRIMINAL PROCEDURE* 827 (1985).

the government might require the owner to slaughter the herd. Although the cattle herder would lose a valuable asset, no social stigma or blame would result. Losing one's principal business assets would not trigger the requirement of proof beyond a reasonable doubt.¹¹³ Conversely, murder would probably remain a crime even if the only punishment were a public declaration of guilt and the levy of a one-cent fine. Harsh punishment alone is not the benchmark for declaring a prosecution criminal.

B. STIGMA FROM THE IMPOSITION

One court has argued that § 881 forfeitures should be treated as civil because the civil label *per se* avoids the stigma associated with criminal convictions. The Second Circuit reasoned:

Historically, forfeitures have always been regarded as civil. This historic civil designation accurately reflects society's view that criminal judgments are of a fundamentally different character. Applicants for employment are often asked if they have been convicted of crimes; rarely, if ever, are they required to disclose judgments of forfeiture. The same distinction is observed on innumerable other questionnaires and applications that people fill out in the course of everyday life. Similarly, while the term "convicted felon" is a commonplace in our vernacular, no such pejorative term has arisen to describe the victims of forfeiture judgments.¹¹⁴

Although stigma may be a factor in deciding whether an action is criminal, this analysis puts the cart before the horse. By defining the civil label as not attaching stigma, the court defines whether a proceeding is criminal based on the name of the government imposition rather than an analysis of whether the forfeiture of property itself is stigmatizing.

A penalty imposed under a civil scheme may be just as stigmatizing as a criminal conviction.¹¹⁵ If a potential employer somehow discovered that a job applicant's home had been forfeited due to alleged cocaine sales, the employer would not likely hire the

¹¹³ See Jonathan Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 504 (1974).

¹¹⁴ *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 14 (2d Cir. 1982) (citations omitted). See also Charney, *supra* note 113, at 512-13.

¹¹⁵ Professor Clark has written:

[T]here may be cases of civil punishment that communicate a greater amount of stigma than certain cases of punishment labeled criminal. A large civil penalty imposed for intentional failure to comply with anti-pollution laws, for example, may stigmatize the defendant considerably more than would a small fine labeled "criminal" imposed for a traffic offense. And as the use of civil penalties proliferates, the public may come to associate them with the commission of serious, morally wrong acts in many cases.

Clark, *supra* note 65, at 408. See also Charney, *supra* note 113, at 496.

applicant.¹¹⁶

Just as severity alone is not determinative, however, neither is stigma. Even if a prosecution results in moral blame, the nature and purpose of the imposition are relevant to the inquiry. A civil prosecution against a pollution dumper is one example.¹¹⁷ If the goal of the prosecution is not the imposition of punishment but the restoration of the environment, the suit is civil regardless of public perceptions of the perpetrator.

Neither severity nor stigma alone will suffice to label a forfeiture criminal. Such a determination must be made with reference to the moral blame associated with, and the purposes of, the prosecution. The Supreme Court has developed a systematic way of analyzing these elements.

C. THE *WARD*¹¹⁸ TEST AND THE *MENDOZA-MARTINEZ*¹¹⁹ FACTORS

In *United States v. Ward*, the Supreme Court addressed a Fifth Amendment self-incrimination challenge to a self-reporting provision in the Federal Water Pollution Control Act.¹²⁰ The Court held that the self-reporting provision was civil, and that the Fifth Amendment's guarantee against self-incrimination did not therefore apply.¹²¹ The Court arrived at this conclusion by applying a two-part test:

First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a

¹¹⁶ The scenario is not so absurd as to be unbelievable. The names and addresses of claimants in civil forfeiture actions are routinely published in local newspapers. See Matt O'Connor, *Drug Asset Sales Pay Off for Chicago*, CHI. TRIB., Aug. 9, 1991, § 2 at 11; Jim Doyle, *U.S. Seizes Home of Couple in Heroin Bust*, S.F. CHRON., July 6, 1991, at A11; Sean P. Murphy, *U.S. Seizes 14 Properties of Suspected Drug Landlord*, BOSTON GLOBE, June 26, 1991, at 31; *U.S. Seizes Farm With Alleged Pot Crop*, CHI. TRIB., May 24, 1991, § 1 at 3; Ronald L. Soble, *Seized Assets Underwrite the War on Drugs*, L.A. TIMES, Apr. 16, 1991, at A3; *6 Alleged Drug Dealers Told They'll Be Evicted From CHA*, CHI. SUN-TIMES, June 27, 1990, at 22. To take a particularly egregious example, a local newspaper in New Bedford, Massachusetts, publishes photographs of every person appearing in the New Bedford district court on drug-related charges. Demonstrating the stigmatizing effect of the paper's "Drug Watch" feature, the New Bedford Housing Authority has initiated eviction proceedings and turned down applicants based solely on the photographs. The executive director of the Housing Authority has explained, "We're not a criminal court so we don't need absolute proof. It's up to them to prove to us that they can be a good neighbor." Mark Starr, *A New Kind of Scarlet Letter*, NEWSWEEK, Feb. 18, 1991, at 75.

¹¹⁷ See *supra* note 115. Civil prosecutions directed at dangerous prescription drugs, poorly designed automobiles or any other number of unsafe products could result in stigma.

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

¹¹⁹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

¹²⁰ *Ward*, 448 U.S. at 246-47.

¹²¹ *Id.* at 255.

preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."¹²²

The Court referred to an earlier case to help interpret whether a statute is so punitive as to negate a civil intention on the part of Congress.¹²³ In *Kennedy v. Mendoza-Martinez*, the U.S. attempted to divest Mendoza-Martinez of his citizenship after he had moved to Mexico to avoid military service. The Court, in deciding that Mendoza-Martinez had been deprived of his Fifth and Sixth Amendment rights, listed seven factors to consider when deciding whether a statute is criminal:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.¹²⁴

Federal courts have applied the *Ward* test and the *Mendoza-Martinez* factors when declaring various forfeitures to be civil in nature. In *United States v. One Assortment of 89 Firearms*,¹²⁵ for example, the Court authorized a seizure of firearms that were purchased and possessed with the intent of selling them without a license. After reviewing legislative statements and examining the nature of the forfeiture provisions, the Court concluded that the intention of Congress was to adopt a civil provision.¹²⁶

The next step was to inquire whether the scheme was so punitive as to negate Congress' intention. In a cursory statement, the Court declared that only the fifth *Mendoza-Martinez* factor was relevant — that the behavior described in the civil forfeiture statute was already a crime.¹²⁷ The Court then dismissed that factor, empha-

¹²² *Id.* at 248-49 (citations omitted).

¹²³ The *Ward* Court noted, "In making this determination, both the District Court and the Court of Appeals found it useful to refer to the seven considerations listed in *Kennedy v. Mendoza-Martinez*. This list of considerations, while certainly neither exhaustive nor dispositive, has proved helpful in our own consideration of similar questions." *Ward*, 448 U.S. at 249.

¹²⁴ *Mendoza-Martinez*, 372 U.S. at 168-69.

¹²⁵ *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

¹²⁶ *Id.* at 356.

¹²⁷ *Id.* The defendant had successfully pled entrapment in an earlier criminal trial. *Id.* at 356.

ing Congress' ability to devise simultaneous civil and criminal sanctions for conduct it proscribes.¹²⁸

VI. APPLYING THE *WARD* TEST AND THE *MENDOZA-MARTINEZ* FACTORS TO § 881

A. DISTINGUISHING TYPES OF CONTRABAND

The procedural protections granted by the Act depend upon the type of property being forfeited. Some property is illegal to possess under any circumstances. Certain drugs, for example, are considered so dangerous that the U.S. prohibits their possession, manufacture and distribution. Section 881(a)(1) is aimed at such drugs, which are considered contraband *per se*.¹²⁹ Since nobody can legally own such property¹³⁰ and since remedial purposes are directly advanced when illicit substances are taken off the streets,¹³¹ forfeiture statutes aimed at *per se* contraband should be subjected to limited scrutiny.

A second class of forfeitable property is the proceeds from any illegal transaction, including all assets acquired with drug money.¹³² Forfeitures of proceeds ensure that criminals are not allowed to retain the fruits of their crimes.¹³³ Section 881 authorizes the forfeiture of proceeds of drug transactions, assets traceable to such proceeds and assets used to facilitate illegal activities or intended as

¹²⁸ *Id.* The Court repeated its statement in *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938): "Congress may impose both a criminal and a civil sanction in respect to the same act or omission."

¹²⁹ See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 691, 699 (1965); *United States v. Farrell*, 606 F.2d 1341, 1344 (D.C. Cir. 1979); Clark, *supra* note 65, at 478; Henry C. Darmstadter & Leslie J. Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 30 (1987); Petrov, *supra* note 60, at 832. See *supra* note 7 and accompanying text.

¹³⁰ See Clark, *supra* note 65, at 478 ("It may be argued, rather conceptually, that forfeiture of such items [contraband *per se*] does not punish or deter because they are never legally owned and, consequently, no deprivation of a legal property interest is involved in their forfeiture."); Darmstadter & Mackoff, *supra* note 129, at 30; Petrov, *supra* note 60, at 832; *Parcels*, *supra* note 62, at 437 ("Almost all *disputed* forfeitures involve articles that are not intrinsically illegal but derive contraband status from use in criminal activities.").

¹³¹ Removing illegal drugs from our society is a remedial goal, aimed at preventing dangerous abuses rather than punishing any individual. Laws requiring purity in food and limiting gun ownership also achieve remedial ends with civil mechanisms. Removal of inherently harmful substances from the population is a means of preventing injury rather than punishing individuals after the damage has occurred. See *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 180 (E.D.N.Y. 1990); Clark, *supra* note 65, at 479.

¹³² See Darmstadter & Mackoff, *supra* note 129, at 30; Fried, *supra* note 62, at 375.

¹³³ See Darmstadter & Mackoff, *supra* note 129, at 31; Fried, *supra* note 62, at 411.

payment for illegal narcotics.¹³⁴ Forfeitures of proceeds of illegal activities presents a difficult problem in the classification of government sanctions due to the converging goals of restitution and retribution.¹³⁵

Finally, a third category of forfeitable property includes so-called "tools" or "instrumentalities" of crime. When some otherwise legally held property is employed to facilitate a crime, that item becomes *derivative* contraband.¹³⁶ Section 881, for example, authorizes the forfeiture of chemicals, laboratory equipment, boxes, bottles, airplanes, automobiles, land and buildings used to manufacture, store, distribute, sell or possess illegal drugs.¹³⁷ When the government forfeits derivative contraband, it effectuates criminal punishment and should be held to the highest standards of proof.

B. APPLYING THE FIRST PRONG OF THE *WARD* TEST

Several courts have applied the *Ward* test and the *Mendoza-Martinez* factors to § 881 forfeitures.¹³⁸ According to these courts, Con-

¹³⁴ See *supra* note 9 and accompanying text.

¹³⁵ It could be argued that, since such forfeitures further the essentially civil goal of restitution, they should be classified as civil penalties. This argument, however, rests on a misunderstanding of restitution. Restitution is the return of ill-gotten gains to the victim of the illegal activity. For example, the proceeds of a bank robbery may be returned to the bank. Section 881, however, provides no mechanism for the return of assets to those victimized by the prohibited activity. It provides merely that such assets shall become the property of the government. When viewed in such a light, forfeitures of proceeds under § 881 are no more restitutionary than any other fines or penalties. Such forfeitures promote purely retributive goals, long considered the exclusive domain of the criminal law. See Fried, *supra* note 62, at 399 (noting that "[t]he forfeiture of proceeds is precisely retributive, effectuating the principle that the criminal shall not profit by his crime.").

Two aspects of § 881 highlight its essentially retributive nature. First, the statute's innocent owner defense provides in essence that the assets of claimants who can show themselves morally innocent shall not be forfeited. See *supra* notes 55-66 and accompanying text. Second, the statute provides for forfeiture of assets purchased only partially with the proceeds of prohibited activity. See § 881(a)(b). The government need not reimburse a claimant for any portion of the forfeited property even if the claimant is able to prove by a preponderance of the evidence that some of the funds used to purchase an asset were the result of legal employment. *United States v. 15603 85th Ave.*, 933 F.2d 976, 981-82 (11th Cir. 1991). *But see United States v. Pole No. 3172 Hopkinton*, 852 F.2d 636, 639-40 (1st Cir. 1988). Neither of these provisions can be explained using a restitutionary theory.

¹³⁶ See *supra* note 129.

¹³⁷ See *supra* notes 8-9, 12 and accompanying text.

¹³⁸ See, e.g., *United States v. Price*, 914 F.2d 1507, 1512 (D.C. Cir. 1990); *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990); *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989); *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 12-13 (2d Cir. 1982); *United States v. 16 Clinton St.*, 730 F.Supp 1265, 1270-71 (S.D.N.Y. 1990). Some cases have not explicitly applied

gress intended to create a civil or remedial forfeiture procedure. The purpose of § 881 was not to punish drug dealers, these courts reason, but to take away their means of distributing narcotics.¹³⁹ Additionally, forfeitures reimburse society for the costs of the illegal conduct and the enforcement of criminal laws.¹⁴⁰

These courts reason that the existence of a separate provision permitting criminal forfeitures evidences Congress' intent to create a civil remedy.¹⁴¹ Additionally, § 881 explicitly states that "property is subject to *civil* forfeiture under this title."¹⁴² Examining the statutory scheme as a whole, one court explained:

[C]ongress indicated both 'expressly [and] impliedly a preference for' the civil label. The Comprehensive Drug Abuse Prevention and Control Act of 1970 makes a clear distinction between criminal 'Offenses and Penalties,' which are set forth in Part D of the Act, and 'Administrative and Enforcement Provisions,' including forfeiture, which are set forth in Part E.¹⁴³

Finally, the procedures for forfeiture under § 881 are civil in nature, providing additional support for the notion that Congress envisioned a civil mechanism.¹⁴⁴ For these reasons, courts applying the *Ward* test have concluded that Congress intended § 881 to be civil in nature.

A look at Congress' motivations and expectations, however, shows undeniably the punitive nature of § 881. The legislative history of the Comprehensive Drug Abuse Prevention and Control Act indicates that Congress intended forfeiture of derivative contraband to be criminal in nature. Members of Congress clearly stated their intentions that the civil forfeiture provisions impose punishment on violators.

the *Ward* test, but have instead ignored the intent inquiry and jumped to the second prong of *Ward*, asking whether a statute is punitive in purpose or effect. See, e.g., *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 43-44 (1st Cir. 1989).

¹³⁹ See *infra* notes 190-91 and accompanying text.

¹⁴⁰ See *infra* notes 236-37, 254-55 and accompanying text.

¹⁴¹ See *Price*, 914 F.2d at 1512; *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 543 (5th Cir. 1987) (referring to 21 U.S.C. § 853).

¹⁴² 21 U.S.C. § 881(b)(4) (emphasis added).

¹⁴³ *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 13-14 (2d Cir. 1982) (citations omitted). See also *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400 (3d Cir. 1990); *D.K.G. Appaloosas*, 829 F.2d at 543.

¹⁴⁴ See 21 U.S.C. 881(b), (d); *Price*, 914 F.2d at 1512; *One 107.9 Acre Parcel of Land*, 898 F.2d at 400; *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989) ("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 laws. As the Supreme Court has noted, Congressional intent is 'clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute.'") (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984)) (citations omitted); *D.K.G. Appaloosas*, 829 F.2d at 543.

For example, a joint explanatory statement described the forfeitures: "Due to the penal nature of forfeiture statutes, it is the intent of these provisions that the property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent."¹⁴⁵ Similarly, Senator Sam Nunn, who sponsored the amendments providing for forfeitures of proceeds of illegal activities, stated, "[t]he punitive and deterrent purposes of the Controlled Substances Act would have greater impact on drug trafficking."¹⁴⁶ Finally, a congressional panel reviewing the purposes of the 1984 amendments noted:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country Forfeiture is the mechanism through which such an attack may be made.¹⁴⁷

Analyzing this record, several courts have recognized the punitive motivations of the Congress.¹⁴⁸ The D.C. Circuit, for example, stated that "[§ 881] deters drug trafficking by seizing assets and subjecting them to forfeiture."¹⁴⁹ Similarly, the Second Circuit has taken note of "[C]ongressional concern with rising drug trafficking in this country and its conviction that those who profit and thrive upon the misery of drug addicts should be punished financially by forfeiture."¹⁵⁰ The Eleventh Circuit has observed, "The language of § 881(a)(7) reflects two interrelated aims of Congress: to punish criminals while ensuring that innocent persons are not penalized for their unwitting association with wrongdoers."¹⁵¹ The Seventh Circuit observed that "[t]he loss of one's home for the sale of a small

¹⁴⁵ Act of October 13, 1978, Pub. L. No. 95-633, 8511, 1978 U.S.C.C.A.N. (92 Stat.) 9518, 9522.

¹⁴⁶ 124 CONG. REC. 23, 055 (1978).

¹⁴⁷ Act of October 11, 1984, Pub. L. No. 98-473, 1985 U.S.C.C.A.N. (98 Stat.) 3182, 3374 (emphasis added).

¹⁴⁸ See, e.g., *United States v. United States Currency*, 626 F.2d 11, 18 (6th Cir. 1980) (Merritt, J., concurring); *United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991).

¹⁴⁹ *United States v. Price*, 914 F.2d 1507, 1513 (D.C. Cir. 1990). The D.C. Circuit unwittingly described the deterrent function of § 881 as a remedial purpose, thus justifying the civil characterization of the forfeiture provisions. *Id.* at 1512-13.

¹⁵⁰ *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 424 (2d Cir. 1977) (referring to § 781 within an opinion regarding a § 881 forfeiture).

¹⁵¹ *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1511, 1513 (11th Cir. 1990). More recently, the Eleventh Circuit has described a violation of § 881 as "criminal conduct" on the part of a claimant who knew of but did not participate in illegal activities on her property. *United States v. Sixty Acres in Etowa County*, 930 F.2d 857, 860 (11th Cir. 1991).

amount of cocaine is undoubtedly a harsh penalty. But Congress has intended this harsh punishment for those who sell illegal drugs.”¹⁵² Finally, one court concluded that “[t]he Act brought real property within the scope of civil as well as criminal forfeiture No distinction between the purposes of civil and criminal forfeiture is apparent from the legislative history, which describes both as weapons of deterrence.”¹⁵³

Perhaps most persuasive of all, the Supreme Court has implicitly recognized § 881’s criminal nature. In *Calero-Toledo*, the Court disposed of a Takings Clause claim by arguing that the forfeiture mechanism was criminal in nature.

Plainly, the Puerto Rican forfeiture statutes further the *punitive and deterrent purposes* that have been found sufficient to uphold, against constitutional challenge, the applications of other forfeiture statutes to the property of innocents. Forfeitures of conveyances that have been used — and may be used again — in violation of the narcotics laws fosters *the purpose served by the underlying criminal statutes*, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.¹⁵⁴

In sum, when not faced with a constitutional challenge, courts have felt free to disregard the civil label. Congress’ stated intention was to fashion a forfeiture statute to deter criminal activity. Under *Ward*, § 881 should be declared criminal and all procedural protections required in criminal cases should be guaranteed in forfeiture prosecutions aimed at derivative contraband.

C. THE SECOND PRONG OF *WARD* AND THE *MENDOZA-MARTINEZ* FACTORS

The second prong of the *Ward* test asks whether the statute is so punitive in purpose or effect that the forfeiture cannot be treated as civil. Emphasizing the stringency of the *Ward* test, the Court has explained: “‘Only the clearest proof’ that the purpose and effect of the forfeiture are punitive will suffice to override Congress’ manifest preference for a civil sanction.”¹⁵⁵ Because the standard is so demanding, courts have been hesitant to classify § 881 forfeitures as

¹⁵² *United States v. 916 Douglas Ave.*, 903 F.2d 490, 494-95 (7th Cir. 1990).

¹⁵³ *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 178 (E.D.N.Y. 1990).

¹⁵⁴ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974) (emphasis added). The Court was referring to a different statutory scheme, but a footnote explained that “[b]ut for unimportant differences, [the Puerto Rican statute] is modelled after 21 U.S.C. § 881(a).” *Id.* at 686 n.25. The Court then went on to quote § 881(a)(4), which provides for the forfeiture of conveyances used to transport illicit substances.

¹⁵⁵ *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). See also *United States v. Ward*, 448 U.S. 242, 249 (1980).

criminal. The decisions are characterized by the use of a vague balancing test. Typical is a comment by the Third Circuit: "Although reasonable minds might disagree, we conclude that the purpose or effect of the statute does not belie a civil sanction."¹⁵⁶ Some remedial connection usually can be made between forfeitures and the dangers of the drug trade. As long as this nexus is conceivable, courts are unwilling to re-characterize the statute.

The fact that the legislature labeled a statute civil rather than criminal should not relieve courts of their responsibility to review the constitutionality of that statute. In order to determine if criminal protections are required, courts ask whether the legislature selected civil labels and procedures. The question of whether the sanctions are criminal in substance, however, remains unanswered by inquiries concerning labels. This is all the more important in a situation where the legislative history indicates an intent to deter criminal conduct.¹⁵⁷ Regardless of how much deference is given to Congress, it is difficult to conclude that § 881 is anything but criminal in nature.

1. A Tailored, Remedial Justification as a Predicate for Attaching the Civil Label

Application of the *Mendoza-Martinez* factors reveals that § 881 has a punitive purpose or effect.¹⁵⁸ Taking derivative contraband undoubtedly imposes an "affirmative disability or restraint" on the owner, satisfying the first factor. The *Mendoza-Martinez* Court did not define these terms, never applying the factors.¹⁵⁹ *Black's Law Dictionary* defines "disability" as: "The want of legal capability to perform an act. Term is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus persons under age, insane persons and convicts are said to be under legal disability."¹⁶⁰ When the government takes a person's home or automobile without compensation, the government has imposed on that person.

¹⁵⁶ *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 398 (3d Cir. 1990). See also *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989); *Bramble v. Richardson*, 498 F.2d 968, 972 (10th Cir. 1974) ("Unfortunately, an analysis of the cases both antedating and succeeding *Helvering* convinces us that the civil-criminal distinction, whether characterized as remedial-penal or otherwise, is indeed an elusive one.").

¹⁵⁷ See *supra* notes 146, 179 and accompanying text.

¹⁵⁸ The two inquiries appear to have been merged by the *Mendoza-Martinez* factors. The Court has even unwittingly eliminated the disjunctive on one occasion, requiring proof of both punitive purpose *and* effect before declaring a statute criminal in nature. *One Assortment of 89 Firearms*, 465 U.S. at 365.

¹⁵⁹ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

¹⁶⁰ BLACK'S LAW DICTIONARY, *supra* note 61, at 461.

As contraband *per se* is illegal to possess, the claimant cannot legally own the items subject to forfeiture. Theoretically, the government does not impose a disability if no legal property interest existed in the first place.¹⁶¹ The same argument can be made of assets derived from the proceeds of illegal transactions. If a criminal gained the asset as the result of illegal conduct, he does not rightly own it.¹⁶² Likewise, someone who owns derivative contraband arguably gives up ownership of that property by permitting its use in a criminal act.

The lack of "ownership" in the case of derivative contraband,¹⁶³ however, is merely semantic. If property interests are divested upon the commission of a particular act, the government can assert that the possessor voluntarily committed the act and gave up any interest in the property. No forfeiture involves an affirmative disability or restraint when ownership is defined in this manner. The government could routinely avoid the attachment of criminal protections by defining away the injury. Indeed, any government forfeiture imposes a disability for the purposes of the *Mendoza-Martinez* factors. As Professor Clark has written, "Any burden can be viewed as an affirmative disability or restraint The question whether the sanction involves an affirmative disability or restraint is better simplified to whether there is a sanction at all — or in H.L.A. Hart's terms, whether there is 'pain or some consequence normally considered unpleasant.'" ¹⁶⁴

The second *Mendoza-Martinez* factor asks whether the sanction has historically been regarded as punishment. The Court's muddled handling of forfeiture statutes in the past has resulted in the "quasi-criminal" label, whereby forfeitures are considered criminal for some purposes and not for others.¹⁶⁵ The historical inquiry required by *Mendoza-Martinez* asks a more fundamental question than the traditional *in personam/in rem* distinction. The *Mendoza-Martinez* Court was concerned with special disabilities that do not fit neatly into the criminal justice system. Although imprisonment and fines are routinely used as punishment, for example, sanctions such as revocation of an educational institution's accreditation or an individual's business license might deserve different treatment based on their past applications. In *Mendoza-Martinez*, the divestiture of citizenship was not so obviously viewed as punishment and demanded

¹⁶¹ See *supra* note 130 and accompanying text.

¹⁶² See *supra* note 133 and accompanying text.

¹⁶³ The same argument probably applies in the case of proceeds of illegal activities.

¹⁶⁴ Clark, *supra* note 65, at 455.

¹⁶⁵ See *supra* notes 90-100 and accompanying text.

special inquiry.¹⁶⁶

Courts should inquire into whether a given sanction has historically been employed as a means of criminal punishment. Prior use of special impositions might shed light on their current application. In the case of § 881, forfeitures have traditionally been used to punish and thus satisfy the second factor.¹⁶⁷ Permanent seizures of property such as automobiles and homes are akin to fines and do not deserve special categorization, even if such sanctions serve alternative purposes on some occasions.

Even if a court were to examine the *in personam/in rem* distinction while applying the second *Mendoza-Martinez* factor, civil forfeitures carry obvious punitive effect. The attachment of the "quasi-criminal" label indicates that forfeitures have been viewed as imposing more bite than a civil judgment.¹⁶⁸ Modern constitutional jurisprudence should evaluate their true nature regardless of their historical label.¹⁶⁹

The third factor questions the degree of personal responsibility necessary for a forfeiture.¹⁷⁰ Courts finding § 881 to be civil in nature have declared that the degree of culpability is irrelevant in § 881 forfeiture decisions.¹⁷¹ This description ignores several provisions in the statute. For example, the "innocent owner" defense can make the claimant's mental state decisive in any § 881 action.¹⁷² Additionally, the forfeiture provisions also inquire into whether the property was "intended to be used" to violate or facilitate a violation of drug laws.¹⁷³

Furthermore, simply eliminating the *mens rea* element from a criminal law does not insulate the statute from constitutional challenges. Even if forfeiture provisions are viewed as strict liability schemes, owners are personally responsible if they permit their property to facilitate wrongful conduct.¹⁷⁴ In fact, many strict liability statutes are explicitly regarded as criminal despite their lack of a

¹⁶⁶ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963).

¹⁶⁷ See *supra* notes 6, 103 and accompanying text.

¹⁶⁸ See *supra* notes 90-100 and accompanying text.

¹⁶⁹ See *supra* note 109 and accompanying text.

¹⁷⁰ BLACK'S LAW DICTIONARY succinctly defines "scienter" as "knowingly." BLACK'S LAW DICTIONARY, *supra* note 61, at 1345. See also *infra* note 176.

¹⁷¹ *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 14 (2d Cir. 1982).

¹⁷² See *supra* note 55 and accompanying text.

¹⁷³ See 21 U.S.C. § 881(a)(4), (6), (7); *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990); *United States v. One 1980 Bertram 58 Foot Motor Yacht*, 876 F.2d 884, 887-88 (11th Cir. 1989) ("It is the state of mind of the criminal with respect to the property sought to be forfeited which is determinative, not whether the property is actually used to execute the criminal intentions.").

¹⁷⁴ See *supra* notes 86-87 and accompanying text.

scienter requirement.¹⁷⁵

Finally, courts should note that the *Mendoza-Martinez* Court brought in the issue of culpability because of the notion that a criminal conviction attaches with it a degree of moral responsibility.¹⁷⁶ Although a § 881 forfeiture action might not require determination of an individual's responsibility, some social blame attaches nonetheless.¹⁷⁷ Therefore, the reasons for applying the *scienter* requirement are satisfied.

The fourth factor, which asks whether the statute promotes the traditionally punitive goals of retribution and deterrence, provides the best argument for declaring § 881 criminal in nature. Section 881 was intended to impose punishment on drug dealers.¹⁷⁸ Further, the existence of an innocent owner defense provides strong evidence that the goal of the statute is to impose punishment only on those shown to be morally deserving of it.¹⁷⁹

Additionally, § 881 has the effect of deterring drug-related activity.¹⁸⁰ By imposing costs on those who have acted or failed to act in a particular manner,¹⁸¹ it provides clear incentives. The legislative history of the section reveals that Congress was well aware of

¹⁷⁵ See Charney, *supra* note 113, at 495.

¹⁷⁶ See Clark, *supra* note 65, at 456-57 (The third and fifth factors combine to form the concept of deterrence, which is based "on the notion of purposive offense or culpability."). If conduct occurs unknowingly, the actor cannot be said to have purposely chosen a particular path and is not morally blameworthy.

¹⁷⁷ See *supra* notes 61-62, 115-16 and accompanying text.

¹⁷⁸ See *supra* notes 146-54 and accompanying text.

¹⁷⁹ *Id.*

¹⁸⁰ Some observers argue that forfeitures of proceeds of illegal activities do not deter potential criminals because the forfeiture only returns what was not originally owned. The criminal has not been made any worse off than before the criminal conduct and therefore will not be deterred. See Clark, *supra* note 65, at 478; Fried, *supra* note 62, at 371-72; Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1201-02 (1985).

In reality, § 881 forfeitures of proceeds of criminal activities probably do result in deterrence. First, the argument against deterrence ignores the value of time and effort. When people devote their professional efforts to an activity and buy assets with their profits, they feel as though they have earned those assets. The threat that the government might come along and take away all your earnings if you choose a career as a drug dealer is a deterrent. Drug dealers always face the threat that their homes, cars and financial security will be swept away in an instant.

The non-deterrence argument is similar to the game played in defining what property actually belongs to an individual. See *supra* notes 161-64 and accompanying text. If someone did not truly deserve a house in the first place, the argument goes, then taking away the home is not a deterrent. What a person is legally entitled to, however, is not always the same as what a person believes is deserved. If taken to its logical consequence, the non-deterrence argument would obliterate the meaning of the fourth *Mendoza-Martinez* factor just as it would the meaning of the first.

¹⁸¹ BLACK'S LAW DICTIONARY, *supra* note 61, at 450 (defining deter).

this deterrent effect.¹⁸²

The fifth factor, which asks whether the behavior to which the statute applies is already a crime, strengthens the case for treating § 881 as a criminal statute. Section 881 applies to activities that are subject to criminal sanctions. Indeed, that § 881 forfeitures occur *only* in conjunction with criminal conduct belies any congressional indications that the statute is civil in nature.¹⁸³

The case for interpreting § 881 as a civil statute comes down to the sixth and seventh *Mendoza-Martinez* factors. If an alternative or non-punitive purpose exists for § 881 forfeitures and if such forfeitures are not excessive in relation to the alternative purpose, then the punitive impact of § 881 is merely incidental to the achievement of remedial or regulatory goals.

The Supreme Court explained the application of these factors in other contexts. In holding that the detention of arrestees could

¹⁸² In sponsoring the 1978 amendment to § 881, Senator Sam Nunn argued in favor of § 881(a)(6) as a deterrent:

The criminal justice system can only be effective if there is a meaningful deterrent. It is important that the offender be aware of the risk he is running. In today's narcotic traffic the profits to be made are astronomical . . . [D]eterrence is minimized because it is difficult to attack an individual's sources of finance for narcotics trafficking. We cannot forget that profit, astronomical profit, is the base motivation of drug traffickers. The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illegal drug trafficking.

124 CONG. REC. 23,055 (1978). See also *supra* notes 146-47 and accompanying text.

¹⁸³ The Court has adverted to the significance of the coextensive nature of conduct sanctioned by civil provisions and conduct sanctioned by expressly criminal penalties:

[C]ongress in fact drafted [the statute providing for civil forfeiture of firearms] to cover a broader range of conduct than is proscribed by the criminal provisions . . . Because the sanction embodied in [the statute providing for civil forfeiture of firearms] is not limited to criminal misconduct, the forfeiture remedy cannot be said to be coextensive with the criminal penalty. What overlap there is between the two sanctions is not sufficient to persuade us that the forfeiture proceeding may not legitimately be viewed as civil in nature.

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984) (applying the fifth *Mendoza-Martinez* factor).

The Fifth Circuit flips this argument on its head by arguing that § 881 is broader in coverage than the parallel criminal forfeiture statute (§ 853) because of the different burdens of proof. As § 853 requires a criminal conviction based on proof beyond a reasonable doubt, forfeitures that would be impossible under the criminal provisions could occur under § 881. See *supra* note 6. Thus, the court reasons, the civil provisions go beyond the criminal ones. See *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544 (5th Cir. 1987).

The point of the fifth *Mendoza-Martinez* factor is not that the lower burden of proof makes civil statutes broader than criminal statutes. Rather than pursuing such a circular rationale, the fifth *Mendoza-Martinez* factor is directed at the conduct proscribed. Under a probable cause standard, the government might have an easier time proving that particular acts occurred. The same conduct that forms the predicate for a § 881 action, however, can do so for a criminal prosecution. All predicate acts identified in § 881 are also subject to expressly criminal sanctions.

fail to pass muster under the test, the Court explained that “[i]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective. Retribution and deterrence are not legitimate nonpunitive governmental objectives.”¹⁸⁴ Similarly, in analyzing a pretrial commitment procedure to determine the competency of defendants, the Court cautioned that, “[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”¹⁸⁵ Thus, § 881 must not burden property owners any more than is reasonably necessary to achieve its regulatory ends.

Reviewing an excessive civil penalty that the government claimed served the purpose of compensation for damages, the Supreme Court applied these factors in an even more stringent manner:

We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Furthermore, “[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.” From these premises, it follows that a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.¹⁸⁶

This language apparently demands a criminal label if *any* punitive goals are served.¹⁸⁷

The civil forfeiture provisions aimed at derivative contraband

¹⁸⁴ *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).

¹⁸⁵ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

¹⁸⁶ *United States v. Halper*, 490 U.S. 435, 448 (1989) (citations omitted, emphasis added). The *Halper* Court cited the sixth and seventh *Mendoza-Martinez* factors to support such a stark proposition. *Id.*

¹⁸⁷ Although the language of *Halper* appears absolute, the Court probably should not be taken literally. First, decades of precedent indicate that all that is necessary is a reasonable relation, not a perfect one. See *supra* notes 126, 187-88 and accompanying text. Second, such an extreme interpretation would effectively eliminate the possibility of a “civil” forfeiture. No forfeiture can be described as *solely* remedial, as some punitive impact is inevitable when the state takes away property. As one court commented:

The presence of both punitive and remedial goals does not of itself convert a civil statute into a criminal measure, or vice versa. To some degree all civil forfeiture acts as a deterrent to owners of property, if only to encourage them to take all reasonable care that their property is not put to illegal use. Indeed, the application of ordinary tort law usually has a deterrent effect. The material inquiry is not whether civil forfeiture is punitive in purpose and effect. It usually is. The question is whether the forfeiture serves some alternative purpose as well, and whether the penalty inflicted is excessive in relation to that alternative purpose.

United States v. 38 Whalers Cove Drive, 747 F. Supp. 173, 179 (E.D.N.Y. 1990) (citations omitted). See also *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) (“[t]he punitive aspects of any forfeiture are self-evident. . .”).

do not meet these requirements. Section 881 is so broad in both scope of forfeiture and impact on claimant that it cannot possibly be described as civil after an honest application the sixth and seventh *Mendoza-Martinez* factors. If Congress had intended to adopt a criminal measure, aimed not merely at reducing the incidence of drug use through remedial measures but instead at punishing drug dealers and users, it could hardly have come up with a more punitive and extensive forfeiture scheme.

2. Remedial Justifications and Instrumentalities of Crime

Section 881 authorizes the forfeiture of property used to facilitate the possession, manufacture or distribution of illegal drugs.¹⁸⁸ Currency, automobiles, airplanes, ships, buildings, land and even leaseholds have been forfeited under the statute.¹⁸⁹ These forfeitures, according to many courts, prevent future drug transactions and their attendant harms by removing the tools of the drug trade.¹⁹⁰ One court spelled out, "The intent of the forfeiture provision of [§ 881] is to deprive criminals of the tools by which they conduct their illegal activities."¹⁹¹ If a ship regularly carries cocaine to the U.S., for example, forfeiture of the ship will make it more difficult for the drugs to arrive. Forfeiture might cause hardship to its owner, but such hardship is incidental to the government's actual purpose. The aim is not to punish, but to prevent potential drug users and other persons from being hurt.

Derivative contraband, however, is not an instrument of crime. A particular automobile or airplane does not make it easier to de-

¹⁸⁸ See *supra* notes 8-9, 12 and accompanying text.

¹⁸⁹ See *supra* notes 17-18 and accompanying text.

¹⁹⁰ *E.g.*, *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) ("[T]he remedial, non-punitive purposes of [§ 881] are extremely strong: 'These remedial purposes include . . . stripping the drug trade of its instrumentalities.'") (quoting *United States v. 2639 Meeting House Rd.*, 633 F. Supp. 979, 993-94 (E.D. Pa. 1986)); *United States v. 526 Liscum Drive*, 866 F.2d 213, 217 (6th Cir. 1988); *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 13-14 (2d Cir. 1982) ("Forfeiture of drugs, vehicles and money used in drug trafficking has many apparent remedial, non-punitive purposes. These include impeding the success of the criminal enterprise by eliminating its resources and instrumentalities . . . [Section 881] was clearly aimed at the instrumentalities of the drug trade with the clear intent of preventing their continued use."); *United States v. Eighty-Eight Designated Accounts*, 740 F. Supp. 842, 848 (S.D. Fla. 1990); *United States v. Route 2, Box 61-C*, 727 F. Supp. at 1295, 1297 (W.D. Ark. 1990) ("Section 881(a)(7) is designed to strip the drug trade of the instrumentalities of crime, including real estate used to facilitate drug transactions."); *United States v. One 1976 Buick Skylark*, 453 F. Supp. 639, 643 (D. Colo. 1978) ("The primary purpose of [§ 881] is to cripple illegal drug trafficking and narcotics activity by depriving narcotics peddlers of the operating tools of their trade.").

¹⁹¹ *526 Liscum Drive*, 866 F.2d at 217.

liver drugs, a particular building does not make it easier to sell or store drugs and a particular piece of land does not make it easier to grow or manufacture drugs. Cocaine physically takes up space somewhere. Being in one apartment makes the drug no more dangerous or useful than if it were in a coat pocket, on a boat or in another apartment. Evidence that a truck transports marijuana does not prove that a different truck or an automobile could not deliver the controlled substance. Forfeiture of derivative contraband, therefore, does not preclude any illegal activity.

Only if the derivative contraband is indispensable to the commission of crime could its forfeiture possibly be remedial. In order for a forfeiture to reduce future harmful activity, the property must be necessary for the wrongful conduct and it must be irreplaceable (or at least difficult to replace).¹⁹² As alternatives will almost always exist, § 881 forfeitures of derivative contraband cannot be justified as remedial based on an "instrumentalities of crime" rationale.

In *United States v. One 1972 Datsun*,¹⁹³ a drug dealer used an automobile to lead an undercover agent to the scene of an illegal sale. The court found that the vehicle was not a usual element in an ongoing criminal enterprise and that forfeiture of the particular automobile would therefore not prevent future illegal sales of narcotics. The court concluded that forfeiture of the car would exceed the remedial purposes of § 881:

Unlike the seizure of *per se* contraband, "the possession of which, without more, constitutes a crime," and the seizure of which directly promotes the remedial goals of a forfeiture scheme, seizure of derivative contraband may or may not be remedial, depending on the nature and substantiality of its association with the underlying illegal activity. Therefore, 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 suspects via the forfeiture route, could deprive citizens of the constitutionally-mandated safeguards which surround the criminal process.¹⁹⁴

¹⁹² See Clark, *supra* note 65, at 479.

¹⁹³ *In re One 1972 Datsun*, 378 F. Supp. 1200 (D.N.H. 1974).

¹⁹⁴ *Id.* at 1206. Unfortunately, the court did not take this principle to its logical end. Although recognizing that an automobile that transports a wrongdoer to the scene of a crime should not be forfeited without affording criminal protections to its owner, the court explained in dicta that derivative contraband need not be uniquely suited to illegal activities and need not be difficult to replace to fall under § 881. *Id.* at 1202-03. Rather, the court's concern was the property's level of involvement in a particular illegal transaction. The court elaborated:

It is clear that any intentional transportation or concealment of contraband in a conveyance, no matter how small the amount, will subject the conveyance to forfeiture. In addition, use of a vehicle as a place for conducting negotiations for or

Arguably, the government could achieve its regulatory purposes by bankrupting a claimant. Section 881 allows forfeiture of property intended to be used to facilitate a drug crime.¹⁹⁵ If the government could establish probable cause to believe that a claimant would merely purchase a new piece of property with which to commit offenses, the Act could be interpreted as allowing forfeiture of most or even all of a claimant's assets.¹⁹⁶

Constitutionally, however, complete bankruptcy would be excessive in relation to the remedial purpose.¹⁹⁷ If most of a person's property has no tie to illegal activities, forfeiture of all of that person's assets would go far beyond the specific regulatory purpose of removing tools of crime from the hands of wrongdoers. The total economic incapacitation of an alleged wrongdoer should be treated the same as incapacitation through imprisonment, which would clearly be excessive in relation to almost any civil purpose. When wrongdoers are put in jail, a remedial purpose is served to the extent that they will be unable to commit more crimes. Despite serving the function of incapacitation, the punitive nature of a prolonged imprisonment would be excessive in relation to the alternative purpose.¹⁹⁸ The same rationale applies to economic incapacitation. As one court observed:

[T]here is nothing inherently unlawful about possessing a condominium. A forfeiture in the present case may incapacitate the owner who permits the illegal use, but hardly rids society of a noxious instrumen-

transacting any portion of a sale is sufficient to subject the vehicle to forfeiture. Use as a look-out or decoy vehicle in a convoy will also render the vehicle subject to forfeiture.

Id. at 1202 (citation omitted).

See also *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 691, 699 (1965) ("[T]he return of the automobile to the owner would not subject him to any possible criminal penalties for possession or frustrate any public policy concerning automobiles, as automobiles."); *Howard v. United States*, 423 F.2d 1102, 1103-04 (9th Cir. 1970) (In the context of a § 781 forfeiture, "[t]he seized car was merely the means of locomotion by which the person suspected of participating in illegal drug trafficking reached the site of that activity. The ease or the difficulty of transporting the marihuana in the Chevrolet was not affected by the manner in which [the claimant] reached the load car."); *United States v. Leasehold Interest in 850 S. Maple*, 743 F. Supp. 505, 511 (E.D. Mich. 1990); *Clark*, *supra* note 65, at 480; *Fried*, *supra* note 62, at 384.

¹⁹⁵ See *supra* notes 8-12 and accompanying text.

¹⁹⁶ See *In re Kingsley*, 802 F.2d 571 (1st Cir. 1986) (government seized all of a person's assets, including home and its contents, based on an attempted proceeds forfeiture).

¹⁹⁷ Several statutory arguments are also possible. Courts might interpret § 881's "intended use" provisions as requiring specificity in the identification of forfeitable assets. See 21 U.S.C. § 881(a). The government would have to establish probable cause to believe that a particular item or investment was going to be exchanged for a new instrumentality.

¹⁹⁸ See *infra* notes 232-33 and accompanying text.

tality. Incapacitation could also be accomplished by criminal measures, avowedly punitive, such as imposing heavy fines or constraining the person's liberty by imprisonment. It was just such a practice of economically disabling those whom the Stuarts considered dangerous that led to the incorporation in the English constitution of the precursor to the excessive fines clause of our Eight Amendment.¹⁹⁹

Forfeiture of all of a person's assets would be excessively punitive if accomplished through a civil procedure designed to attack narcotics trafficking. Forfeitures of assets that are legal to possess can rarely if ever be described as remedial in nature.

Unfortunately, most courts have not recognized this principle. Section 881 is routinely applied to property with only tenuous connections to an illegal transaction and that is unnecessary for continued law violations. In *United States v. 916 Douglas Avenue*,²⁰⁰ for example, a homeowner received a telephone call at his house and negotiated a cocaine sale during the subsequent conversation. The actual exchange of drugs for money took place at a different location. No other connection between the home and the drug transaction was alleged. The court found that a sufficient nexus existed for forfeiture.²⁰¹ The court never explained how taking the home would prevent future drug sales. These transactions could be negotiated over a pay phone, over a mobile cellular phone, in writing or in person.

In another case, police found four cigarette butts containing marijuana in an automobile.²⁰² No other link to drugs was alleged. No witnesses connected the car owner to the marijuana or established how forfeiting the automobile would prevent future drug use. Nevertheless, a forfeiture was approved.²⁰³

In another case, the court approved the forfeiture of an automobile because the vehicle happened to be in front of two people conducting a drug transaction. Whether the car transported any money, weapons, drugs or persons involved in the exchange was irrelevant:

[T]he test [for facilitation] was "whether there was a reasonable

¹⁹⁹ *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 178 (E.D.N.Y. 1990) (citations omitted).

²⁰⁰ *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990).

²⁰¹ *Id.* at 494. The court explained, "When Mueller called Born at his home telephone number on April 15, 1986, Born negotiated the price and quantity of cocaine to be sold the next day. When Mueller called Born's number again on April 16, he was able to arrange the entire transaction with Mazzanti . . . Given this history, we are satisfied that the district court properly found that the nexus between Born's house and the drug offense was not incidental or fortuitous." *Id.*

²⁰² *United States v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978).

²⁰³ *Id.* at 198.

ground for belief that the use of the automobile made the sale less difficult and allowed it to remain more or less free from obstruction or hindrance." The facts in this case satisfy the test. The presence of the automobile with its hood up provided a convenient cover whereas the two men alone in an alley might have appeared suspicious. Under these circumstances, a reasonable belief is warranted that the automobile facilitated the sale.²⁰⁴

Obviously, the car hood was not necessary for the transaction. Future sales can take place in a private apartment, behind a trash dumpster or even under the cover of a cardboard box.

These cases are not isolated examples. Section 881 is routinely applied without any inquiry into remedial impact on future activities.²⁰⁵ Some courts have tried to correct for the incongruity be-

²⁰⁴ *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir. 1981) (citations omitted).

²⁰⁵ In *United States v. One 1974 Cadillac Eldorado*, 548 F.2d 421 (2d Cir. 1977), a car owner drove a friend to an apartment where the friend attempted to negotiate a drug sale. Although no cash or drugs were ever transported in the car and although the drug sale never occurred, the automobile was forfeited. The court concluded, "if the purpose of [§ 881] is, as Congress indicated, to reduce the profits of those who practice this nefarious profession, we are loath to make the forfeiture depend upon the accident of whether the dope is physically present in the vehicle The conveyance of Santiago and Montanez in the Cadillac to and from the June 7 meeting did facilitate the sale of the drug." *Id.* at 426-27.

Similarly, in *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500 (5th Cir. 1981), an automobile was used to transport two people to the site of a cocaine sale. Neither contraband nor cash for the purchase were transported in the vehicle. Nevertheless, the court approved the forfeiture: "The use of the Cadillac in transporting [the claimant] to the site facilitated the transaction by enabling her to consummate the sale at the prearranged time and place. We conclude such use of the vehicle to transport the dealer to the scene forms a sufficient nexus between the vehicle and the transaction to validate forfeiture under 21 U.S.C. § 881." *Id.* at 503.

In *United States v. 42450 Highway 441*, 920 F.2d 900 (11th Cir. 1991), negotiations for cocaine shipments occurred in a single family home on a one-acre parcel of land. Although no drugs were ever brought onto the property and no money was ever exchanged on the property, the court approved the forfeiture. The Eleventh Circuit explained: "[T]he property was used to negotiate and plan an essential component of a specific drug transaction that actually took place. The conspirators met regularly on the property and discussed the details of their plan there. Moreover, they travelled from the house to inspect the proposed landing site nearby." *Id.* at 903. Clearly, the property was not indispensable. In fact, the claimant owned an additional 40 acres of land. *Id.* If the one-acre lot in question had been unavailable, the illegal activities could have occurred elsewhere without impediment.

In *United States v. Santoro*, the government documented four sales of "[s]mall amounts of cocaine." 866 F.2d 1538, 1543 (4th Cir. 1989). The sales took place on a small section of land separated from the rest of the property by a road. The entire 26 acres, worth \$100,000, were forfeited. *Id.* at 1540-41. The court stated that the property need be "only fortuitously connected with drug trafficking" in order to come under § 881's reach. *Id.* at 1542.

In *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983), the claimant drove his car to a hotel to negotiate a drug purchase. The owner was supposed to pay for the drugs, but no cash was found in the automobile. The court concluded,

tween the regulatory purpose and the punitive effect by reading a "substantial connection" requirement into the statute. Unless the government can show reason to believe that a substantial connection exists between the property and the predicate crime, these courts will not approve a forfeiture.²⁰⁶

"The subject vehicle in this case was used to transport the 'pivotal figure in the transaction' several hundred miles to the precise location at which the attempted purchase took place [T]he Porsche had a sufficient nexus to the attempted drug purchase to support the forfeiture." *Id.* at 1427.

In *United States v. 38 Whalers Cove Drive*, a condominium owner made two cocaine sales for a total of \$250 (one and one-half grams of cocaine) in his home. The government informant who purchased the drugs requested that the first sale take place in the condominium after the claimant proposed another site. For ten weeks following the second sale, the government informant called the condominium owner every day requesting further drug transactions, but the condominium owner always refused. The government informant observed only small amounts of drugs, never any more than would be expected of an individual's personal use. Finally, a search of the premises found no weapons, drugs or other evidence of drug transactions. 747 F. Supp. 173, 175 (E.D.N.Y. 1990). Despite the minimal nature of the connection between the property and the illegal conduct, the court authorized the forfeiture of a \$70,000 condominium.

²⁰⁶ See, e.g., *United States v. 28 Emery St.*, 914 F.2d 1, 3-4 (1st Cir. 1990) ("We have consistently required that there be a 'substantial connection' between the property forfeited and the drug activity."); *United States v. 7715 Betsy Bruce Lane*, 906 F.2d 110, 112 (4th Cir. 1990) ("In order for the court to find probable cause that the house was used or was intended to be used to facilitate a crime, the evidence must demonstrate that there was a substantial connection between the property and the underlying criminal activity."); *United States v. One Parcel of Real Property*, 900 F.2d 470, 472 (1st Cir. 1990) ("[The government] established probable cause to believe that there was a substantial connection between the claimants' property and drug trafficking, and hence that the property was subject to forfeiture."); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989) (requiring sufficient nexus similar to substantial connection test); *United States v. 3639-2nd St.*, 869 F.2d 1093, 1096-97 (8th Cir. 1989); *Santoro*, 866 F.2d at 1542; *United States v. 526 Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1988) ("[T]he United States must establish probable cause to believe that a substantial connection exists between the property to be forfeited and the illegal exchange of a controlled substance."); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (not reaching the question of whether a substantial connection is necessary, but establishing some minimum nexus requirement).

The Fifth Circuit has adopted an "any connection" standard for § 881(a)(4) actions and the substantial connection standard for § 881(a)(6) actions. See *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228, 230 (5th Cir. 1982); *United States v. \$364,960 in United States Currency*, 661 F.2d 319, 323 (5th Cir. 1981). As § 881(a)(7) is phrased similarly to § 881(a)(4), one would expect the Fifth Circuit to apply the any connection standard to § 881(a)(7) actions. See *Santoro*, 866 F.2d at 1542 ("Although this Court has never expressly addressed this issue as it relates to 21 U.S.C. § 881(a)(7), we have found the 'substantial connection' standard appropriate under the analogous provision of 21 U.S.C. § 881(a)(4).").

The Eleventh Circuit has adopted the substantial connection standard for § 881(a)(6) forfeitures of proceeds, but questions whether that standard should apply in forfeiture actions aimed at derivative contraband. See *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551, 1555-56 (11th Cir. 1991) ("The term 'substantial connection' is found in the legislative history of the 1978 amendment to 21 U.S.C. § 881, which added

Despite such judicial attempts to limit the reach of forfeitures, § 881 is applied in an excessively punitive manner in all circuits. First, many federal courts have been explicit in their application of an “any connection” standard.²⁰⁷ One circuit noted, “[T]he government must show that it had reasonable grounds to believe that the property was *related* to an illegal drug transaction [W]e decline to read a ‘substantial connection’ requirement into the forfeiture statute.”²⁰⁸ Circuits adopting the any connection standard have by definition rejected an indispensability requirement.²⁰⁹

In jurisdictions that have demanded a substantial connection, the application of § 881 remains the same. The standard requires merely that the property have “[m]ore than an incidental or fortuitous connection to criminal activity.”²¹⁰ Most courts look for evidence that the property simply had some small nexus to a crime. The substantial connection requirement rejects the notion that property must be indispensable in order to be an instrumentality of crime. As one court explained:

Under the substantial connection test, the property must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At [a] minimum, the property must have more than an incidental or fortuitous connection to criminal activity. Still, the lan-

to the statute paragraph (6), a provision providing for the forfeiture of the proceeds of a drug transaction. Nothing indicates that the term was intended to apply to other forfeiture actions.”); *42450 Highway 441*, 920 F.2d at 902; *United States v. \$41,305 in Currency and Traveler’s Checks*, 802 F.2d 1339, 1343 (11th Cir. 1986). *But see* *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1426 (11th Cir. 1983) (“To support a forfeiture under § 881, the government must demonstrate probable cause for the belief that a substantial connection exists between the vehicle to be forfeited and the relevant criminal activity.”).

²⁰⁷ *See, e.g.*, *United States v. 916 Douglas Ave.*, 903 F.2d 490, 493 (7th Cir. 1990); *United States v. \$5,644,540 in United States Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986); *United States v. Fleming*, 677 F.2d 602, 609-10 (7th Cir. 1982); *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir. 1981); *One 1974 Cadillac Eldorado Sedan*, 548 F.2d at 423 (“The question is whether there was a sufficient nexus between the use of the Cadillac . . . to amount to a facilitation *in any manner* of the later sale of the controlled substance.”); *United States v. 1205 Beron Drive, No. 89-3622*, 1990 U.S. Dist. LEXIS 14265, at *5 (E.D. La. Oct. 23, 1990) (“It is not necessary for the Government to establish a ‘substantial’ connection between the property and the felony drug transaction A single drug transaction occurring on the real property is sufficient to violate 21 U.S.C. § 881(a)(7).”); *38 Whalers Cove Drive*, 747 F. Supp. at 176 (defining “facilitate” as “to make easier”).

²⁰⁸ *\$5,644,540 in United States Currency*, 799 F.2d at 1362 (emphasis added).

²⁰⁹ *See 916 Douglas Ave.*, 903 F.2d at 493 (“The legislation itself, however, no more demands that the property be ‘substantially connected’ to the underlying offense than it requires that the property be ‘indispensable’ to the crime.”).

²¹⁰ *United States v. Schifferli*, 895 F.2d 987, 990 (4th Cir. 1990). *See also* *United States v. 1933 Commonwealth Ave.*, 913 F.2d 1, 3 (1st Cir. 1990); *3639-2nd St.*, 869 F.2d at 1096-97 (8th Cir. 1989); *United States v. Lots Eighteen & Nineteen*, 657 F. Supp. 1062, 1065 (E.D. Va. 1987).

guage of § 881(a)(7) makes clear that it is irrelevant whether the property is even used at all in the commission of a crime, so long as it is intended to be used It is also irrelevant whether the property's role in the crime is integral, essential or indispensable. The term "facilitate" implies that the property need only make the prohibited conduct "less difficult or 'more or less free from obstruction or hindrance.'" . . . Just one use of the property may be enough, given that a single violation is sufficient under § 881(a)(7).²¹¹

Indeed, every circuit that has mouthed the substantial connection language has applied the any connection standard.²¹² As one court noted, "[T]he differences between this ['substantial connection'] approach and our own appear largely to be semantic rather than practical."²¹³ Courts allow forfeiture of property when the government can establish probable cause that there is some connection between the property in question and illegal drugs.

Even if courts read the more stringent indispensability requirement into § 881, the provisions of the statute would still go far beyond what is necessary to achieve the remedial aim of reducing illegal drug transactions. If the concern is not to punish felons but merely to remove instrumentalities from their hands, why not simply require property owners to sell derivative contraband coming

²¹¹ *Schifferti*, 895 F.2d at 990 (quoting *3639-2nd St.*, 869 F.2d at 1096). See also *United States v. 42450 Highway 441*, 920 F.2d 900, 903 (11th Cir. 1991) ("[E]ven those circuits that adopt the substantial connection test have not imposed the requirement that the property be integral, essential, or indispensable to the transaction."); *United States v. \$148,215 in United States Currency*, 768 F. Supp. 525, 527-28 (W.D.N.C. 1991).

²¹² See, e.g., *42450 Highway 441*, 920 F.2d at 902 ("This conflict between the Circuits may well be 'semantic rather than practical.' For instance, the courts agree that property is used to 'facilitate' a crime when it makes the illegal activity 'easy or less difficult,' ensures that the crime will be 'more or less free from obstruction or hindrance,' or 'lessens the labor' involved in handling illegal substances.") (citations omitted); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1427 (11th Cir. 1983); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 198 (6th Cir. 1978).

Rarely is the "substantial connection" standard applied to invalidate a § 881 forfeiture action. *But see, e.g., United States v. Four Parcels of Real Property*, 893 F.2d 1245 (11th Cir. 1990); *United States v. One Gates Learjet*, 861 F.2d 868, 872 (5th Cir. 1988) (not expressly adopting a substantial connection standard, but invalidating a § 881 forfeiture for insufficient nexus when only three to four milligrams of cocaine were recovered by a vacuum sweep); *United States v. \$38,000 in United States Currency*, 816 F.2d 1538 (11th Cir. 1987); *United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (not expressly adopting a substantial connection standard, but invalidating a § 881 forfeiture for insufficient nexus when a truck was driven to a field where marijuana was grown); *United States v. \$12,585 in United States Currency*, 669 F. Supp. 939 (D. Minn. 1987), *rev'd sub nom.*, *United States v. 3639-2nd St.*, 869 F.2d 1093 (8th Cir. 1989); *Lots Eighteen & Nineteen*, 657 F. Supp. 1062; *In re One 1972 Datsun*, 378 F. Supp. 1200, 1204 (D.N.H. 1974) (requiring a "substantial and/or instrumental connection" and invalidating a § 881 forfeiture of an automobile used to lead an undercover agent to a drug sale).

²¹³ *United States v. 916 Douglas Ave.*, 903 F.2d at 490, 494 (7th Cir. 1990).

under § 881? Or why not return all proceeds from the sale of forfeited assets to the claimant? The desired remedial end would be achieved — the dangerous items would no longer be in the hands of criminals, and the punitive impact would be no greater than necessary to accomplish the regulatory goal.²¹⁴

Further minimizing the remedial claim, § 881 permits claimants to re-purchase their property.²¹⁵ Thus, § 881 forfeitures are the functional equivalent of monetary fines. The particular property is irrelevant to the litigation. A “forced sale” scheme would better achieve the remedial aim by prohibiting ownership of all similar tools of crime. Just as persons convicted of violent felonies are not allowed to possess firearms, the government could prohibit drug dealers from owning airplanes or ships.²¹⁶

Section 881 goes beyond its regulatory purposes in other respects. A court adjudicating a civil forfeiture action under the Act need not inquire into whether the property may facilitate felonies in the future, something central to a “preventive” scheme.²¹⁷ The statute permits forfeiture of property intended to be used to violate the law. The language of § 881 does not require a determination of continuing illegal use. If § 881 were truly aimed at preventing fu-

²¹⁴ See Clark, *supra* note 65, at 479.

²¹⁵ 21 U.S.C. § 881(d); 19 U.S.C. § 1614 (1992); 19 C.F.R. §§ 162.43-44 (1990). Section 1614 has been described as a bond procedure whereby the owner puts up security to cover the value of the government's interest in the property. *In re Newport Sav. & Loan Ass'n*, 928 F.2d 472, 479-80 (1st Cir. 1991).

²¹⁶ See 18 U.S.C. § 922(g) (1992) (federal offense for convicted felons to possess firearms); Clark, *supra* note 65, at 479.

²¹⁷ 916 *Douglas Ave.*, 903 F.2d at 494 (“The court expressly overruled the district court's requirement of a continuing drug business or ongoing operation.”); *United States v. 3639-2nd St.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (“[W]e find no requirement of a continuing drug business or ongoing operation. Rather, we believe that if persons ‘make real property available as a situs for an illegal drug transaction, it is forfeitable,’ as the forfeiture statute requires only ‘a violation’ of the title.”) (citations omitted); *United States v. 300 Cove Rd.*, 861 F.2d 232, 236 (9th Cir. 1988) (Ferguson, J., concurring) (“[W]hen the government commenced federal forfeiture proceedings against [the claimant's] property . . . [the claimant] was no longer growing marijuana on his land; state authorities had previously seized the plants . . . while executing a search warrant. Nor does any evidence suggest that [the claimant] intended to use his property in the future for marijuana cultivation.”). *But see United States v. One 1976 Ford F-150 Pick-Up*, 769 F.2d 525, 527 (8th Cir. 1985) (“[T]here is but speculation to suggest [the vehicle] was to be used to transport marijuana in the future.”); *In re One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974) (“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. Absent such allegations, 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.”).

ture violations of the law, the inquiry would focus on evidence indicating future uses of property.

Section 881 also surpasses its regulatory aims through the limitless nature of real property forfeitures. If drugs are sold in a secluded barn located on a 200-acre farm, the entire 200 acres (with all crops and buildings) are subject to forfeiture. Even if an easily distinguishable portion of the property is connected to the predicate drug sale, the entire tract will be forfeited.²¹⁸

Despite some questioning,²¹⁹ no federal appeals court has invalidated the "whole tract" provision. The metaphysics of labeling a piece of land an "instrumentality of crime" are dubious. Even accepting the initial description of the property as a tool of the drug trade, when an illegal transaction occurs on an isolated section of a larger tract of land, only part of the real property has facilitated the predicate act. Any forfeiture beyond the immediate property used is unnecessary to accomplish a remedial purpose.²²⁰

Improvements in real property are also subject to forfeiture without reimbursement.²²¹ A property owner might add a building to a tract of land after the illegal conduct but before the government has sought forfeiture. The new building will be forfeited regardless of the impossibility of any connection to the crime. Indeed, if the

²¹⁸ See *supra* note 13 and accompanying text.

²¹⁹ The Second Circuit, for example, questioned the propriety of such broad forfeitures:

The theory of civil forfeiture is that the property devoted to an unlawful purpose is tainted as an instrumentality of crime and therefore must be condemned. While that concept makes sense for a car or a boat, and perhaps for a home and its curtilage, it raises troubling questions when applied to all of an individual's contiguous property. At some point, it seems that a forfeiture would cross the line of condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate. If punishment is involved, the Constitution requires many more procedural protections than are available under civil forfeiture.

United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1270 (2d Cir. 1989). Although apparently willing to rein in § 881(a)(7), the Second Circuit in *4492 Livonia Road* never reached the issue because the claimant did not raise it. The Second Circuit later rejected the constitutional argument in *United States v. 141st St. Corp.*, 911 F.2d 870, 880 (2d Cir. 1990). See also *United States v. Sixty Acres in Etowa County*, 727 F. Supp. 1414, 1422 (11th Cir. 1990) ("The United States argues that all of Texas would be forfeited under a literal reading of § 881(a)(7) if Texas were owned by one person, and if one acre of it was used in a drug deal with the owner's knowledge or consent. The larger the tract and the smaller the portion misused, the more questionable may become the constitutionality of a literal application of the § 881(a)(7) language. This court is happy not to have had to deal with this question."), *aff'd*, 930 F.2d 857 (11th Cir. 1991).

²²⁰ Even if the smaller portion cannot be separated from the whole, the government could sell the property and reimburse the claimant for the value of the non-offending portion. See *United States v. 2 Burditt St.*, 924 F.2d 383, 385 (1st Cir. 1991) ("[Claimant] seeks reimbursement from the government for the value of his improvements [made after the illegal conduct]."); *300 Cove Rd.*, 861 F.2d at 235.

²²¹ See *supra* note 14 and accompanying text.

changes are significant enough, the tool of crime may no longer exist, denying the need for the forfeiture entirely. The government ought to reimburse the claimant for the value of the improvements.

An analogy can be drawn between civil forfeitures and preventive detention. In many ways, the concerns in preventive detention decisions mirror those in forfeiture decisions. In the forfeiture context, property is seized to prevent future anti-social conduct. In the preventive detention context, a person is seized to prevent future anti-social conduct (as well as to prevent the defendant from fleeing the jurisdiction or destroying evidence before the trial).

In federal courts, preventive detention is governed by the Bail Reform Act of 1984.²²² The Supreme Court found the Act to be constitutional in *United States v. Salerno*.²²³ The Court implicitly applied the *Ward* test, declaring Congress' intention to be regulatory rather than penal.²²⁴ Given that the legislative intention was appropriate, the Court then applied the sixth and seventh *Mendoza-Martinez* factors to determine whether the scheme exceeded its regulatory justifications.²²⁵

The Court found that the pre-trial detention procedure is tailored to the remedial aim.²²⁶ First, the Bail Reform Act requires a finding of future dangerousness if the detention is supposed to prevent violent acts.²²⁷ The statute also lists a number of possible release conditions which limit the need for actual confinement.²²⁸ The government is required to find the least restrictive alternative in order to accomplish its remedial aims.²²⁹

In addition, the Bail Reform Act's procedural protections are substantially greater than those of § 881. The rights to counsel, to testify, to compulsory process and to confrontation are guaranteed in all preventive detention hearings.²³⁰ The framework can legitimately be called civil because the detention is narrowly tailored to the remedial ends, thus justifying a lower burden of proof. Even with the civil label, the Bail Reform Act requires that the govern-

²²² 18 U.S.C. §§ 3141-50 (1992).

²²³ 481 U.S. 739 (1987).

²²⁴ *Id.* at 747.

²²⁵ *Id.*

²²⁶ *Id.* at 747-48.

²²⁷ 18 U.S.C. § 3142(e).

²²⁸ *Id.* § 3142(c).

²²⁹ *Id.* § 3142(e). An accused cannot be detained without a finding that "[n]o condition or combination of conditions [short of imprisonment] will reasonably assure the appearance of the person as required and the safety of any other person in the community." *Id.*

²³⁰ *Id.* § 3142(f)(2).

ment prove its case by clear and convincing evidence.²³¹

Section 881 could be amended to tailor its sanction to a civil purpose. Courts should be required to make an initial determination that removing the property from the hands of the owner would make future violations more difficult. The Bail Reform Act does not have an analogous provision because the effectiveness of its form of incapacitation is obvious — people in jail cannot commit violent crimes against members of the general public. In the civil forfeiture context, a court should have to find the property so necessary for the commission of a crime and so difficult to replace that forfeiture would serve a regulatory purpose. Courts should also have to determine future risks of leaving property in the hands of claimants. An asset may be indispensable for certain activities, but its owner may be unlikely to allow its use in further offenses. Upon a finding of future dangerousness, the forfeiture statute should demand that judges examine less restrictive alternatives, such as requiring the owner to sell the asset or seizing only part of the property.

Even with these changes, however, § 881's remedial aims still might be outshadowed by its punitive impact. Pre-trial detention as envisioned in the Bail Reform Act does not have the permanence of a § 881 forfeiture. The *Salerno* Court was careful to limit its ruling with regard to timing: "Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve The arrestee is entitled to a prompt detention hearing and the maximum length of pretrial detention is limited by the strin-

²³¹ *Id.* The Supreme Court has explicitly interpreted this provision as placing the burden of proof on the government: "The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure. . . the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (quoting 18 U.S.C. § 3142(e)).

In some instances, the burden of proof shifts under the scheme. The statute declares that under certain circumstances, "[a] rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community." *Id.* § 3142(e). The rebuttable presumption typically applies when the defendant has been accused of committing a crime within five years of being released from prison or being convicted of another serious crime or upon a finding of probable cause to believe that the person committed a serious drug felony.

This automatic shift in the burden of proof is probably unconstitutional for the same reasons § 881's shift is unconstitutional, but a lesser preponderance of the evidence standard on the government might satisfy the Due Process Clause. *See supra* note 78. Although the *Salerno* Court found the Bail Reform Act to be constitutional, the Court's decision was limited to the application of § 3142(f)(2), in which the government bears the burden of proof. The Court was careful to point out that it was not addressing those sections of the Bail Reform Act involving an automatic shift in the presumption of dangerousness. *Salerno*, 481 U.S. at 745 n.3.

gent time limitations of the Speedy Trial Act.”²³² The *Salerno* Court, in discussing the issue of timing, suggested that a sanction so narrowly tailored as to be the only means of achieving a legitimately remedial end might still have a disproportionately punitive impact. If a preventive detention framework existed independent of the criminal justice system and if permanent or long-term incapacitation was the least restrictive means of achieving the remedial aims, detention would still be inappropriate without a finding of proof beyond a reasonable doubt of a predicate criminal act.²³³

Unlike the Bail Reform Act, § 881 is not limited to a set period of time while a claimant faces criminal charges. The Court has explicitly recognized the relevance of the timing question in the forfeiture setting:

[I]t would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent’s possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense. Given the gravity of the offenses charged in the indictment, respondent himself could have been subjected to pretrial restraint if deemed necessary to “reasonably assure [his] appearance [at trial] and safety of . . . the community,” we find no constitutional infirmity in [the forfeiture statute’s] authorization of a similar restraint on respondent’s property to *protect its “appearance” at trial, and protect the community’s interest in full recovery of any ill-gotten gains.*²³⁴

Whether the permanence of a § 881 forfeiture demands a higher burden of proof is admittedly arguable. Perhaps the Court is hesitant to conclude that a sanction is primarily remedial when

²³² *Salerno*, 481 U.S. at 747 (citations omitted). The Court further explained, “We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.” *Id.* at 747 n.4. The Court’s reasoning was tied to the notion that a pre-trial detainee is in a special situation: “While the Government’s general interest in preventing crime is compelling, even this interest is heightened when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society’s interest in crime prevention is at its greatest.” *Salerno*, 481 U.S. at 750. See also *Jackson v. Indiana*, 406 U.S. 715, 736 (1972).

²³³ See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 556-58 (1986).

²³⁴ *United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (brackets within quotation marks, ellipses and first emphasis in original, second emphasis added). The Court held that the lower probable cause standard is acceptable in instances of temporary seizure, but implied that a proceeding with a higher standard of proof might be necessary for permanent forfeiture based on past criminal acts: “We have previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable.” *Id.* (citations omitted).

never-ending imprisonment is a possibility, but would not be so concerned when property is involved. Detention of people has always been viewed as requiring special protections.²³⁵ If the language in *Salerno* establishes a general principle, however, then incapacitation through a permanent deprivation of either liberty or property is by definition excessive in relation to the goal of preventing violent felonies. To survive scrutiny, § 881 should be amended either to provide for only temporary seizures of assets or to require proof of the predicate act beyond a reasonable doubt.

3. Remedial Justifications and Compensation

Another possible remedial justification for forfeiture is compensation for the costs of fighting crime. When enforcing criminal laws, the government may require a wrongdoer to pay back the costs of investigating and preventing anti-social behavior.²³⁶

Several courts have described § 881 as remedial because forfeitures reimburse the government for its efforts.²³⁷ The First Circuit has argued:

Forfeiture of the entire property is a justifiable means to remedy the injury to the government itself that results from illegal marijuana operations, hence the forfeiture would be unlikely to constitute a "punishment" The Supreme Court has frequently held that one important difference between criminal and civil penalties is that the former are primarily punitive or deterrent in their purpose — calcu-

²³⁵ See *supra* note 73 and accompanying text. The Supreme Court has approved prolonged detention without a finding of criminal guilt beyond a reasonable doubt only in special circumstances, such as when an accused is judged mentally ill. *Addington v. Texas*, 441 U.S. 418 (1979).

²³⁶ The Supreme Court has praised the potential for raising funds as a regulatory or civil purpose:

[The] forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses.

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972). See also *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629-30 (1989); *United States v. Halper*, 490 U.S. 435, 446 (1989); *Fried*, *supra* note 62, at 362; *Petrov*, *supra* note 60, at 830.

²³⁷ See, e.g., *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 43 (1st Cir. 1989); *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989); *One 1974 Cadillac Eldorado Sedan*, 548 F.2d at 424 ("The Government is also compensated in part for its enforcement efforts, which are substantial"); *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 179 (E.D.N.Y. 1990) ("Retribution and deterrence are not legitimate nonpunitive governmental objectives. On the other hand, the application of property seized towards the government's enforcement expenses is a well-recognized remedial purpose.") (citations omitted); *United States v. Route 2, Box 61-C*, 727 F. Supp. at 1295, 1297 (W.D. Ark. 1990).

lated to “vindicate public justice,” — while civil penalties are primarily remedial and designed to “protect the government from financial loss.”²³⁸

Section 881 explicitly provides that the proceeds of forfeitures may be used to pay “[a]ll property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising and court costs.”²³⁹

Forfeiture of distinctly identified assets, however, is not reasonably related to the remedial aim of compensation. If the government wishes to charge citizens for enforcement costs, a traditional civil fine would be sufficient.²⁴⁰ Directing forfeitures at property involved in crime frustrates reimbursement in some cases and exceeds it in others. The requirement that assets be connected to the predicate offense defines the compensation available to the government. The worth of the property may have no connection to the resources expended by law enforcement officials. If a wealthy real estate investor plans a drug sale in a city park and takes public transportation, § 881 would not provide for forfeiture of any property except for the drugs themselves and any proceeds from the sale. Meanwhile, if a patrol officer stumbles upon the same cocaine purchase in large shopping mall owned by the investor, the government would be able to seize the entire structure regardless of enforcement costs or societal impact.²⁴¹

²³⁸ 40 *Moon Hill Rd.*, 884 F.2d at 43 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943)).

²³⁹ 21 U.S.C. § 881(e)(2)(i).

²⁴⁰ See *Petrov*, *supra* note 60, at 835. Section 881 and § 1614 permit claimants to repurchase their assets at a price set by government officials. See *supra* note 224 and accompanying text. Although the repurchase option tightens the fit between the remedial purpose of compensation and § 881's actual impact, the issue is not completely resolved. Why should a claimant have to go through the extra set of procedures if a direct monetary fine would be sufficient?

²⁴¹ A real-life example of the valuation problem occurs when the government forfeits a public housing leasehold. When the government seizes such a leasehold, it gains nothing monetarily. As one court recognized:

When someone's lands (commercial real estate, residence or what have you) or goods (most frequently in drug cases a vehicle — an automobile, a boat or even an airplane) are forfeited, the United States acquires often valuable property while at the same time punishing the wrongdoer. Millions of dollars are generated by the seizure and forfeiture of such properties or of money forfeited under like circumstances. But what can be said for the extinction of a low-income public housing lease in terms of tangible benefit to the United States? [T]he net effect of this line of activity will be punitive as to the few individuals involved but purely cosmetic in governmental terms — nice headline-grabbers that mask the failure of the vaunted “war on drugs” to deal with our massive drug problems in any meaningful way.

United States v. Leasehold Interest in 900 E. 40th St., Apartment 102, 740 F. Supp. 540, 541 n.2 (N.D. Ill. 1990).

In *Halper v. United States*,²⁴² the Supreme Court invoked the idea of “rough justice.” A civil sanction need not perfectly correspond to the compensation deserved by the government.²⁴³ Yet such an approach hardly dictates that a court should ignore the relationship between the remedial purpose and the punitive impact of a sanction. The *Halper* Court explicitly called for an accounting of government expenses when a potentially punitive situation arises:

Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as “punishment” in the plain meaning of the word, then the defendant is entitled to an accounting of the Government’s damages and costs to determine if the penalty sought in fact constitutes a second punishment While the trial court’s judgment in these matters often may amount to no more than an approximation, even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment.²⁴⁴

The “rough justice” approach should not be misconstrued to permit courts to ignore the actual expenses imposed on the government when determining whether a statute is remedial in nature.

Unfortunately, § 881 does not call for any calculations of investigation and litigation costs. Courts adjudicating § 881 actions concern themselves only with allegations of illegal conduct.²⁴⁵ Civil forfeiture prosecutions under the Act are not related in any manner to the regulatory goal of reimbursement. Rather than being the pri-

²⁴² 490 U.S. 435 (1989).

²⁴³ *Id.* at 449. See also Clark, *supra* note 65, at 469.

²⁴⁴ *Halper*, 490 U.S. at 449-50.

After discussing the “rough justice” standard in a § 881 action, one court explained:

[W]here an owner negligently or wilfully permits property to be used in violation of the criminal law, due process requires that a civil penalty bear some reasonable relation to the purpose of compensating the government for its efforts in attempting to discover the violations, to prosecute the violators, and to avert or mitigate the consequent harms.

United States v. 38 Whalers Cove Drive, 747 F. Supp. 173, 177 (E.D.N.Y. 1990).

²⁴⁵ Most courts that have evaluated § 881 have ignored any remedial rationale based on compensation. See *supra* notes 148-54, 190-91, 200-17 and accompanying text. Those courts that have presented § 881 as a compensation scheme have also ignored the costs expended by the government in any particular lawsuit. See, e.g., *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 43 (1st Cir. 1989); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977); Charney, *supra* note 113, at 499. Even after recognizing the importance of such a relationship, one court summarily concluded that the government’s drug operations generally cost money and approved a forfeiture without any inquiry into the exact costs in the particular case. *38 Whaler’s Cove Drive*, 747 F. Supp. at 179.

mary purpose, reimbursement is a nice incidental effect that accompanies the punishment meted out in § 881 forfeiture actions.

In addition, the bond posted by claimants usually serves to reimburse the government for the expenses of forfeiture proceedings.²⁴⁶ Claimants do not receive their property in return for the bond. Instead, the government holds onto *both* the bond and the seized assets.²⁴⁷ Although the bond posted might amount to less than the government's costs in pursuing a forfeiture action, the bond ensures some compensation for the government regardless of the value of the property. Section 881 does not require a determination of whether the additional value of the property is necessary to repay the government for investigating and prosecuting the case.

Finally, empirical analysis belies the alleged remedial purpose of compensation. Drug-related forfeitures have gone beyond strict reimbursement of enforcement costs. The statute explicitly permits forfeiture proceeds to finance "[a]wards of up to \$100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent."²⁴⁸ Further, the Attorney General may keep forfeited property "[f]or official use."²⁴⁹ If the Attorney General does not put the funds to use, the remainder is forwarded to the

²⁴⁶ The customs provisions governing § 881 forfeitures direct that "[i]n the case of condemnation of the article so claimed the obligor [on the bond] shall pay all the costs and expenses of the proceedings to obtain such condemnation." 19 U.S.C. § 1608. *See also* *United States v. Route 1, Box 111*, 920 F.2d 788, 790 (11th Cir. 1991) ("[T]he bond in this case is a cost bond and is at risk only to the extent of the cost of the forfeiture proceedings. Therefore, the Claimant should receive any balance remaining from the bond after the United States has been afforded the opportunity to prove costs.").

²⁴⁷ *See id.*; *United States v. One 1987 Chevrolet Corvette*, 746 F. Supp. 865, 866 (E.D. Wisc. 1990) ("Sections 1608 and 1316.76(b) permit the United States to deduct the costs and expenses it incurs as the result of being a party to a forfeiture action [from the cost bond posted by claimant]."); *United States v. Lot 9, Block 1, Village E. Unit 4*, 704 F. Supp. 1025, 1030-31 (D. Colo. 1989) (declaring forfeited both subject property and bond posted).

Federal regulations are explicit. 19 C.F.R. § 162.47(c) (1990) reads: "The filing of a claim and the giving of a bond, if required, pursuant to [19 U.S.C. § 1608] shall not be construed to entitle the claimant to possession of the property. Such action only stops the summary forfeiture proceeding." Another provision states: "The filing of the claim and the posting of the bond does not entitle the claimant to possession of the property, however, it does stop the administrative forfeiture proceedings." 21 C.F.R. § 1316.76(b) (1990).

The bond required to prevent summary forfeiture, as provided by 19 U.S.C. § 1608, should not be confused with the additional costs of re-purchasing the property from the government while the forfeiture is pending, as provided by 19 U.S.C. § 1614 and described *supra* at note 224 and accompanying text.

²⁴⁸ 21 U.S.C. § 881(e)(2)(ii) (1990).

²⁴⁹ 21 U.S.C. § 881(e)(1)(A) (1990). Section 881 gives the Attorney General a number of options for disposing of the proceeds of a forfeiture, including reimbursing

Treasurer of the United States as general federal revenues.²⁵⁰

As a result of the broad delegation of authority, government agencies use § 881 to support activities unrelated to the individual case generating the revenues. Local and federal authorities use forfeitures to purchase expensive equipment, hire additional officers, expand office space, fund drug treatment programs and even expand public elementary and high school facilities.²⁵¹ In effect, § 881 has turned into a fund-raising mechanism independent of any particular law enforcement efforts.

Perhaps more troublesome, most civil forfeiture proceedings cannot compensate the government for enforcing criminal laws because criminal prosecutions do not occur in the vast majority of these cases. The remedial purpose for forfeiting property cannot be to pay for the forfeiture of the property, or else the remedial rationale would become implausibly circular. The government could save its resources simply by not forfeiting the property in the first place.

foreign and state governments for their role in the forfeiture effort. See *Federal Seizure of Illegal Assets*, *supra* note 4.

²⁵⁰ 21 U.S.C. § 881(e)(2)(B).

²⁵¹ See Abraham Abramovsky, *Asset Forfeiture*, 206 N.Y. L.J. 3 (July 18, 1991); Fried, *supra* note 62, at 362; Leonard Bernstein, *Supervisors Back Move of Sheriff Headquarters*, L.A. TIMES, Oct. 3, 1991, at B2; *Use Drug Profits to Treat Addicts*, NEWSDAY, Aug. 18, 1991, at 37; Peggy Y. Lee, *Sheriff Would Like to Move Headquarters to Kearny Mesa*, L.A. TIMES, Aug. 9, 1991, at A23; cf., Robert E. Kessler, *LI Drug Money Going to Fight Drugs*, NEWSDAY, July 3, 1991, at 33 (proceeds of drug-related forfeitures funding a 22% increase in police department's budget in one year); *Anti-drug Programs to Get County Grants*, CHI. TRIB., May 17, 1991, § 2 at 3 (proceeds of drug-related forfeitures funding drug education programs); Soble, *supra* note 116 (proceeds of drug-related forfeitures funding helicopters, drug education programs, additional police officers, automobiles, boats, and exotic high-tech equipment); Dave Birkland, *Drug Dealers 'Help' Police*, SEATTLE TIMES, Dec. 6, 1990, at G2 (proceeds of drug-related forfeitures funding general police activities beyond narcotics-related law enforcement); Sean P. Murphy, *More Dealer Forfeitures Being Used to Fight Drugs*, BOSTON GLOBE, Nov. 12, 1990, at 21 ("Last year, the four-person forfeiture unit at the U.S. attorney's office in Boston realized a net gain of \$6 million."); *No to Virginia Literary Fund Changes*, WASH. TIMES, Oct. 30, 1990, at G2 (proceeds of drug-related forfeitures funding public school construction and a retirement fund for teachers); see also, Isikoff, *supra* note 4; *Federal Seizure of Illegal Assets*, *supra* note 4; See also *infra* notes 254, 258-59 and accompanying text.

In an extreme case, the sheriff of San Diego County opened a secret bank account with between \$300,000 and over \$1 million in drug forfeiture proceeds after supervisors prohibited him from spending proceeds from forfeitures without their approval. The sheriff allegedly spent the money on a number of law-enforcement-related projects without any guidelines or public review. Forfeiture proceeds were reportedly used to purchase portable radios, video production equipment, computers, a portable copier, and a laser printer. Nearly \$70,000 of the funds were used to pay attorney's fees in civil suits filed against a group of deputies dubbed "Rambo Squad" by the media. Soble, *supra* note 116; see also Barry Horstman, *Sheriff, County Reach Accord Over Drug Funds*, L.A. TIMES, Mar. 8, 1991, at B1; Mark Platte, *Duffy Ordered Not to Touch Secret Account*, L.A. TIMES, Nov. 10, 1990, at B1.

Rather than reimbursing the government for the costs of the forfeiture proceeding itself, the proceeds should pay for the expenses of a related criminal prosecution. A recent survey, however, revealed that parallel criminal charges are filed in only twenty percent of § 881 cases.²⁵² To serve the remedial goal of reimbursing the government for its expenses in enforcing criminal laws, government attorneys should initiate forfeiture proceedings only after a related criminal prosecution has been completed and its costs determined.²⁵³

Some courts have argued that the remedial purpose goes beyond the investigation and litigation costs of the immediate case and extends to other expenses in the war on drugs.²⁵⁴ The claimant contributes to the fight against all drug dealers and users, regardless of personal responsibility or costs in any particular case. Property worth billions of dollars would have to be forfeited before the remedial aims had been exceeded. One court has articulated the broader compensation rationale:

The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement — not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention — easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance.²⁵⁵

By exceeding the costs imposed by the specific property owner, such forfeitures go beyond the realm of civil sanctions, as the Supreme Court expressed in *Halper*.²⁵⁶ Professor Charney has articulated the need to match expenses with wrongdoers:

A suit can be viewed as compensatory only if property is transmitted to

²⁵² Andrew Schneider & Mary Pat Flaherty, *Drug Law Leaves Trail of Innocents*, CHI. TRIB., Aug. 11, 1991, § 1 at 1. The same survey also indicated potentially discriminatory application of federal forfeiture statutes. *Id.* at 13 (“[A]n examination of 121 travelers’ cases in which police found no illegal drugs, made no arrest, but seized money anyway, showed that 77% of the people stopped were Black, Hispanic or Asian.”).

²⁵³ New York’s civil forfeiture statute, for example, establishes different burdens of proof depending upon whether the claimant has already been convicted of a crime. N.Y. CIV. PRAC. L. & R. § 10:442 (McKinney 1991).

²⁵⁴ *E.g.*, *United States v. 2 Burditt St.*, 924 F.2d 383, 395 (1st Cir. 1991); *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 44 (1st Cir. 1989); *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989) (forfeiture of real property could serve the purpose of “[f]inancing Government programs designed to eliminate drug-trafficking.”); *United States v. Brock*, 747 F.2d 761, 763 (D.C. Cir. 1984) (U.S. Marshal deposits proceeds from sale of forfeited property to the U.S. Treasury after deducting for costs incident to the forfeiture action); *United States v. Route 2, Box 61-C*, 727 F. Supp. at 1295, 1297 (W.D. Ark. 1990) (“Section 881(a)(7) is designed . . . to finance government programs designed to eliminate drug trafficking.”).

²⁵⁵ *40 Moon Hill Drive*, 884 F.2d at 44.

²⁵⁶ *See supra* notes 186-87 and accompanying text.

an identifiable individual or group of individuals and the value of that property is actually determined by estimating the value of the interests lost by the recipient as a result of the actions by the defendant. Any less rigorous standard permits the government to obfuscate, to its own benefit, the distinction between compensatory and punitive actions.²⁵⁷

Resources expended by police to reduce a particular property owner's contribution to the spread of controlled substances are arguably costs imposed by the property owner. Thus, a requirement that the owner pay those costs could be viewed as remedial. Likewise, if a drug dealer's sales harm particular people due to their abuse of controlled substances, then a payment by the dealer to the harmed people for the damages caused is compensatory. If the government takes assets for the purpose of funding government programs not directly related to the claimant's activities, however, the government is pursuing a punitive goal and must afford criminal protections. Forfeiture profits going to general drug rehabilitation programs or investigations of law violators other than the claimant do not serve a remedial purpose. Although drug rehabilitation is a laudable goal, a criminal fine cannot be transformed into a civil one by spending the proceeds on worthwhile causes.

Besides exceeding the remedial purposes of a civil sanction, broad use of forfeitures as a fund-raising mechanism for law-enforcement agencies provides a dangerous motive for police. The potential for improper motivation is obvious. The potential for forfeiture gains motivates forfeitures and even influences what property is seized. A representative from the U.S. Marshal's Service for the Southern District of Texas described the attitude of many in the law enforcement community: "The aim used to be to hurt the bad guy. Now we want to hurt the bad guy and maximize profits for the Government."²⁵⁸ Professor Fried has decried the situation:

[T]he gap between the tasks with which the Justice Department is en-

²⁵⁷ Charney, *supra* note 113, at 499-500. See also Note, *Narrowing the Scope of Civil Drug Forfeiture*, 89 MICH. L. REV. 165, 190 (1990) ("All criminal activity imposes social costs. A civil remedy exists only when the costs of the single act can be associated with a specific harm.").

²⁵⁸ Belkin, *supra* note 4. A U.S. Marshal operating in the Southern District of Florida explained, "Between us and the Resolution Trust Company, there are so many Government houses for sale that the market has really softened in the last 18 months. Now we always look at how much equity there is in a property before we seize it." Kukka, *supra* note 4. An officer with the U.S. Marshal's Service in Maine reflected on the need to raise funds: "We figured we'd break even on the sale, but until we sold it we had to keep making mortgage payments and would ultimately lose money. In the future, we plan to ask the United States' Attorney not to seize real estate unless there is a minimum amount of equity in it." *Id.* Municipal police officers also feel the pressures to seize assets to raise funds. An officer in southern California lamented that local police departments are "[u]nder pressure to be revenue producers." Soble, *supra* note 116.

trusted and its resources tends to widen over time. This gap should not be filled, however, by making the Justice Department dependent on forfeited assets. The prosecutor's charging decisions may be distorted by considerations of the most profitable course. Even the appearance of such distortion is intolerable.²⁵⁹

In an age of tightening budgets, the use of civil forfeitures becomes even more questionable. Public officials have openly praised the potential of drug-related civil forfeiture schemes to make up for budget shortfalls.²⁶⁰ As minimal judicial supervision is called for by the statute, financing concerns could easily overtake crime-prevention and justice as guides for prosecutorial decisions. Given the incentives that exist, forfeitures as revenue-generating devices cannot be characterized as civil in nature. Section 881 forfeitures of derivative contraband constitute criminal punishment and should be affected only upon proof of illegal conduct by a preponderance of the evidence.

VII. CONCLUSIONS

The Constitution provides important protections for all citizens accused of wrongdoing. In particular, the Due Process Clause requires the government to prove its case beyond a reasonable doubt before imposing criminal punishment. Congress should not be able to avoid this requirement simply by labelling a sanction civil when it is truly criminal in nature.

Section 881 forfeitures of derivative contraband further the goals of deterrence and retribution and are not tailored to accomplish primarily remedial aims. Despite the importance of the war on drugs, such forfeitures constitute criminal punishment and should not be permitted unless the prosecution meets its burden according to the reasonable doubt standard.

²⁵⁹ Fried, *supra* note 62, at 365-66. See also Soble, *supra* note 116; Isikoff, *supra* note 4; *No to Virginia Literary Fund Changes*, *supra* note 251; Belkin, *supra* note 4.

²⁶⁰ See, Fried, *supra* note 62, at 362-63; Isikoff, *supra* note 4; John Ellement, *DA Says He's Out of Cash, Walsh Accuses Pina of Breaking Budget*, BOSTON GLOBE, Feb. 21, 1991, at 23 ("Bristol County District Attorney Paul Walsh, Jr. said his office would close May 1 unless the state provided an emergency infusion of cash. [Former District Attorney Pina] said the financial crisis could be averted when Walsh taps into \$700,000 in assets seized in connection with drug investigations now pending."); Murphy, *More Dealer Forfeitures*, *supra* note 260 ("Stung by budget cuts and prodded by neighborhood anti-crime groups, law enforcement officials are increasingly using new laws to seize cash and other property from drug dealers to help finance drug-fighting When he assumes his new office in January, [Massachusetts State Attorney General-Elect] Harshbarger said, he will appoint a top assistant to work full time with district attorneys statewide to maximize seizures under drug asset forfeiture laws Harshbarger said the \$750,000 taken from drug dealers in Middlesex County last year helped forestall layoffs due to a \$1.1 million cut in state funding.").