

Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?

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Introduction

The Comprehensive Drug Abuse Prevention and Control Act provides for civil forfeiture of real property seized in connection with illegal drug activity.¹ In an attempt to increase the penalties for felony drug violations, Congress amended 21 U.S.C. § 881 as part of the Comprehensive Crime Control Act of 1984.² Section 881(a)(7) authorizes the forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of," a felony violation of the federal Drug Abuse Prevention and Control Act of 1970.³ By allowing for the forfeiture of houses and land connected with drug felonies, section 881(a)(7) represents an attempt to further solidify and strengthen drug forfeiture provisions.⁴

Congress intended section 881(a)(7) to be a strong deterrent measure, attacking the economic power bases out of which illegal drug operations were performed.⁵ To date, courts have construed the statute expansively, permitting forfeiture of real property used to facilitate a drug felony whether or not the owner of the property was involved in the commission of the felony.⁶ Under the current language of the statute, the government can seize real property from a landowner due to a ten-

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1. 21 U.S.C. § 881(a)(7)(Supp.1991).

2. *See, e.g.,* Charles B. Rangel, *Reagan's Zero Tolerance Is a Zero Drug Policy*, NEWS-DAY, June 28, 1988, at 66 (commenting on the effects of stronger drug penalties); 129 CONG. REC. 5607 (1983) (commenting on the need to create more severe penalties for drug felony violations) (remarks of Sen. Laxalt).

3. *See* Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970); 21 U.S.C. § 881(a) (Supp. 1991).

4. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984); 21 U.S.C. § 881(a)(7) (Supp. 1991).

5. *See* 129 CONG. REC. 5607 (1983) (commenting on the victimization of the American people due to drug violations, the need to stiffen drug penalties, and the importance of penalizing drug dealers financially) (remarks of Sen. Laxalt).

6. The issue of what constitutes facilitation is beyond the scope of this note. *See infra* note 29 and accompanying text.

ant's illegal activity even if the landowner did not participate in or know of the illegal drug activity.⁷ Some courts have even construed the statute to mean that a landowner has an affirmative duty to monitor the activities of a tenant or otherwise take all reasonable steps necessary to prevent illicit use of the premises.⁸

Congress's hope seems to be that the harsh prospect of a real property forfeiture will strongly deter the illegal drug trade.⁹ Unfortunately for many landowners, real property forfeiture is a substantial and often disproportionate remedy, especially where the underlying violation is relatively minor or the landowner's involvement in the felony was relatively limited.¹⁰ Drug forfeitures also carry little constitutional protection.¹¹ Most importantly to this Note, proportionality analysis under the Eighth Amendment, which might otherwise remedy some of the harsher effects of drug forfeitures, is not available under current civil forfeiture laws.¹²

This Note proposes that the Disproportionate Punishments Clause of the Eighth Amendment, or some other method of ensuring proportionality between the severity of the transgression and the extent of the penalty imposed, should apply in analyzing the application of section 881(a)(7) forfeiture provisions.

Part I provides a general background to the civil forfeiture provision in section 881(a)(7). This Note first looks at the history behind civil forfeiture provisions and examines the current procedure by which real property is forfeited. It next examines constitutional protections which have traditionally been afforded to those whose property has been forfeited. Finally, it looks at the statutory innocent owner defense, which, under limited circumstances, protects a landowner innocent of wrongdoing from having his or her property forfeited.

Part II examines the application of proportionality standards to civil statutes. It explores the possibility that a civil statute may actually be punitive in nature with the result that a court must construe the civil statute as a criminal statute. In such a case, the Eighth Amendment proportionality standard would apply. Part II also examines the possibility of examining each forfeiture action on a case-by-case basis to see if the forfeiture remedy exceeds reasonable governmental civil "damages" caused by the civil violation. If so, the extent of the forfeiture which

7. See, e.g., *United States v. 2011 Calumet*, 699 F. Supp. 108 (S.D. Tex. 1988).

8. See, e.g., *United States v. 141st St. Corp.*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, *reh'g denied*, 417 U.S. 977 (1974).

9. See, e.g., 129 CONG. REC. 5607 (1983) (arguing that forfeiture provisions "can cripple and not merely wound" organizations dealing in illegal drugs) (remarks of Sen. Laxalt).

10. See, e.g., *141st St. Corp.*, 911 F.2d at 881.

11. See *infra* notes 38-51 and accompanying text.

12. *Id.*; see U.S. CONST. amend. VIII ("... nor excessive fines imposed . . .").

exceeds the government's reasonable losses or "damages" would be subject to Eighth Amendment challenge.

Part III examines the potential for excessive or disproportionate punishments which this statute has created. It provides examples of substantial, costly forfeitures which have come about as the result of relatively minor transgressions or as the result of limited involvement in a drug felony. This brief review will show that, as written and as applied, section 881(a)(7) often results in disproportionate and excessive punishments.

Part IV proposes that section 881(a)(7), though ostensibly civil, is so punitive as to be criminal in nature. Thus, the Eighth Amendment should in all cases apply to seizures of real property under this statute. In the alternative, if the statute is to be construed as a civil statute, the value and extent of the forfeiture must be limited to reasonable losses or "damages" incurred by the government in enforcing the statute. To avoid abuse where a tenant, and not a landowner, is the guilty party, this Note proposes a "direct involvement" standard: unless a landowner is directly involved in an applicable drug felony, his or her real property may not be forfeited. This Note concludes that if section 881(a)(7) is so construed, it will be a more effective and fair instrument in curbing drug felonies.

I. Background

A. History of Civil Forfeiture

Civil forfeiture, though not common, is a fairly prevalent form of forfeiture in American law.¹³ Essentially, it is a proceeding by which property itself is accused of wrongdoing and is forfeited to the government as a result.¹⁴ Unlike a criminal forfeiture proceeding, in which a property owner's guilt is a prerequisite for the validity of a forfeiture, civil forfeiture only requires that the property itself be associated with the wrongdoing.¹⁵

Civil forfeiture dates back to Biblical times.¹⁶ It originates out of pre-Judeo-Christian practices,¹⁷ under the once commonly-held belief that objects associated with proscribed activity can themselves be guilty

13. Other examples of civil forfeitures include 18 U.S.C. § 492 (Supp. 1991) (counterfeiting paraphernalia); 18 U.S.C. § 1465 (Supp. 1991) (transportation of obscene materials for sale or distribution); 19 U.S.C. § 1305 (Supp. 1991) (importation of obscene or immoral materials); 22 U.S.C. § 401 (Supp. 1991) (illegal exportation of war materials).

14. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-82 (1974).

15. *Id.* at 683.

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

17. *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1218 n.4 (10th Cir. 1986).

of wrongdoing.¹⁸ Historically, the “guilty” objects and not their owners were parties to the *in rem* lawsuit.¹⁹ The innocence of the owners was uniformly rejected as a defense, unless constitutionally or statutorily prescribed.²⁰ Once an object was forfeited, title to that object would be transferred to the Crown.²¹ Originally, English tradition dictated that the money collected from the sale of the forfeited objects was to be used for charitable purposes; the money was often used to pay for church Masses.²² Over time, however, the value of seized objects was no longer used for religious purposes and instead became a source of revenue for the Crown.²³

Although civil forfeiture has been called a “superstition” from the “blind days” of feudalism, it has curiously gained favor in this country.²⁴ As many as seventy years ago, *in rem* forfeiture was seen as a “worn out fiction”²⁵ derived from the “superstitious” belief that a physical object has a power or personality capable of guilt.²⁶ Today, *in rem* forfeiture is used as a powerful method for attacking drug felony violations.²⁷

B. Procedure by Which Real Property Is Forfeited Under Section 881(a)(7)

Section 881(a)(7) is designed to allow for the civil forfeiture of real property used to commit or facilitate the commission of a felony violation of the federal narcotics laws.²⁸ Under section 881(a)(7), seizure of real property proceeds once the government has been able to prove that the property was used to “facilitate” the violation of the narcotics law.²⁹ Generally, both an exchange of a controlled substance and a substantial connection between the property and the illegal activity are required

18. *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971).

19. *\$39,000 in Canadian Currency*, 801 F.2d at 1218.

20. *Id.*; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

21. *Calero-Toledo*, 416 U.S. at 680-81, 684.

22. *Id.* at 680-81.

23. *Id.* at 681.

24. *United States Coin & Currency*, 401 U.S. at 720-21.

25. *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 506 (1921).

26. *Id.* at 510-11.

27. *See, e.g., United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

28. 21 U.S.C. § 881(a)(7) (Supp. 1991).

29. The issue of what constitutes “facilitation” is not always clear. Generally, courts require a “substantial connection” between the real property and the underlying narcotics violation, although some jurisdictions allow forfeiture when property is connected “in any manner” with a drug felony. This is a significant topic, but is outside the scope of this Note. *See* Lalit K. Loomba, *The Innocent Owner Defense to Real Property Forfeiture under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 475 (1989); Steven S. Biss, *Substantial Connection and the Illusive Facilitation Element for Civil Forfeiture of Narcoband in Drug Felony Cases*, 25 *U. RICH. L. REV.* 171 (1990).

before the civil forfeiture action may proceed.³⁰

Once the government proves that the property has facilitated a violation of federal drug laws, the burden then shifts to the landowner to prove that the property is not subject to forfeiture.³¹ This often involves invoking the innocent owner defense — that the landowner neither “knew” nor “consented” to the illegal activity associated with the property.³² If an affirmative defense cannot be proved, there is little that can be done to reverse the forfeiture proceeding.³³ The Attorney General then has the power to sell the forfeited property, the proceeds of which can be forwarded to various branches of the government.³⁴

One additional incentive exists which encourages the government to implement drug forfeiture laws. Under a related subsection, section 881(e), state and local law enforcement agencies involved in the seizures of real and other property are allowed to keep some of the forfeited property's proceeds once the property has been sold.³⁵ The value of the proceeds must bear “a reasonable relationship to the degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture”³⁶ Thus, in addition to its punitive aspects, section 881 as currently written provides state and local law enforcement agencies a strong economic incentive to initiate civil forfeiture proceedings whenever possible.³⁷

C. Constitutional Protections and Other Limits to Civil Forfeiture Laws

Unlike criminal forfeiture proceedings, civil forfeiture proceedings afford property owners only limited constitutional protection.³⁸ The

30. *United States v. 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 986 (E.D. Pa. 1986).

31. *See, e.g., United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1216-17 (10th Cir. 1986).

32. Section 881(a)(7) states that “no property shall be forfeited under this paragraph . . . by reason of any act or omission . . . committed or omitted without the knowledge or consent of” the owner of the property. 21 U.S.C. § 881(a)(7) (Supp. 1991). *See infra* notes 56-76 and accompanying text.

33. One can appeal to the Attorney General for “remission.” The Attorney General may return the property if he finds the penalty excessively harsh or if there are mitigating circumstances to justify remission. *See United States v. One 1976 Porsche 911S*, 670 F.2d 810, 813 (9th Cir. 1979).

34. *See* 21 U.S.C. § 881(e) (Supp. 1991).

35. 21 U.S.C. § 881(e)(1)(A) (Supp. 1991).

36. 21 U.S.C. § 881(e)(3)(A) (Supp. 1991).

37. In 1986, federal agents seized assets totalling about \$360 million. *See Battle Strategies; Five Fronts in a War of Attrition*, TIME, September 15, 1986, 69, 71.

38. Most constitutional protections provided to a criminal defendant do not apply here, since it is technically the property, not the alleged perpetrator of a crime, that is the defendant. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (the double jeopardy clause does not apply to civil forfeiture); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 900 (1st Cir. 1987) (because of its civil nature, section 881 does not require proof beyond a reasonable doubt that a criminal violation occurred); *United States v.*

strictness of civil forfeiture laws has led to numerous constitutional attacks, most of which have enjoyed only limited success.³⁹ An action under section 881(a)(7) does not entitle a landowner to the stricter constitutional protections of a criminal statute.⁴⁰ Some constitutional protections, however, still apply.

Fourth Amendment procedural limitations against unreasonable searches and seizures apply to civil forfeiture statutes.⁴¹ The role of the Fourth Amendment has been a limited one, however, due to the Supreme Court's adoption of the *Fuentes v. Shevin* doctrine to drug forfeiture cases.⁴² *Fuentes v. Shevin* established that property forfeiture without a pre-forfeiture hearing is permissible in the presence of a compelling governmental interest.⁴³ In civil forfeiture cases, the elimination of the drug trade has been held a compelling interest thereby justifying pre-hearing seizures of property.⁴⁴

Civil forfeiture statutes trigger limited Fifth Amendment protection as well. They are subject to the Fifth Amendment Self-Incrimination Clause, allowing a landowner to refuse to reveal information which might lead to property forfeiture.⁴⁵ An appellate court has further held that these statutes are subject to the Fifth Amendment's Due Process Clause, protecting against arbitrary or harsh government action.⁴⁶ The justification for applying Fifth Amendment protection is that forfeiture laws are "quasi-criminal" in nature.⁴⁷ Attacks on forfeiture statutes under the Fifth Amendment Takings Clause, however, have been regularly defeated.⁴⁸

\$5,644,540 in United States Currency, 799 F.2d 1357, 1364 n.8 (9th Cir. 1986) (because of its civil nature, section 881 is not subject to the *ex post facto* clause); *United States v. 141st St. Corp.*, 911 F.2d 870, 880-81 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991) (because of its civil nature, the Eighth Amendment does not apply to section 881); *United States v. 2639 Meetinghouse Rd.*, 633 F. Supp. 979, 993 (E.D. Pa. 1986) (Article III, Section 3, Clause 2 of the U.S. Constitution [provision against forfeitures to the government] does not apply to civil forfeitures).

39. The argument "that civil forfeiture actions are essentially criminal and must be governed by all of the rules which adhere to criminal prosecution . . . has enjoyed only qualified success." *Bramble v. Richardson*, 498 F.2d 968, 971 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

40. *See, e.g., United States v. 141st St. Corp.*, 911 F.2d 870, 880 (2d Cir. 1990).

41. *See, e.g., One 1958 Plymouth Sedan v. Penn.*, 380 U.S. 693, 696 (1965).

42. The court adopted the *Fuentes* test in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974). *See Fuentes v. Shevin*, 407 U.S. 67, *reh'g denied*, 409 U.S. 902 (1972).

43. *See Fuentes*, 407 U.S. at 91-92.

44. *See Calero-Toledo*, 416 U.S. at 678-79.

45. *Boyd v. United States*, 116 U.S. 616, 634 (1886); *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 540-41 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988).

46. *United States v. One Tintoretto Painting*, 691 F.2d 603, 608 (2d Cir. 1982).

47. *See, e.g., Boyd*, 116 U.S. at 634.

48. The Takings Clause argument has been addressed elsewhere by the Supreme Court, and a discussion pertaining to it is beyond the scope of this Note. *See United States v. United States Coin & Currency*, 401 U.S. 715, 720-21 (1970).

The Fourteenth Amendment procedural due process requirements are also met under the *Fuentes v. Shevin* test.⁴⁹ As mentioned earlier, the Supreme Court has concluded that drug-related civil forfeitures arise out of “extraordinary” situations, which justify postponement of pre-seizure notice and hearing.⁵⁰ Thus, the Supreme Court has concluded that civil forfeiture proceedings do not violate due process rights.⁵¹

In addition to the more relaxed constitutional standards afforded to civil forfeiture laws, evidentiary standards in civil cases provide less protection than those in criminal cases. The initiation of forfeiture proceedings under 21 U.S.C. § 881 requires only a showing of probable cause,⁵² not, as would be true in a criminal case, proof beyond a reasonable doubt. Also, because *in rem* actions are instituted against the property itself, not against the owner of the property, the landowner’s guilt is not a necessary prerequisite for the property seizure.⁵³ Theoretically, cases might arise in which the criminal forfeiture proceeding fails for lack of evidence but the civil proceeding succeeds.⁵⁴ And once the government has put forward a valid, *prima facie* case for forfeiture, the burden of proof shifts to the landowner to prove that he or she is innocent.⁵⁵

D. The Statutory Innocent Owner Defense

Section 881(a)(7) contains a statutory innocent owner defense that prohibits government seizures of real property where the illegal drug activity was committed “without the knowledge or consent” of the property owner.⁵⁶ Prior to 1984, the only innocent owner defense available in civil forfeiture actions was the “constitutional” innocent owner defense.⁵⁷ This defense required not only that a property owner was “[1] uninvolved in and [2] unaware of the wrongful activity, but also, [3] that he had done all that reasonably could be expected to prevent the pro-

49. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972)).

50. *Id.* at 679-80.

51. *Id.*

52. *See, e.g.*, *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988).

53. *See, e.g.*, *Bramble v. Richardson*, 498 F.2d 968, 971 (10th Cir. 1974); *D.K.G. Appaloosas, Inc.*, 829 F.2d at 543-44.

54. The criminal forfeiture statute relating to violations of the federal narcotics laws is 21 U.S.C. § 853 (Supp. 1991). The relevant evidentiary and constitutional standards for criminal proceedings apply to this statute, which might account for its lower popularity with prosecutors. Interestingly, federal law enforcement agencies can bring actions simultaneously against the same property under the criminal statute, section 853, and the civil statute, section 881. In such cases, the double jeopardy clause does not apply. *See Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

55. *See, e.g.*, *United States v. Four Million, Two Hundred Fifty-Five Thousand (Dollars)*, 762 F.2d 895, 906-07 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

56. 21 U.S.C. § 881(a)(7) (Supp. 1991).

57. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974).

scribed use of his property”⁵⁸ Under this test, property owners had an affirmative duty to prevent illegal use of their property.

As currently written, the section 881(a)(7) statutory defense appears easier to mount. The statute bars forfeiture if the felony violation occurs “without the knowledge or consent” of the property owner.⁵⁹ Unfortunately, this standard is difficult to interpret or, as one court stated, “at best, confusing.”⁶⁰

Two problem areas are most troubling. First, it is unclear whether lack of either knowledge or consent, or lack of both, is required under the defense. Section 881(a)(7) simply states that the defense applies where the felony occurred “without the knowledge or consent of that owner,”⁶¹ thereby arguably supporting either interpretation. Matters are further complicated by the fact that knowledge is generally a prerequisite for consent.⁶² Thus, the disjunctive interpretation, that either lack of knowledge or lack of consent will satisfy the defense, generally reduces itself to a lack of consent requirement.⁶³

There are two interpretations with respect to this defense which courts have followed. Some jurisdictions require that the owner neither knew nor consented to the illegal activity.⁶⁴ Other jurisdictions allow the disjunctive interpretation, which ultimately requires only a showing of lack of consent.⁶⁵

A second problem related to the ambiguity of the innocent owner defense is apparent in the various interpretations of “knowledge” and “consent.” Some jurisdictions interpret “knowledge” as “actual knowledge,” or what the innocent owner actually was aware of at the time of

58. *Id.* at 689.

59. *See* 21 U.S.C. § 881(a)(7) (Supp. 1991).

60. *United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

61. 21 U.S.C. § 881(a)(7) (Supp. 1991).

62. This assumes, fairly reasonably, that knowledge would generally predate consent. A landowner might assert, “I knew, but I didn’t consent.” On the other hand, an assertion that “I didn’t know, but I consented,” would be rare in most cases.

63. Some writers have concluded that either lack of knowledge or lack of consent should be sufficient to satisfy the defense. *See* Lalit K. Loomba, *The Innocent Owner Defense to Real Property Forfeiture Under The Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 478-86 (1989). A problem with this construction is, if the disjunctive interpretation generally reduces to “lack of consent,” then there would be no reason for Congress to include the reference to “lack of knowledge.” At the same time, however, the opposite interpretation, showing that both lack of knowledge and lack of consent are necessary, generally reduces itself to a lack of knowledge standard. *See infra* note 62. Again, it is difficult to understand what Congress’s intention is from the language of the statute alone. The adopted standard now varies among jurisdictions. *See infra* notes 64 and 65 and accompanying text.

64. *See, e.g.*, *United States v. 124 East North Ave.*, 651 F. Supp. 1350, 1357 (N.D. Ill. 1987). Logically, this is the same as requiring only lack of knowledge.

65. *See, e.g.*, *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 49-50 (E.D.N.Y. 1989); *141st St. Corp.*, 911 F.2d at 878.

the illegal drug activity.⁶⁶ Other jurisdictions have used a “constructive knowledge” standard, based upon what the landowner “should have known” at the time of the illegal activity. If the landowner “should have known” that the property was being used for illegal purposes, then the innocent owner defense is unavailable.⁶⁷

Elements that courts have held to constitute constructive knowledge include knowledge that a tenant has used drugs previously or knowledge that the area where the property is located has a reputation for large amounts of drug activity.⁶⁸ Some courts have also used inferences to impute knowledge if it seems likely that the property owner knew of the illegal activity.⁶⁹ Thus, in some jurisdictions, if an owner has failed to meet a reasonable person standard with respect to knowledge, then, even if the landowner had no actual knowledge, that landowner’s entire property may be forfeited.⁷⁰

Courts have also used two different interpretations of “consent.” Consent may be interpreted as “actual consent,” meaning that a landowner affirmatively agreed to allow the tenants to commit drug felonies.⁷¹ Other courts have interpreted consent to include a broader concept of “constructive consent.”⁷² An owner constructively consents when he or she fails to do all that reasonably can be expected in preventing a tenant from engaging in illegal drug activity on the landowner’s property.⁷³ In the Second Circuit, for example, once a landowner is put on notice that there may be drug felony violations on his or her property, that landowner is under a duty to prevent the violations from occurring.⁷⁴

66. *See, e.g., United States v. Four Million, Two Hundred Fifty-Five Thousand (Dollars)*, 762 F.2d 895, 907 (11th Cir. 1985); *United States v. 2901 S.W. 118th Court*, 683 F. Supp. 783, 788 (S.D. Fla. 1988), *cert. denied*, 474 U.S. 1056 (1986).

67. *See, e.g., United States v. Four Million, Two Hundred Fifty-Five Thousand (Dollars)*, 762 F.2d 895, 906 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986) (no constructive knowledge standard, but allowed factual inferences whether, under the circumstances, the owner was aware of the illegality); *United States v. 2011 Calumet*, 699 F. Supp. 108, 110 (S.D. Tex. 1988) (owner had no reason to know that property was being used illegally).

68. *See, e.g., United States v. 5745 N.W. 110 Street*, 721 F. Supp. 287 (S.D. Fla. 1989).

69. *See, e.g., United States v. One 1983 Pontiac Gran Prix*, 604 F. Supp. 893, 897 (E.D. Mich. 1985).

70. *See 2011 Calumet*, 699 F. Supp. at 110.

71. *See, e.g., United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 50-52 (E.D.N.Y. 1989); *United States v. Certain Real Property*, 724 F. Supp. 908, 916 (S.D. Fla. 1989).

72. *See, e.g., 2011 Calumet*, 699 F. Supp. at 108; *United States v. 141st St. Corp.*, 911 F.2d 870, 876 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. 11885 S.W. 46th St.*, 715 F. Supp. 355, 358 (S.D. Fla. 1989).

73. *2011 Calumet*, 699 F. Supp. at 110. This is simply a reworking of the older *Calero-Toledo* constitutional innocent owner defense. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974).

74. *See, e.g., 141st St. Corp.*, 911 F.2d at 879. This standard was also applied in *2011 Calumet*, 699 F. Supp. at 110.

What a landowner can reasonably be expected to do to prevent drug use once put on notice is subject to some dispute.⁷⁵ Still, many courts do not appear troubled that the drastic step of real property forfeiture can result from failure to comply with a vaguely defined affirmative duty.⁷⁶ The harshness of the forfeiture provision and the excessive penalties imposed as the result of what in many cases is limited wrongdoing are problems which this Note addresses in the following sections.

II. Disproportionality Analyses of Section 881(A)(7)

A. Eighth Amendment Proportionality Analysis

1. Section 881(a)(7): Civil or Criminal?

“The peculiar nature of forfeiture statutes . . . has given rise to numerous constitutional attacks.”⁷⁷ Claimants whose property has been forfeited have consistently argued that forfeiture actions are essentially criminal and must be subject to important constitutional protections such as the Eighth Amendment.⁷⁸ Courts have consistently held, however, that the Eighth Amendment does not apply to civil statutes such as section 881(a)(7).⁷⁹

In order for the Eighth Amendment to apply to a civil statute, the statute must be construed by the court as criminal in nature. In *Helvering v. Mitchell*, the Supreme Court held that a civil sanction intended as “punishment” is essentially criminal in nature.⁸⁰ Over time, the Supreme Court refined this standard, creating a seven-step test in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).⁸¹ This test essentially examines the

75. See, e.g., *171-02 Liberty Ave.*, 710 F. Supp. at 51. The landowner owned a building in a “war zone” neighborhood that was one of the largest crack houses in New York. The landowner refused to “fully cooperate” with police, although he did allow them to destroy steel doors and barricades erected on the property by the drug dealers. *Id.* Cooperation with the police was perceived as dangerous in the neighborhood; tenants had automatic weapons and firepower greater than that of the police. *Id.*

76. See, e.g., *2011 Calumet*, 699 F. Supp. at 110 (“A landlord cannot escape accountability to the community . . . by refusing to investigate suspicious facts and allegations of illegal use.”).

77. *Bramble v. Richardson*, 498 F.2d 968, 971 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

78. *Id.*

79. See, e.g., *United States v. 300 Cove Rd.*, 861 F.2d 232, 233-35 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989); *United States v. 26.075 Acres*, 687 F. Supp. 1005, 1013 (E.D.N.C. 1988), *modified*, 866 F.2d 1538 (4th Cir. 1989); *United States v. One 1985 BMW 635 CSI*, 677 F. Supp. 1039, 1041 (C.D. Cal. 1987). See also *Ingraham v. White*, 430 U.S. 651, 664 (1977) (Eighth Amendment applies only to those convicted of crimes).

80. *Helvering*, 303 U.S. 391, 398-99 (1938).

81. Under the *Mendoza* test, the intention of Congress is considered a primary factor. *Mendoza*, 372 U.S. at 168-69. If Congress intended the statute to be civil, a seven-step analysis is used to determine whether Congress’s intention should be overridden. *Id.* Courts still consider the seven-step *Mendoza* analysis as a source of supplementary guidelines. See, e.g.,

civil remedy to determine if it is criminal in nature or essentially punitive.⁸²

In 1980, the Supreme Court simplified the civil/criminal test in *United States v. Ward*.⁸³ *Ward* established a two-step test that determines whether a statute intended to be civil is in fact criminal.⁸⁴ First, the court examines the statute carefully to determine whether Congress expressly or impliedly indicated whether the statute was intended as a civil statute.⁸⁵ Second, if the court finds the "clearest proof" that the statutory scheme is so punitive as to override Congress's intention, then the statute will be construed as a criminal statute.⁸⁶ The court is also free to use the seven factors of *Mendoza* to support an assertion of excessive punitiveness.⁸⁷

2. Underlying Punitiveness of Section 881(a)(7) Remedy

Whether the Eighth Amendment applies to section 881(a)(7) depends, again, upon whether the statute is construed as civil or criminal. As we have seen, a determination that a statute is criminal results when that statute is held to be essentially punitive in nature.⁸⁸ In prior cases, courts have consistently concluded that section 881(a)(7) is not so punitive as to be considered a criminal statute and thereby subject to the

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, *reh'g denied*, 448 U.S. 916 (1980).

The seven-step analysis is as follows:

- 1) Does the sanction involve an affirmative disability or restraint?
- 2) Is the sanction historically regarded as a punishment?
- 3) Does the statute come into play only on a finding of scienter?
- 4) Does the statute's operation promote the traditional aims of punishment?
- 5) Is the behavior to which the statute applies already a crime?
- 6) Is there an alternate purpose to which the statute may rationally be connected?
- 7) Does the statute appear excessive in relation to the alternative purpose assigned?

Mendoza, 372 U.S. 168-69.

The fifth guideline in *Mendoza* is probably met in that the behavior section 881(a)(7) seeks to address is already a crime. 21 U.S.C. § 881(a)(7) relates to felony violations of federal narcotics laws punishable by more than one year in jail and thus applies to behavior which is already a crime. The second *Mendoza* guideline, the underlying punitiveness of the statute, is by far the most important inquiry and will be analyzed under the analysis of *United States v. Ward*, 448 U.S. 242 (1980). See *infra* notes 83-87 and accompanying text.

82. *Mendoza*, 372 U.S. at 167.

83. *Ward*, 448 U.S. 242.

84. *Id.* at 248-49.

85. *Id.*

86. *Id.*

87. See, e.g., *Ward*, 448 U.S. at 249; United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984). See *supra* notes 81-82.

88. Some courts look only at the intention of Congress and at the punitiveness of the statutory scheme in considering whether a statute should be deemed criminal. See, e.g., United States v. Santoro, 866 F.2d 1538, 1543 (4th Cir. 1989).

Eighth Amendment.⁸⁹ For example, an appellate court called the statute “primarily remedial,” with a primary purpose not to punish, but to “attack . . . the economic power bases of criminal organizations.”⁹⁰ Other courts have qualified civil forfeiture as having only “collateral and incidental punitive effect.”⁹¹ Many courts justify civil forfeitures as liquidated damages owed to society,⁹² or as compensation for losses incurred by the government.⁹³

At the same time, other courts have implicitly acknowledged the underlying punitiveness of section 881(a)(7). The United States Supreme Court once noted that the civil forfeiture statute’s “penalties” are a valuable deterrent device.⁹⁴ It has also stated that punitive damages awarded to the government in a civil action may raise Eighth Amendment concerns.⁹⁵ The Court has also acknowledged the similarity between “forfeiting” property and paying a criminal fine.⁹⁶ Despite these statements, the Supreme Court still has not granted proportionality review to civil forfeitures.

Among appellate courts, the Second Circuit has held that forfeitures overwhelmingly disproportionate to the value of the offense must be classified as punishment unless the forfeitures serve legitimate civil purposes.⁹⁷ The Third Circuit has acknowledged that “reasonable minds might disagree” as to whether section 881(a)(7) is not in fact so punitive as to qualify for Eighth Amendment protection.⁹⁸ The Fourth Circuit has stated that the “punitive aspects of any forfeiture are self-evident.”⁹⁹ The Seventh Circuit has categorized the statute as a “harsh punishment for those who sell illegal drugs.”¹⁰⁰ The Eighth Circuit has admitted that

89. *See, e.g.,* *United States v. Premises Known As 2639 Meetinghouse Rd., Jameson, Pennsylvania*, 633 F. Supp. 979, 994 (E.D. Pa. 1986).

90. *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544-45 (5th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988).

91. *See, e.g.,* *United States v. 26.075 Acres*, 687 F. Supp. 1005, 1013 (E.D.N.C. 1988), *modified*, 866 F.2d 1583 (4th Cir. 1989) (section 881(a)(7) is not punitive, but serves “broad, remedial, non-punitive purposes . . . to strip the drug trade of its instrumentalities of crime.”).

92. *See* *United States v. Ward*, 448 U.S. 242, 254 (1980); *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956).

93. *See, e.g.,* *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 180 (E.D.N.Y. 1990), *aff’d*, 954 F.2d 29 (2d Cir. 1992).

94. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974). “[T]he Puerto Rican [civil] forfeiture statutes further the punitive and deterrent purposes . . . by imposing an economic penalty, thereby rendering illegal behavior unprofitable.” *Id.* at 686-87.

95. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 n.21 (1989).

96. *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971).

97. *38 Whalers Cove Drive*, 954 F.2d 29 at 35. This is the only appellate court which has held that proportionality review applies to section 881(a)(7) forfeitures. *Id.* at 36.

98. *United States v. One 107.9 Acre Parcel of Land Located in Warren Township*, 898 F.2d 396, 401 (3rd Cir. 1990).

99. *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989).

100. *United States v. 916 Douglas Ave.*, 903 F.2d 490, 495 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1090 (1991).

“[i]n this case it does appear that the government is exacting too high a penalty in relation to the [section 881(a)(7) offense] committed.”¹⁰¹ However, all but one of these courts have refused to apply any kind of proportionality standard to civil forfeitures.

A New York district court noted that “forfeiture is a penalty without clear limits” and that “[t]he value of the property is not inevitably related to the harmfulness of the use to which it is put.”¹⁰² The same court found that civil forfeitures “usually” are punitive in purpose and effect.¹⁰³ It suggested that the Eighth Amendment may indeed be applicable to all cases where the government attempts to punish an individual if the punishment goes beyond serving any compensatory or remedial interest.¹⁰⁴

In criminal forfeiture cases, the Eighth Amendment has certainly been raised as a concern. For instance, in one criminal forfeiture proceeding, an appellate court found that there was great potential for excessively harsh penalties because courts do not have discretion to exclude part of the property from forfeiture.¹⁰⁵ Because of this, the court called the criminal forfeiture statute “literally without limitation” and capable of “exceed[ing] constitutional bounds in any particular case.”¹⁰⁶ The court then held that an Eighth Amendment proportionality standard¹⁰⁷ should be applied in criminal forfeiture cases where an excessive punishment may have been imposed.¹⁰⁸ There seems little reason to grant proportionality review to criminal forfeitures and not to civil forfeitures when both provisions are roughly equivalent in purpose and effect.¹⁰⁹

B. Case-By-Case Proportionality Analysis

Rather than finding that section 881(a)(7) should be construed as a criminal provision in all cases, thereby subjecting civil forfeitures to Eighth Amendment protection, some courts have called for a proportion-

101. *United States v. 508 Depot St.*, 964 F.2d 814, 818 (8th Cir. 1992).

102. *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 181 (E.D.N.Y. 1990), *aff'd*, 954 F.2d 29 (2d Cir. 1992).

103. *Id.* at 179-81.

104. *Id.*

105. *United States v. Busher*, 817 F.2d 1409, 1414 (9th Cir. 1987) (defendant charged under RICO's criminal forfeiture provisions, 18 U.S.C. § 1963(a)).

106. *Id.*

107. In *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), the Supreme Court provided standards for determining whether a punishment was disproportionate under the Eighth Amendment. *See infra* notes 129-134 and accompanying text.

108. *Busher*, 817 F.2d at 1415.

109. “[I]t appears incongruous to ‘require proportionality review for forfeitures when the government proceeds *in personem* [i.e., under criminal forfeiture provisions], but not when the government proceeds *in rem* [i.e., under civil forfeiture provisions].’” *United States v. 508 Depot St.*, 964 F.2d 814, 817-18 (8th Cir. 1992) (quoting *United States v. 300 Cove Rd.*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989)).

ality review of civil forfeitures on a case-by-case basis.¹¹⁰ If this view were implemented, section 881(a)(7) would still be considered a civil provision, but the value of any potential forfeitures would be limited by a proportionality standard.

For the purpose of determining whether the Double Jeopardy Clause has been violated, the Supreme Court has recently recommended examining civil penalties on a case-by-case basis to determine if the penalty exceeds that which would reasonably be expected of a civil remedy. In *United States v. Halper*, the Court stated that when the civil penalty sought bears no rational relation to the goal of compensating the government for its loss, it should instead be considered a criminal punishment.¹¹¹ The Court held that a civil penalty should be imposed only to the extent by which it compensates the government for its losses.¹¹² Any amount which serves purposes of "retribution and deterrence," the traditional goals of punishment, would be considered a criminal punishment¹¹³ and not a legitimate civil penalty.¹¹⁴ The Court also determined that such a quasi-punitive civil statute entitles a defendant to an "accounting of the government's damages and costs."¹¹⁵

The Second Circuit, in *United States v. 38 Whalers Cove Drive*, has held that *Halper* should apply to civil forfeitures.¹¹⁶ Forfeitures that are overwhelmingly disproportionate to the value of the offense are classified as punishment in the Second Circuit's analysis "unless the forfeitures are shown to serve articulated, legitimate civil purposes."¹¹⁷ Following *Halper*, the *38 Whalers Cove* court said it must look to the forfeiture remedy, on a case-by-case basis, to "examine whether the forfeiture at hand is fully justified by the civil and remedial purposes it ostensibly serves, or whether it or a portion thereof can be explained only with reference to punitive goals."¹¹⁸ If even a "portion" of the forfeiture were punitive in nature, that portion would be a disproportionate penalty in violation of the Eighth Amendment.¹¹⁹

110. See *infra* notes 111-123 and accompanying text.

111. 490 U.S. 435, 446-50 (1989). The district court had previously determined that, because the recovery of \$130,000 bore no "rational relation" to the government's actual damages of \$585, it violated the Fifth Amendment's Double Jeopardy clause. *United States v. Halper*, 660 F. Supp. 531, 533 (S.D.N.Y. 1987).

112. *Halper*, 490 U.S. at 449.

113. *Id.* at 448.

114. See *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.").

115. *Halper*, 490 U.S. at 449.

116. *38 Whalers Cove Drive*, 954 F.2d 29, 35 (2d Cir. 1992), *aff'g* 747 F. Supp. 173 (E.D.N.Y. 1990). See also *Halper*, 490 U.S. 435 (1989).

117. *Id.*

118. *Id.* at 36.

119. *Id.* at 36-38.

The 38 *Whalers Cove* court thus recommended a bifurcated approach to proportionality analysis of civil forfeitures. It granted civil treatment of the forfeited property, to the extent of the value of the drugs,¹²⁰ any "damages" caused to the government by the transgression,¹²¹ or, alternatively, the government's reasonable costs of enforcing the provision.¹²² Where the value of seized property is overwhelmingly disproportionate to the value of the drugs involved in the transgression, however, the Second Circuit will presume that the forfeiture is punitive in nature.¹²³

As of this writing, the Second Circuit is the only court which has called for proportionality review of civil forfeitures. Other appellate courts, such as the First Circuit,¹²⁴ the Third Circuit,¹²⁵ the Fourth Circuit,¹²⁶ and the Ninth Circuit,¹²⁷ have expressly stated that proportionality review is not applicable to section 881(a)(7). The Eighth Circuit, though not expressly holding that proportionality review applies to civil forfeitures, issued a strongly-worded opinion favoring that interpretation.¹²⁸ It remains to be seen whether other appellate courts, or the Supreme Court itself, will adopt such an interpretation.

III. Examining Section 881(A)(7) Forfeitures for Disproportionality

A. Proportionality Analyses Applicable to Section 881(a)(7)

As stated in the previous section, there are two types of proportionality analysis which may apply to section 881(a)(7) forfeitures: the Eighth Amendment proportionality analysis, and the case-by-case analysis recommended by *Halper* and 38 *Whalers Cove*.

Solem v. Helm governs an Eighth Amendment proportionality analysis.¹²⁹ Under *Solem*, three factors determine whether a punishment is

120. The court recommends using the value of the drugs as a "rough measuring stick." *Id.* at 36.

121. *Id.* at 37.

122. *Id.*

123. *Id.* at 36.

124. *See, e.g.*, *United States v. Plat 20, Lot 17, Great Harbor Neck*, 960 F.2d 200 (1st Cir. 1992).

125. *United States v. One 107.9 Acre Parcel Located in Warren Township*, 898 F.2d 396, 400-01 (3rd Cir. 1990).

126. *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989).

127. *United States v. 300 Cove Rd.*, 861 F.2d 232, 233-35 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989).

128. "We sincerely hope Congress re-examines § 881 and considers injecting some sort of proportionality requirement into the statute, even though the Constitution does not mandate such a result." *United States v. 508 Depot St.*, 964 F.2d 814, 818 (8th Cir. 1992).

129. 463 U.S. 277 (1983).

disproportionate.¹³⁰ The first factor compares the harshness of the penalty to the gravity of the offense.¹³¹ The second factor assesses the sentences imposed on other criminals in the same jurisdiction.¹³² The third factor compares the sentences imposed on those convicted of the same crime in other jurisdictions.¹³³ Under both the second and third factors, "a lesser included offense should not be punished more severely than a greater offense."¹³⁴

The second approach to analysis is the case-by-case proportionality review recommended by *Halper* and *38 Whalers Cove*.¹³⁵ The *38 Whalers Cove* court recommended that the government give an accounting of its actual losses or damages where the value of the forfeited object appears to exceed any remedial (i.e., civil) purpose.¹³⁶ The government may use either its reasonable costs or "overhead" involved in enforcing the provision¹³⁷ or the value of the drugs involved in the underlying transaction¹³⁸ as a "rough measuring stick" in determining the extent of the forfeiture which may be permitted.¹³⁹ Where the government fails to show that its costs justify such a penalty, *38 Whalers Cove* concluded, courts should decline to enforce the forfeiture.¹⁴⁰

Though both types of proportionality analysis must proceed on a case-by-case basis, section 881(a)(7) has produced many forfeitures which are profoundly disproportionate both to the extent of the perpetrator's wrongdoing and to the degree of involvement by the landowner. As the following sections will suggest, numerous disproportionate punishments have occurred and will continue to occur unless some type of proportionality standard is inserted into the interpretation of section 881.

B. Value of Penalty Exceeds Severity of Transgression

With section 881(a)(7) forfeitures, the value of the penalty, which is the value of the object forfeited to the government, often greatly exceeds the value of the drugs seized, or the severity of the transgression. For example, a house and surrounding acreage valued at \$94,810 was forfeited when marijuana plants valued at less than \$1000 were found on the

130. *Id.* at 290-95.

131. *Id.* at 291.

132. *Id.*

133. *Id.*

134. *Id.* at 293.

135. *See supra* notes 111-123 and accompanying text.

136. *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 179-181 (E.D.N.Y. 1990), *aff'd*, 954 F.2d 29 (2d Cir. 1992).

137. *38 Whalers Cove Drive*, 954 F.2d at 37.

138. *Id.* at 36.

139. *Id.*

140. *38 Whalers Cove Drive*, 747 F. Supp at 180.

property.¹⁴¹ In another case, a condominium worth \$60,000 was forfeited when less than 2.5 grams of cocaine was found in it.¹⁴² The cocaine had a street value of approximately \$250.¹⁴³ A property worth over \$100,000 was forfeited for the sale of approximately two grams of cocaine and two grams of marijuana on the defendant property.¹⁴⁴ Under the present interpretation of section 881(a)(7), courts will enforce the forfeiture remedy regardless of the value of the forfeited property or the extent of the transgression.

C. No Correlation Between Amount of Property Seized and Amount of Property Used to Facilitate Drug Felony

Another kind of disproportionality exists when an entire lot of real property is seized, even though only a small part of the property was used to commit the drug felony offense. In one case, a house and an entire parcel of land was seized, even though only a small section of it was used to grow marijuana.¹⁴⁵ Another case involving a small plot of marijuana resulted in the forfeiture of 100 acres.¹⁴⁶ An entire 30-acre tract was forfeited when only the house, driveway, and swimming pool were used to commit a drug felony.¹⁴⁷ Two cases document an entire house and its adjoining land being forfeited when a drug felony occurred in the driveway.¹⁴⁸ Although the government claims civil forfeitures are "remedial" in nature and serve to strip the drug trade of its "instrumentalities" of crime,¹⁴⁹ the government's appetite for forfeited property often seems limitless.

D. Forfeiture Where Landowner Is Not Directly Involved in Drug Felony

The punishment under section 881(a)(7) is often excessively harsh to innocent owners whose property is seized as a result of their tenants' wrongdoing. For example, a six-story, forty-one unit apartment building was forfeited because a series of drug felonies were committed by the

141. *United States v. 300 Cove Rd.*, 861 F.2d 232, 233 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989).

142. *38 Whalers Cove Drive*, 747 F. Supp. at 174.

143. *Id.*

144. *United States v. 26.075 Acres*, 687 F. Supp. 1005, 1008, 1009 (E.D.N.C. 1988), *modified*, 866 F.2d 1538 (4th Cir. 1989).

145. *300 Cove Rd.*, 861 F.2d at 235.

146. *United States v. One 107.9 Acre Parcel of Land Located in Warren Township*, 898 F.2d 396 (3rd Cir. 1990).

147. *United States v. Reynolds*, 856 F.2d 675 (4th Cir. 1988).

148. *United States v. 3097 S.W. 111th Ave.*, 921 F.2d 1551 (11th Cir. 1991); *United States v. 31 N.W. 136th Court*, 711 F. Supp. 1079 (S.D. Fla. 1989).

149. *See, e.g., United States v. 26.075 Acres*, 687 F. Supp. 1005, 1013 (E.D.N.C. 1988), *modified*, 866 F.2d 1538 (4th Cir. 1989).

tenants.¹⁵⁰ The landowner's "innocent owner" defense was rejected because he failed to respond to repeated complaints by the police.¹⁵¹ In another case, a five-story brick apartment building was seized when two of the tenants had engaged in drug felony violations.¹⁵² Another case of drug use by a tenant resulted in the forfeiture of an entire building even though the landowner had no actual knowledge that the tenants were committing drug felony violations.¹⁵³ Thus, even where a landowner has no direct involvement in the underlying drug felonies, courts have held that section 881(a)(7) authorizes forfeiture of the landowner's property.

E. Other Problems With Proportionality and Section 881(a)(7)

The basic structure by which section 881(a)(7) forfeitures occur confounds reasonable notions of proportionality. Under *Solem v. Helm*, a lesser offense should not be punished more severely than a greater offense.¹⁵⁴ With section 881(a)(7) real property forfeitures, an innocent landowner can often be punished more severely than a tenant for the tenant's illegal activities. Indeed, because of its lower evidentiary requirements, cases whose proof might not permit a criminal conviction of the tenant could in fact support a civil forfeiture proceeding against the landlord.¹⁵⁵ Additionally, no trial on damages is granted with civil forfeiture actions; the punishment is automatically equal to the value of the property. Thus, the punishment is not determined by the seriousness of the illegal drug activity or the landowner's culpability, but is simply determined by the value of the property.¹⁵⁶

IV. Proposal

A. Subject Section 881(a)(7) to the Eighth Amendment

Although Congress expressly intended section 881(a)(7) to be a civil forfeiture provision, it is sufficiently punitive to negate Congress's intention. Section 881(a)(7), particularly as it applies to innocent landowners, is essentially punitive in nature. Its remedies are often excessive and bear no relationship to the degree or extent of the wrongdoing being addressed. Also, section 881(a)(7) addresses actions which are essentially

150. *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1017 (1991).

151. *Id.* at 877-80.

152. *United States v. 16 Clinton St.*, 730 F. Supp. 1265 (S.D.N.Y. 1990).

153. *United States v. 2011 Calumet*, 699 F. Supp. 108 (S.D. Tex. 1988).

154. 463 U.S. 277, 293 (1983).

155. *See supra* notes 52-55 and accompanying text.

156. *See, e.g., United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 181 (E.D.N.Y. 1990), *aff'd*, 954 F.2d 29 (2d Cir. 1992) (noting the lack of relationship between the value of property and the harmfulness of the use to which it is put).

criminal in nature. Thus, courts should treat section 881(a)(7) as a criminal statute subject to the Eighth Amendment.

B. Apply a Proportionality Standard to Forfeitures Under Section 881(a)(7)

If section 881(a)(7) is subject to Eighth Amendment scrutiny, a proportionality standard should apply in order to limit the value and extent of the property seized to the degree of wrongdoing or harm. The punishment for section 881(a)(7) infractions should be limited by a reasonable governmental showing of "damages," including the government's costs in enforcing the forfeiture provisions. Alternatively, the value of the drugs could be used as a "measuring stick." In any event, courts should limit the extent of forfeiture, or decline to enforce a forfeiture proceeding, where the value and extent of the forfeited object is clearly disproportionate to the degree of wrongdoing. Additionally, in cases where a small section of property is used to commit a felony, as in marijuana growing cases, no greater an area than that used to facilitate the drug felony should be seized. Using a proportionality standard of this type would still preserve the effectiveness of section 881(a)(7), while eliminating many of the unfair and excessively harsh forfeitures which have occurred in the past.

C. Apply a "Direct Involvement" Standard to Section 881(a)(7)

Seizure of property should be limited to those cases where the property owner was "directly involved" in the drug felony offense, eliminating the harsh results of applying section 881(a)(7) to innocent owners. The requirement that the property itself, and not the owner, be the "facilitator" of the drug felony, is clearly a historical remnant of *in rem* proceedings and needs to be discarded. Unless a landowner is directly involved in the applicable felony,¹⁵⁷ or affirmatively consents to and profits by the felony, his or her property should not be forfeited.

Mere knowledge of a tenant's felonious activity is not enough of a justification to seize the landowner's property. Nor is the failure to prevent drug violations by tenants enough of a justification to support property forfeiture. Only those owners who are "directly involved" in a drug felony should be subject to section 881(a)(7).

Conclusion

As it is now written, interpreted, and applied, 21 U.S.C. § 881(a)(7), though ostensibly civil by design, is actually criminal in nature, and should be subject to Eighth Amendment protection. The statute is

157. This might be similar to the way a property is now considered to "facilitate" a drug felony. See *supra* note 29.

uniquely offensive to Eighth Amendment concerns and often forces innocent landowners to suffer for the illegal conduct of their tenants.

Though drug abuse is certainly a problem which needs to be addressed, it must not be done in such a way as to flagrantly violate constitutional safeguards. The Supreme Court, which once held that "constitutional protections for the security of person and property should be liberally construed,"¹⁵⁸ now seems content to overlook important constitutional protections as an expedient means for ending the "War on Drugs." The proposal offered here provides a more reasonable and constitutionally sound interpretation of the current drug forfeiture laws.

158. *Boyd v. United States*, 116 U.S. 616, 635 (1886).