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Wayne W. Yu
Wayne.Yu@chicagounbound.edu

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Determining the Proper Nexus for Vehicle Forfeiture Under 21 USC § 881(a)(4)

Wayne W. Yu†

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act1 (the “Act”) to help combat the growing problem of drug abuse in this country.2 Section 881(a)(4) of the Act3 permits the government to institute an in rem4 civil proceeding against vehicles used in the illegal drug trade. This provision has developed into a powerful tool in effecting drug policy.5 The scope of vehicle forfeiture determines the statute’s effectiveness—the wider the scope of forfeiture, the greater its deterrent effect and the greater the possibility of depleting the financial reserves of drug traffickers.6 In addition to its punitive

† A.B. 1992, Harvard University; J.D. Candidate 1995, University of Chicago.
3 Section 881(a) provides in pertinent part:
The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) . . . .

21 USC § 881(a) (1988). Paragraphs (1), (2), and (9) describe all controlled substances and all raw materials, products, and equipment linked with the manufacture, processing, and transport of controlled substances. Id.
4 An in rem action is an action against the property itself, as opposed to an action against the owner of the property. The theory is that the property itself has committed the wrong, and the guilt or innocence of the owner is irrelevant. See United States v United States Coin & Currency, 401 US 715, 719-20 (1971); United States v Nichols, 841 F2d 1485, 1486 (10th Cir 1988) (stating that “because the property is considered tainted upon the commission of the wrongful act, the interest of the government vests at the time of the act”).
5 See Calero-Toledo v Pearson Yacht Leasing Co., 416 US 663, 686-87 (1974) (“Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.”); United States v One 1977 Cadillac Coupe DeVille, 644 F2d 500, 502 (5th Cir 1981) (“Forfeiture provisions are an essential part of the law enforcement effort in the area of illegal drugs.”).
6 See United States v One 1974 Cadillac Eldorado Sedan, 548 F2d 421, 424 (2d Cir 1977) (“Eldorado Sedan”) (observing that Congress intended the statute to reduce the profits of “those who thrive upon the misery of drug addicts”). See also note 5 and accom-
and deterrent effects, forfeiture generates substantial revenue for the government because the government obtains title to the forfeited property and subsequently auctions the property.\(^7\)

Not every use of a vehicle in a drug transaction triggers forfeiture.\(^6\) Nor does every drug dealer’s vehicle become subject to forfeiture.\(^9\) Indeed, on its face, Section 881(a)(4) establishes a per se forfeiture rule only for vehicles that are actually used to transport items of contraband.\(^10\) However, because Section 881(a)(4) allows for forfeiture of conveyances used “in any manner to facilitate” the sale, receipt, possession, or concealment of illegal drugs, a vehicle may be subject to forfeiture under Section 881(a)(4) even where direct transport of contraband is not involved.\(^11\)

Courts disagree as to the proper nexus for vehicle forfeiture under Section 881(a)(4). Some courts have held that a “substantial connection” to the illegal activity is required,\(^12\) while others have explicitly rejected this standard and stated that the vehicle need only be connected “in any manner” to the illegal activity,\(^13\) a broader, literal reading of the statute. Moreover, the courts purporting to adhere to the substantial connection standard disagree on the definition of “substantial connection,”\(^14\) and the


\(^8\) See United States v One 1972 Chevrolet Corvette, 625 F2d 1026, 1028-29 (1st Cir 1980).

\(^9\) See United States v 1990 Toyota 4Runner, 9 F3d 651, 653 (7th Cir 1993) (“Toyota 4Runner”) (stating that “this is not to say that the statute requires the automatic forfeiture of every drug dealer’s car”).

\(^10\) “All conveyances . . . which are used . . . to transport” controlled substances or materials used in manufacturing or producing controlled substances are subject to forfeiture. 21 USC § 881(a)(4) (1988). See also One 1972 Chevrolet Corvette, 625 F2d at 1028-29.

\(^11\) “All conveyances . . . which are used, or are intended for use . . . in any manner to facilitate the transportation, sale, receipt, possession, or concealment” of illegal narcotics are subject to forfeiture. 21 USC § 881(a)(4) (emphasis added).

\(^12\) See One 1972 Chevrolet Corvette, 625 F2d at 1029. See also United States v 1966 Beechcraft Aircraft Model King Air A90, 777 F2d 947, 953 (4th Cir 1985); United States v One 1976 Ford F-150 Pick-Up, 769 F2d 525, 527 (8th Cir 1985). Accord United States v Schifferli, 895 F2d 987, 989 (4th Cir 1990) (endorsing the substantial connection standard for Section 881(a)(7) forfeitures); United States v One 1986 Nissan Maxima GL, 895 F2d 1063, 1064 (5th Cir 1990) (endorsing the substantial connection standard for Section 881(a)(6) forfeitures).

\(^13\) See United States v One 1978 Mercedes Benz, 711 F2d 1297, 1304 (5th Cir 1983); United States v 1964 Beechcraft Baron Aircraft, 691 F2d 725, 727 (5th Cir 1982) (per curiam).

\(^14\) For example, contrast One 1976 Ford F-150 Pick-Up, 769 F2d at 527 with 1966 Beechcraft Aircraft Model King Air A90, 777 F2d at 953.
courts applying the “in any manner” test are uncertain as to the limitations of that test. These disagreements have resulted in uncertainty as to whether vehicles indirectly linked to a drug transaction, such as those used solely to transport parties to the scene of the transaction or negotiation, are properly subject to forfeiture under Section 881(a)(4).

This Comment examines the proper scope of forfeiture under Section 881(a)(4). The Comment argues that “facilitation” under Section 881(a)(4) should be interpreted in light of intent: in cases of indirect facilitation, the intent of the vehicle’s operator should be determinative. An intent-focused interpretation of Section 881(a)(4) accords with the literal language of the statute and effectuates Congress’s intent to crack down on drug dealers, while simultaneously safeguarding the rights of the accused. Furthermore, an intent-focused standard for forfeiture properly reflects the quasi-criminal nature of the statute by explicitly recognizing intent as a determinative factor, just as the courts focus on intent in criminal cases.

Part I of this Comment describes the evolution and application of the different approaches to Section 881(a)(4). Part II analyzes the principles and limitations of current approaches to the statute. Part III proposes an intent-focused standard for defining the scope of Section 881(a)(4).

I. APPROACHES TO SECTION 881(A)(4)

A. Before the Act: 49 USC §§ 781-82

Before passage of the Act, the main civil forfeiture provisions with respect to drug cases were 49 USC §§ 781-82, which were substantially similar to Section 881(a)(4). Sections 781 and

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15 See, for example, Toyota 4Runner, 9 F3d at 652-54. According to Judge Cudahy, “It has become increasingly difficult to impose any principled constraints on the exercise of forfeiture powers under the drug laws.” Id at 654 (Cudahy concurring).

16 Section 881(a)(4) provides that “conveyances... which are used, or are intended... to facilitate the transport, sale, receipt, possession, or concealment” of illegal drugs are subject to forfeiture. 21 USC § 881(a)(4) (emphasis added).

17 See Boyd v United States, 116 US 616, 634 (1886) (stating that forfeiture, “though technically a civil proceeding, is in substance and effect a criminal one”). See also One 1972 Chevrolet Corvette, 625 F2d at 1029 (noting the need for a substantial connection between the property and the “underlying criminal activity”).

18 49 USC § 781 made unlawful the facilitation of the transport, carrying, or conveyance of any contraband article and defined contraband articles to include illegal narcotics. 49 USC § 781 (1988). 49 USC § 782 provided for forfeiture of any vehicle used in violation of Section 781, with exceptions not pertinent to this Comment. 49 USC § 782 (1988). Both Sections were repealed in 1994. 108 Stat 1379 (1994).
782, like Section 881(a)(4), applied to vehicles used to facilitate the transport, carrying, or conveyance of illegal narcotics.¹⁹

Under Sections 781 and 782, courts determined that the use of a vehicle solely to commute to the scene of a crime did not justify forfeiture.²⁰ For instance, in *Platt v United States*,²¹ a car was used to drive to a drug store where an illegal prescription for morphine was filled.²² The court held that such automobile usage was not “facilitation” within the meaning of the statute and that “[a]scribing such a meaning to the use of the word ‘facilitate’ would raise grave doubts over the constitutionality of the statute on the ground of vagueness and indefiniteness.”²³ Citing *Platt*, the Ninth Circuit in *Howard v United States*²⁴ similarly reasoned that an automobile was merely an arbitrary method of transportation, and the ease or difficulty of the illegal activity was not affected by the manner in which the party reached the scene of the crime.²⁵

The precedent of *Howard* and *Platt*, however, does not bind the courts’ interpretation of Section 881(a)(4).²⁶ Sections 781 and 782, unlike Section 881(a)(4), did not contain the phrase “in any manner.”²⁷ Many courts have held that the addition of this phrase indicates that Congress intended to loosen the causal connection required for forfeiture and to expand the government’s right of forfeiture in drug cases.²⁸ Thus, although *Howard* and *Platt* shed some light on Section 881(a)(4) cases, they are not dispositive.

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¹⁹ See id.
²⁰ See *Platt v United States*, 163 F2d 165, 167 (10th Cir 1947). See also *Howard v United States*, 423 F2d 1102, 1103-04 (9th Cir 1970).
²¹ 163 F2d 165 (10th Cir 1947).
²² Id at 166-67.
²³ Id at 167.
²⁴ 423 F2d 1102 (9th Cir 1970).
²⁵ Id at 1103-04.
²⁶ See *United States v One 1979 Mercury Cougar XR-7*, 666 F2d 228, 230 (5th Cir 1982); *United States v One 1977 Cadillac Coupe DeVille*, 644 F2d 500, 502 (5th Cir 1981) (rejecting Section 781 cases as precedents in a Section 881(a)(4) case); *United States v One 1974 Cadillac Eldorado Sedan*, 548 F2d 421, 425 (2d Cir 1977); *United States v One 1987 Ford F-350 4x4 Pickup*, 739 F Supp 554, 559 (D Kan 1990).
²⁷ Section 881(a)(4) provides that “conveyances . . . which are used, or intended for use, to transport, or in any manner to facilitate the transport, sale, receipt, possession, or concealment” of illegal drugs are subject to forfeiture. 21 USC § 881(a)(4) (emphasis added).
²⁸ See *One 1979 Mercury Cougar XR-7*, 666 F2d at 230 (holding that the “in any manner” language stretches Section 881(a)(4) “substantially farther” than Sections 781-82). See also *One 1977 Cadillac Coupe DeVille*, 644 F2d at 502; *Eldorado Sedan*, 548 F2d at 423-25; *United States v One 1981 Datsun 280ZX*, 563 F Supp 470, 473-74 (E D Pa 1983).
B. Substantial Connection Test

Generally, forfeiture is disfavored, and statutes providing for forfeiture are strictly construed. Concerns about the potentially arbitrary exercise of government power have traditionally limited the scope of civil forfeiture. In accordance with this basic principle of strict construction, some courts have determined that Section 881(a)(4) should be narrowly construed.

Some of these courts have found that Congress intended to require a "substantial connection" between the forfeited property and the underlying criminal activity. These courts, while finding that the legislative history of Section 881 itself sheds little light on the scope of the facilitation clause, have looked to the legislative history of the Psychotropic Substances Act (the "PSA"), an amendment to the Act. The PSA added Section 881(a)(6), a complementary provision to Section 881(a)(4), providing for the forfeiture of money or other valuable objects nego-
tiated in exchange for drugs. The explanatory statement to the PSA states:

[I]t is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity.

Some courts have interpreted this statement to mean that Congress intended to require a “substantial connection” for all forfeitures under Section 881(a)(4). 40


In United States v One 1972 Datsun, the District Court for the District of New Hampshire determined that a vehicle must have a “substantial and/or instrumental connection” to the illicit activity to be subject to forfeiture. Applying this standard, the court held that forfeiture is inappropriate under Section 881(a)(4) where the vehicle was only used to transport the person to the site of the criminal activity. Because the government did not allege that the car in Datsun was part of an ongoing criminal enterprise, the court did not believe that “forfeiture of the vehicle [would] 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.” The court noted that “[t]here is little activity which is not ‘facilitated’ by the use of a car in some fashion.”

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38 Rejecting the substantial connection standard, the Fifth Circuit interpreted the legislative history of the PSA as pertaining exclusively to Section 881(a)(6). See United States v 1964 Beechcraft Baron Aircraft, 691 F2d 725, 727 (5th Cir 1982) (per curiam). The court reasoned that the “amendment’s legislative history makes no mention of using the same test for other forfeiture actions and the legislative history of § 881 is devoid of any mention of a ‘substantial connection’ test.” Id.


40 See 1966 Beechcraft Aircraft Model King Air A90, 777 F2d at 953. See also One 1972 Chevrolet Corvette, 625 F2d at 1029.

41 378 F Supp 1200 (D NH 1974) ("Datsun").

42 Id at 1204.

43 Id at 1206.

44 Id at 1205.

45 Datsun, 378 F Supp at 1206.
Other courts have adopted the reasoning in Datsun. In United States v One 1976 Ford F-150 Pick-Up, for example, the Eighth Circuit adopted the substantial connection test and held that evidence of a single trip with a truck to a marijuana field, in the absence of evidence that the vehicle transported supplies to be used for the marijuana crop, was too tenuous to warrant forfeiture. The court stated:

[T]here was little showing, apart from a singular episode of transportation, that use of the truck was an “integral part” of Hudson’s marijuana operation. . . . [W]e do not believe that the forfeiture statute was meant to support divestiture of private property based on an insubstantial connection between the vehicle and the illegal activity . . . .

The court reasoned that mere suspicion would not support forfeiture, and the facts of the case did not show that the truck facilitated the illegal activity or was “substantially associated” with it.

2. “Antecedent relationship” variation of the substantial connection test.

Other courts have adopted a variant of the substantial connection test, best denoted as the “antecedent relationship” test. This test requires an antecedent relationship between the vehicle and the illegal drug transaction in order for the vehicle to have “facilitated” the transaction under Section 881. Under this analysis, forfeiture is inappropriate when the vehicle’s only involvement with the crime occurs after the transaction.

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See, for example, United States v One 1976 Ford F-150 Pick-Up, 769 F2d 525 (8th Cir 1985). Other courts have also adopted versions of the substantial connection test. See United States v Schifferli, 895 F2d 987, 990 (4th Cir 1990) (adopting the “substantial connection” test in a Section 881(a)(7) forfeiture case); United States v 1966 Beechcraft Aircraft Model King Air A90, 777 F2d 947, 953 (4th Cir 1985); United States v One 1972 Chevrolet Corvette, 625 F2d at 1026, 1029 (1st Cir 1980).  

769 F2d 525 (8th Cir 1988).  

Id at 527.  

Id at 527 (emphasis added).  

Id.  

See, for example, One 1972 Chevrolet Corvette, 625 F2d at 1029-30. Accord United States v One 1981 Ford F-100 Pickup Truck, 577 F Supp 221, 222 (D Mass 1983).  

See One 1972 Chevrolet Corvette, 625 F2d at 1030.  

Id at 1029.
For example, in *United States v One 1972 Chevrolet Corvette*, the car in question was used to retrieve the cash proceeds of an earlier drug transaction. The First Circuit stated that it could find "no decision upholding forfeiture on the basis of the facilitation clause in which there was not an antecedent relationship between the vehicle and the sale of narcotics." The court proceeded to hold that Congress did not intend for "minimal involvement," such as the subsequent transport of proceeds, to trigger forfeiture. Thus the court found that the car did not facilitate the transaction and therefore was not subject to forfeiture. While the court stated that the absence of an antecedent relationship rendered the causal connection too insubstantial to warrant forfeiture, it did not address the substantiality of the antecedent relationship necessary for forfeiture.

While some courts have followed the First Circuit's reasoning in *Corvette* as a modified test to determine the required nexus for forfeiture, other courts have explicitly rejected the antecedent relationship test, criticizing it as drawing an unnecessary and irrelevant temporal distinction. For example, the antecedent relationship test would presumably draw a distinction between

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54 625 F2d 1026 (1st Cir 1980).
55 Id at 1027-28.
56 Id at 1029.
57 Id at 1030.
58 *One 1972 Chevrolet Corvette*, 625 F2d at 1029-30. The court hypothesized that in the absence of an antecedent relationship, the car might only be used weeks or months after the illegal transaction. Id at 1030.
59 Id.
60 The First Circuit explicitly left open the question of whether a vehicle is subject to forfeiture solely because of its use in transporting participants to the scene of an illicit drug transaction. Id at 1030 n 5. The District Court of Massachusetts, claiming to follow the First Circuit's antecedent relationship test, required an antecedent relationship but did not require that the antecedent relationship constitute a "substantial connection." *United States v One 1981 Ford F-100 Pickup Truck*, 577 F Supp at 223. The court ignored the substantiality of the antecedent connection and instead applied the "in any manner" standard. The court held that a vehicle used solely to commute to the scene of a drug deal had the requisite antecedent relationship to the crime and that the relationship constituted facilitation under the "in any manner" test. Id.
63 *Toyota 4Runner*, 9 F3d at 654.
the use of a vehicle to commute to the illegal transaction and the use of the same vehicle to commute from the transaction, though both halves of the commute could be considered equally necessary to the transaction and thus equally "facilitating."

C. “In Any Manner” Standard

Several courts have rejected the substantial connection test in favor of a broader “in any manner” standard.64 These courts have reasoned that by including the “in any manner” language in Section 881(a)(4), Congress intended to broaden the scope of forfeiture under Section 881(a)(4) to strengthen law enforcement.65 In reaching this conclusion, the Fifth Circuit relied on the House Report accompanying the Act,66 which stated:

This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . (2) through providing more effective means for law enforcement aspects of drug abuse prevention and control.67

The Fifth Circuit found that this language evidenced an intent to expand the scope of vehicle forfeiture and that “[t]o hold otherwise would negate the need for and purpose of the new statute.”68

Courts applying the “in any manner” standard have explicitly rejected the necessity of a “substantial connection,” holding instead that the use of a vehicle to facilitate an illegal drug transaction “in any manner” justifies forfeiture.69 Neither the language of the statute nor its legislative history mentions a “substantial connection”; this term is referred to only in the legis-

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64 See, for example, United States v 1964 Beechcraft Baron Aircraft, 691 F2d 725, 727 (5th Cir 1982); United States v One 1974 Cadillac Eldorado Sedan, 548 F2d 421, 423 (2d Cir 1977). See also Toyota 4Runner, 9 F3d at 654.
65 See Toyota 4Runner, 9 F3d at 654; United States v One 1977 Cadillac Coupe DeVille, 644 F2d 500, 502 (5th Cir 1981); Eldorado Sedan, 548 F2d at 425. The Second Circuit, however, could not find any legislative history to explain the addition of Section 881. Id.
66 One 1977 Cadillac Coupe DeVille, 644 F2d at 502.
68 One 1977 Cadillac Coupe DeVille, 644 F2d at 502.
69 See, for example, United States v One 1978 Mercedes Benz, 711 F2d 1297, 1304 (5th Cir 1983); 1964 Beechcraft Baron Aircraft, 691 F2d at 727; Eldorado Sedan, 548 F2d at 423.
ative history of an amendment to the Act. Thus many courts have found that any substantial connection requirement is limited to that amendment.\textsuperscript{70} For example, the Seventh Circuit recently stated that "[t]he language 'or in any manner to facilitate' indicates that Congress did not want the courts to use their ingenuity to trim the statute to 'reasonable' proportions."\textsuperscript{71}

In \textit{United States v One 1974 Cadillac Eldorado Sedan},\textsuperscript{72} the Second Circuit held that Congress intended to extend the reach of Section 881(a)(4) beyond the substantial connection boundary erected in \textit{Datsun}.\textsuperscript{73} To give full effect to the broad congressional intent to reduce the profits of drug dealers, the court was "loathe to make the forfeiture depend upon the accident of whether dope is physically present in the vehicle."\textsuperscript{74} Applying its broadened standard, the court in \textit{Eldorado Sedan} held that the use of a vehicle to transport parties to the scene of a sale or to a meeting where the sale is proposed is sufficient to warrant forfeiture.\textsuperscript{75}

In \textit{Eldorado Sedan}, the vehicle was used to commute to an initial meeting at which a drug deal was proposed and rejected.\textsuperscript{76} The court pointed out that it was neither unusual nor dispositive that the initial discussion did not result in an immediate sale, especially since drug traffickers are often wary of strangers.\textsuperscript{77} The initial meeting led to further meetings and to the eventual sale, and thus the court found that the vehicle used to transport the parties to the first meeting was subject to forfeiture under Section 881(a)(4).\textsuperscript{78}

Following the Second Circuit's \textit{Eldorado Sedan} decision, several courts have similarly used the addition of the phrase "in any manner" to extend Section 881(a)(4) forfeiture beyond the

\textsuperscript{70} See, for example, \textit{1964 Beechcraft Baron Aircraft}, 691 F2d at 727 ("[PSA's] legislative history makes no mention of using the same [substantial connection] test for other forfeiture actions and the legislative history of \textsection{881} is devoid of any mention of a 'substantial connection' test.").

\textsuperscript{71} \textit{Toyota 4Runner}, 9 F3d at 654.

\textsuperscript{72} 548 F2d 421 (2d Cir 1977) ("Eldorado Sedan").

\textsuperscript{73} Id at 423-25 (labeling the \textit{Datsun} decision "perforce suspect").

\textsuperscript{74} Id at 426.

\textsuperscript{75} Id.

\textsuperscript{76} \textit{One 1974 Cadillac Eldorado Sedan}, 548 F2d at 422.

\textsuperscript{77} Id at 427.

\textsuperscript{78} Id. Following \textit{Eldorado Sedan}, courts have held that forfeiture is proper where a vehicle is used merely to commute to the site of a meeting eventually leading to an illegal drug transaction. See \textit{United States v One 1981 Datsun 280ZX}, 563 F Supp 470, 473-74 (E D Pa 1983) (involving a car used for commuting to meetings which led to the sale). See also \textit{United States v One 1987 Ford F-350 4x4 Pickup}, 739 F Supp 554, 558-59 (D Kan 1990) (pertaining to commuting to negotiations).
boundaries of other civil forfeiture. Under the "in any manner" standard, forfeiture is warranted where the nexus between the vehicle and the illegal transaction is more than "incidental or fortuitous." Under this analysis, courts have uniformly found that the use of a car to transport parties to the site of a drug transaction constitutes a sufficient nexus for forfeiture. The Fifth Circuit has also extended the "in any manner" standard to affirm the forfeiture of a vehicle used in laying the groundwork for a future drug operation.

Recently, in *United States v 1990 Toyota 4Runner*, the Seventh Circuit, in adopting the "in any manner" interpretation of Section 881(a)(4), distinguished "between personal use unrelated to drugs and [drug business] use." Though vehicles used for "personal" use might indirectly "facilitate" a drug dealer's illegal transactions, the court concluded that such vehicles were beyond the reach of the statute. The court hypothesized that without such a limit on "facilitation," items like groceries and clothing might be subject to civil forfeiture.

On the other hand, this modified test encompasses all vehicles used for "business," including those used to transport par-

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79 See, for example, *United States v One 1977 Cadillac Coupe DeVille*, 644 F2d 500, 503 (5th Cir 1981). The Northern District of Illinois held that a "substantial connection" was required for forfeiture under 18 USC § 981, a civil forfeiture statute for property used in money laundering, because the statute lacked the phrase "in any manner." *United States v One 1989 Jaguar XJ6*, 1993 WL 157630, *2-3 (N D Ill 1993). However, the court opined that a less rigorous "in any manner" standard should be applied to Section 881(a)(4) forfeitures. Id at *2.

80 *United States v One Parcel of Real Estate Known as 916 Douglas Avenue*, 903 F2d 490, 493-94 (7th Cir 1990) (applying the "in any manner" test to Section 881(a)(7)).

81 See, for example, *United States v 1990 Toyota 4Runner*, 9 F3d 651, 652-54 (7th Cir 1993); *United States v One 1984 Cadillac*, 888 F2d 1133, 1137-38 (6th Cir 1989) (concerning commuting to transaction); *United States v One 1981 Ford F-100 Pickup Truck*, 577 F Supp 221, 223 (D Mass 1983); *United States v One 1979 Lincoln Continental*, 574 F Supp 156, 159-60 (N D Ohio 1983) (upholding forfeiture where car transported both party and drug-testing equipment); *One 1977 Cadillac Coupe DeVille*, 644 F2d at 503.

82 See *United States v One 1979 Mercury Cougar XR-7*, 666 F2d 228, 230 (5th Cir 1982) (holding that a vehicle used in searching for an airfield and renting storage space and equipment for a marijuana operation has sufficient nexus and is subject to forfeiture). The Fifth Circuit distinguished an earlier Section 781 case which had held that the mere performance of a useful function did not itself support a finding of facilitation. Id, distinguishing *United States v One 1971 Chevrolet Corvette Automobile*, 496 F2d 210 (5th Cir 1974).

83 9 F3d 651 (7th Cir 1993).

84 Id at 653-54.

85 Id at 653.

86 Id.

87 Judge Cudahy, concurring in *Toyota 4Runner*, pointed out the possible difficulty of distinguishing between business and pleasure uses, noting that "[e]ven on vacation or
ties to a meeting at which a future drug transaction is arranged. The Seventh Circuit reasoned that the vehicle "facilitated" the conspirator's presence at the meeting and thus facilitated any drug deals that might arise from the meeting. The court also likened the situation to the formation of an executory contract for a future drug delivery and rationalized that the sale actually occurred at the initial meeting with consummation to ensue.

D. "Mislabeled" Approaches

Some courts have claimed to apply the substantial connection standard for Section 881(a)(4) forfeiture, yet they have adopted the reasoning of courts applying the "in any manner" test. These "mislabeled" approaches exacerbate the existing confusion in the current law.

Several courts purporting to apply the substantial connection test have nonetheless relied on Eldorado Sedan, the leading case rejecting that test, to determine what constitutes a substantial connection. For example, the Fourth Circuit professed to apply the "substantial connection" test. Contrary to other cases using this test, however, the court held that a vehicle used only to transport conspirators to the scene of a drug sale or to a preliminary meeting is substantially connected to the sale and subject to forfeiture. In reaching its holding, the court relied on the Sec-

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Id at 652.

1 90 See United States v 1966 Beechcraft Aircraft Model King Air A90, 777 F2d 947 (4th Cir 1985); United States v One 1979 Porsche Coupe, 709 F2d 1424 (11th Cir 1983). The First Circuit found Eldorado Sedan, which explicitly rejects the substantial connection test, "consonant with Congress's statement that 'it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity.'" One 1972 Chevrolet Corvette, 625 F2d at 1029.

See, for example, One 1979 Porsche Coupe, 709 F2d at 1426-27; One 1987 Ford F-350 4x4 Pickup, 739 F Supp at 558-59 (citing Eldorado Sedan, the court found that the use of a vehicle to commute to an initial meeting where a possible drug transaction was discussed rendered the vehicle subject to forfeiture under the "substantial connection" standard, even though the deal was eventually finalized weeks later in a different transactional form than initially discussed). See also One 1984 Cadillac, 888 F2d at 1137-38 (holding that the mere use of a vehicle to commute to the site of an illegal transaction is sufficient to justify forfeiture under Section 881(a)(4) "even under the 'substantial connection' standard," but citing as authority cases that rely on Eldorado Sedan).

1 966 Beechcraft Aircraft Model King Air A90, 777 F2d at 953.
The Fourth Circuit did not attempt to reconcile its application of a substantial connection test with the reasoning of *Eldorado Sedan*, which explicitly rejected the substantial connection standard in favor of the broader “in any manner” interpretation.

The Eleventh Circuit similarly claimed to adopt the substantial connection test, yet it relied on the reasoning of cases supporting the “in any manner” test. In one case, the court stated: “To support a forfeiture under [Section] 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.” However, the court proceeded to hold that the use of a vehicle to transport the “pivotal figure in the transaction” several hundred miles to the scene of an attempted transaction was sufficient to support forfeiture under the substantial connection test, citing *Eldorado Sedan* and the Fifth Circuit’s opinion in *One 1977 Cadillac Coupe DeVille*, which followed *Eldorado Sedan*.

II. Principles and Limitations of Current Approaches

The various judicial approaches to Section 881(a)(4) attempt to deter drug traffickers and deprive them of their operating tools without extending Section 881(a)(4) beyond constitutional and practical boundaries. Even courts applying the “in any manner” approach have recognized limitations on the scope of Section 881; an expansive literal reading of the statute would unreasonably extend its scope, rendering it inconsistent with the limited congressional intent to crack down on the “operating tools” of the narcotics trade. The various approaches attempt to draw a clear line beyond which forfeiture would no longer serve congressional intent.

The discord among the courts stems in part from the indefinite nature of the term “facilitate” as used in the Act. When illegal drugs are not physically present in a vehicle, whether that vehicle “facilitates” a drug transaction is a question of degree.99

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94 Id.
95 *One 1979 Porsche Coupe*, 709 F2d at 1426.
96 Id.
97 *One 1979 Porsche Coupe*, 709 F2d at 1427, citing *One 1977 Cadillac Coupe DeVille*, 644 F2d at 503.
98 See, for example, *United States v 1990 Toyota 4Runner*, 9 F3d 651, 653-54 (7th Cir 1993).
99 The Southern District of New York discussed the difficulty of defining “facilitation”:
One interpretation of "facilitation" would encompass any activity making the prohibited conduct less difficult, or more free from obstruction or hindrance.\textsuperscript{100} Other courts, however, have pointed out that under such a broad definition, basics of life such as food and clothing could be considered "facilitating."\textsuperscript{101} This difficulty in adequately defining "facilitation" has led the courts to try various standards in applying Section 881(a)(4).

The names given the various approaches are largely irrelevant;\textsuperscript{102} the important distinctions lie in the reasoning the courts actually employ in applying the standards. Courts professing to apply the substantial connection test, yet following the reasoning of the "in any manner" test, have blurred the practical distinctions between the two;\textsuperscript{103} indeed, no distinction separates the tests if the threshold for substantial connection is so low that any connection is "substantial."\textsuperscript{104} Conversely, courts applying the "in any manner" standard have recognized practical and constitutional limitations to such an interpretation, and these limitations could be considered a form of a "substantial connection" requirement.\textsuperscript{105}

The essential difference between the approaches, however named, is the actual causal nexus required for forfeiture and the manner of determining this nexus.\textsuperscript{106} The more tenuous the

\textsuperscript{100} See United States v One 1977 Lincoln Mark V. Coupe, 643 F2d 154, 157 (3d Cir 1981).

\textsuperscript{101} Accord id (stating that "the distinction between a 'substantial connection' test and the 'in any manner' test... is blurry at best").

\textsuperscript{102} See United States v One Parcel of Real Estate Known as 916 Douglas Avenue, 903 F2d 490, 494 (7th Cir 1990) (stating that "although the Fourth Circuit has adopted a 'substantial connection' test, the differences between this approach and our own ['in any manner test'] appear largely to be semantic rather than practical").

\textsuperscript{103} See, for example, United States v One 1984 Cadillac, 888 F2d 1133, 1136 (6th Cir 1989); United States v One 1979 Porsche Coupe, 709 F2d 1424, 1426-27 (11th Cir 1983); United States v One 1987 Ford F-350 4x4 Pickup, 739 F Supp 554, 558-59 (D Kan 1990).

\textsuperscript{104} See Toyota 4Runner, 9 F3d at 653-54 (recognizing that the connecting "chain" between the item and the transaction can be "too long"). The necessity of a shorter chain could be considered, in effect, a "substantial connection" requirement.

\textsuperscript{105} Contrast Toyota 4Runner, 9 F3d at 653-54, with Datsun, 378 F Supp at 1206, with United States v One 1974 Cadillac Eldorado Sedan, 548 F2d 421, 426-27 (2d Cir 1977), with United States v One 1976 Ford F-150 Pick-Up, 769 F2d 525, 527-28 (8th Cir 1988),
connection allowed, the more likely it is that all vehicles used in the drug trade will be forfeited. A more tenuous connection, however, also increases the chance that other vehicles, not necessarily tools of the trade, may fall within the broad grasp of the statute.

Under any interpretation, the scope of Section 881(a)(4) cannot extend beyond constitutional boundaries. The Due Process Clause protects individuals from forfeiture of their property without due process of law, ensuring that the government cannot arbitrarily or indiscriminately confiscate property. For forfeiture to comport with constitutional standards, some particularized connection is necessary. In applying due process analysis to real estate forfeiture proceedings, the courts have balanced three considerations: the property interest at stake; the risk of erroneous deprivation and the probable value of additional safeguards; and the government's interest, including any burdens that additional procedures may entail.

Other constitutional protections further limit the scope of civil forfeiture. For example, the Supreme Court recently held that the Eighth Amendment's Excessive Fines Clause applies to Section 881(a)(4) forfeiture proceedings, noting that the alleged remedial goals of the statute do not exclude it from constitutional review.

While the "in any manner" standard does not necessarily violate constitutional requirements, an expansive literal interpretation could violate the Constitution. At some level, almost all of a person's possessions "facilitate" that person's conscious actions in some manner, though the facilitation may be extremely tenuous. Judge Cudahy of the Seventh Circuit hypothesized

with United States v One 1972 Chevrolet Corvette, 625 F2d 1026, 1028-30 (1st Cir 1980).

107 The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law." US Const, Amend V. "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment [due process] purposes." United States v United States Coin & Currency, 401 US 715, 718 (1971), quoting Boyd v United States, 116 US 616, 634 (1886) (emphasis in original).

108 United States v Premises and Real Property at 4492 S Livonia Road, 889 F2d 1258, 1264 (2d Cir 1989), citing Mathews v Eldridge, 424 US 319, 335 (1976).

109 See Austin v United States, 113 S Ct 2801, 2812 (1993); United States v Lasanta, 978 F2d 1300, 1305 (2d Cir 1992) (holding that Fourth Amendment protections against warrantless searches and seizures applied in civil forfeiture settings).

110 Austin, 113 S Ct at 2811-12.

111 See Toyota 4Runner, 9 F3d at 653 (observing that groceries and clothing can be considered "facilitating").

112 For example, a television show may have provided inspiration for the transaction;
that without some requirement of a "closer and clearer nexus between the drug transaction and the forfeited property," merely thinking about a drug transaction while driving a car might subject the car to forfeiture. The "in any manner" test can easily degenerate into a "but for" causation test; a "but for" causation test should not serve as the criterion for determining facilitation because such a test removes from the statute the requirement that the car be used, or intended for use, in specific ways.

The potential degeneration of the "in any manner" standard into "but for" causation also poses possible constitutional problems. Strict "but for" causation would encompass many vehicles so tenuously connected that such a standard would violate constitutional due process; the risk of arbitrary forfeiture would substantially outweigh any governmental interest in forfeiture. Furthermore, the practically limitless nature of "but for" causation might violate the Excessive Fines Clause as well. As the Second Circuit stated:

While Congress may have intended civil forfeiture to be "a powerful weapon in the war on drugs," it would, indeed, be a Pyrrhic victory for the country, if the government's relentless and imaginative use of that weapon were to leave the Constitution itself a casualty.

III. AN INTENT-FOCUSED APPROACH TO DETERMINING THE SCOPE OF SECTION 881(A)(4)

One possible means to alleviate the current judicial difficulties in applying Section 881(a)(4) would be to institute an intent-based standard. This test would essentially impart the intent of the vehicle operator to the vehicle. The intent of the vehicle operator would serve as the nexus for forfeiture. This proposed test would ensure the proper nexus in each individual case by examining the particular facts of each case, rather than attempting to draw arbitrary generalizations as current courts have done. Thus this approach would avoid any constitutional infirmity. Furthermore, an intent-focused standard properly recognizes the quasi-

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\[\text{a stereo may have placed a person in the proper mood to best accomplish the deal; and a microwave may have contributed to the necessary nourishment and energy required to carry out the act. See} \text{Toyota 4Runner}, 9 F3d at 653; \text{Datsun, 378 F Supp at 1206.}\]

\[\text{\text{\textsuperscript{13} Toyota 4Runner, 9 F3d at 655 (Cudahy concurring).}}\]

\[\text{\text{\textsuperscript{14} Lasanta, 978 F2d at 1305 (citations omitted).}}\]
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criminal nature of civil forfeiture by incorporating intent into the forfeiture determination. An intent-based standard fulfills the intent of Congress to deter drug dealers and deprive them of the tools of their trade while maintaining the necessary protections for those individuals incidentally and “unintentionally” snared in the forfeiture net.

A. Incorporating Intent as a Determinative Factor in Forfeiture

Regardless of how facilitation is defined, clearly some nexus between the vehicle and the illegal transaction must exist for facilitation to have occurred under Section 881(a)(4). The courts have held that certain uses of a vehicle in connection with an illegal drug transaction are clearly facilitating. For example, facilitating uses include use of the vehicle to transport the contraband; use of the vehicle as a storage site for the contraband; and use of the vehicle as the site of the transaction. However, where such obvious and direct facilitation is not present, the courts should scrutinize the intent of the party using the vehicle to determine whether facilitation has occurred.

A case-by-case, intent-focused analysis avoids an arbitrary definition of facilitation that does not refer to the particular facts of a case. The current approaches generalize as to whether certain uses of a vehicle, such as commuting to a drug negotiation, do or do not constitute facilitation under Section 881(a)(4). Unfortunately, the approaches ignore the subjective nature of facilitation. Courts have recognized that facilitation is a question of degree, and the subjective intent of the vehicle operator should be crucial to the determination. Similar uses may not be equally facilitating because the intent of the operators may differ.

115 See United States v 1990 Toyota 4Runner, 9 F3d 651, 653 (7th Cir 1993); United States v One Parcel of Real Estate Known as 916 Douglas Avenue, 903 F2d 490, 493-94 (7th Cir 1990); United States v One 1976 Ford F-150 Pick-Up, 769 F2d 525, 527 (8th Cir 1988); United States v One 1972 Chevrolet Corvette, 625 F2d 1026, 1028-30 (1st Cir 1980); United States v One 1974 Cadillac Eldorado Sedan, 548 F2d 525, 527 (2d Cir 1977); United States v One 1972 Datsun, 378 F Supp 1200, 1206 (D NH 1972).

116 See Datsun, 378 F Supp at 1202 (“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 transacting any portion of a sale is sufficient to subject the vehicle to forfeiture.”) (citations omitted). See also United States v One 1977 Cadillac Coupe DeVille, 644 F2d 500, 503 (5th Cir 1981) (holding that even under 49 USC § 781, conveyances used to house the transaction itself or to transport the contraband were facilitating).

117 See United States v One Dodge Coupe, 43 F Supp 60, 61 (S D NY 1942). See also United States v One 1971 Chevrolet Corvette Automobile, 496 F2d 210, 212 (5th Cir 1974).
Section 881(a)(4) states that vehicles “intended for use . . . to facilitate” an illegal drug transaction are subject to forfeiture, thus denoting intent as a criterion for forfeiture. Courts have recognized that in some cases, actual physical use may be secondary to intent. Moreover, the language of Section 881(a)(4) literally requires only an intent to use the vehicle for an illicit purpose. In cases in which it is difficult, if not impossible, to determine whether facilitation actually occurred, the propriety of forfeiture should turn on the intended use of the vehicle.

Under the proposed intent standard, the key inquiry is whether the vehicle was intended to be used in advancing the illegal transaction. If the vehicle was intended for such a purpose, then the vehicle should be subject to forfeiture under Section 881(a)(4). Furthermore, where a court finds an intent to use the vehicle to facilitate, facilitation can be presumed. In other words, the intent of the owner can serve as the “connection” between the vehicle and the illegal transaction, even where such a nexus might not be readily apparent from the objective facts.

Of course, at some level, any use of a vehicle is intentional. However, the inquiry under this proposed test focuses on the planning stage of the transaction. For example, if the plan to travel to an illegal drug transaction required the use of an automobile, then that automobile would have been intentionally used and thus would be subject to forfeiture. By contrast, if no plan to use the vehicle in an illegal drug transaction existed, but rather a spontaneous drug negotiation occurred, the vehicle would not be subject to forfeiture.

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118 Courts have focused on the intent phrase of the statute in cases involving sham drugs and situations in which the intervention of government agents prevents completion of the drug transaction. See, for example, United States v One 1980 Cadillac Eldorado, 705 F2d 862, 862-63 (6th Cir 1983) (per curiam) (concentrating on the intent phrase where sham drugs were involved); United States v One 1972 Chevrolet Corvette, 483 F Supp 629, 632 (D Mass 1980), rev’d, 625 F2d 1026 (1st Cir 1980) (“It is reasonable to infer that Congress included mere ‘intent’ as a pivotal factor permitting forfeiture in order not to discourage government agents’ intervention prior to the completion of a drug transaction.”); United States v One 1945 Douglas Aircraft, 461 F Supp 324, 325 (W D Mo 1978) (scrutinizing the intent phrase of the statute in a case where a plane was intended to be used to transport marijuana).

119 See One 1980 Cadillac Eldorado, 705 F2d at 863. See also note 11 and accompanying text.

120 See note 16 and accompanying text.

121 This situation is analogous to false advertising cases where, if an intent to confuse exists, confusion is presumed. See McNeilab, Inc. v American Home Products, 501 F Supp 517, 529-30 (S D NY 1980). See also Resource Developers, Inc. v Statue of Liberty-Ellis Island Foundation, 926 F2d 134, 140 (2d Cir 1991).

122 This concept extends to substitute vehicles that replace the original vehicle intended to be used. Such substitute vehicles have the same “intent” as the ones they replace.
vehicle was incidentally involved, then the operator of the vehicle would lack the requisite intent, and thus the vehicle would not be subject to forfeiture.\textsuperscript{123}

The determination of intent under this proposed test should focus on whether the use of the vehicle was designed and not merely fortuitous. Planned or designed use would indicate a premeditated, particularized connection between the vehicle and the transaction that would satisfy even the most stringent "substantial connection" test. On the other hand, an unplanned, fortuitous involvement of the vehicle in the drug transaction would suggest that any facilitation provided was unintentional and incidental, and that the vehicle was not significantly linked to the transaction. In such a situation, the balance should weigh strongly against forfeiture of the vehicle, unless the vehicle actually transported the drugs or performed some other integral task in the transaction constituting facilitation even in the absence of intent.

This proposed intent-based approach to Section 881(a)(4) is similar to the business/pleasure distinction applied by the Seventh Circuit.\textsuperscript{124} That distinction, which subjects only a drug dealer's "business" vehicles to forfeiture, implicitly turns on intent. Indeed, no clear distinction between drug business tools and personal items can exist without reference to intent. As Judge Cudahy recognized in his concurrence in \textit{Toyota 4Runner}, a vehicle does not inherently possess a "business" or "pleasure" quality.\textsuperscript{125} Instead, the classification of a vehicle as a business or pleasure item hinges upon the intended use of the vehicle.

B. The Quasi-Criminal Nature of Section 881(a)(4) Forfeiture

Courts have recognized that civil forfeiture, "though technically a civil proceeding, is in substance and effect a criminal one."\textsuperscript{126} While civil forfeiture does not require an underlying

\textsuperscript{123} Under this intent-based inquiry, the fact that a particular vehicle is not unique, or that another vehicle could have performed the task, does not render the use of the vehicle unintentional. See \textit{Toyota 4Runner}, 9 F3d at 652-53. Indeed, forfeiture of only indispensable vehicles would eviscerate the statute and thwart the congressional intent to deprive drug dealers of all the tools of their trade, not only the indispensable ones. See id at 653 (noting the impossibility of proving that the drug dealer could not have used a rental car or public transportation instead of his own car).

\textsuperscript{124} See \textit{Toyota 4Runner}, 9 F3d at 653-54.

\textsuperscript{125} Id at 655 (Cudahy concurring).

\textsuperscript{126} \textit{Boyd v United States}, 116 US 616, 634 (1886).
criminal conviction, it is premised on an illegal act that requires criminal intent. Forfeiture is in effect a punitive monetary fine for the crime. The Supreme Court has acknowledged the criminal nature of Section 881(a)(4), and the statute itself, unlike traditional forfeiture statutes, expressly provides for an "innocent owner" defense, an exemption which focuses on the owner's culpability.

Criminal cases generally require intent, or mens rea, for conviction. Thus, in accord with the quasi-criminal nature of the statute, facilitation should rarely be found in the absence of intent. In effect, a mens rea element should be factored into Section 881(a)(4). Of course, the vehicle itself is incapable of mens rea, but the operator's intent with regard to the vehicle can serve as a proxy for the vehicle's intent.

This intent-based test for forfeiture draws support from the "innocent owner" exception in the statute. The "innocent owner" exception recognizes the inequity of seizing a vehicle where the owner lacks culpability. Because the vehicle itself is accused of wrongdoing in these cases, the innocent owner defense essentially imputes the owner's innocence to the vehicle. Similar reasoning would allow the innocent intentions of the vehicle operator at the time of operation to protect the vehicle from forfeiture.

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129 Austin, 113 S Ct at 2810-12.
130 Id.
132 Mens rea is defined as "a guilty mind; a guilty or wrongful purpose; a criminal intent." Black's Law Dictionary 986 (West, 6th ed 1990).
133 This use of intent comports with the legal fiction that the vehicle itself is the wrongdoer. Because the proceeding is targeted against the vehicle itself on account of its "wrongdoing," the vehicle should have recourse to the defense that it lacked the mens rea for the wrongdoing. The driver's intent at the start of the trip can be imparted to the vehicle and serve as the vehicle's intent. If the driver planned for the vehicle to serve a guilty purpose, then the vehicle should be subject to forfeiture because it now has a "guilty mind." On the other hand, the vehicle should not be subject to seizure if it was used innocently, in an undesigned or fortuitous manner. An intent-focused standard extends to vehicles the notion that without guilty intentions, there is no crime and consequently no punishment.
134 See 21 USC § 881(a)(4)(C).
C. Congressional Intent and Public Policy Rationales

The specific congressional aim of Section 881 was to deprive drug dealers of the tools of their trade. An intent-based standard achieves this goal because drug traffickers will almost always have the requisite illicit intent to satisfy the proposed test. It is inconceivable that a career drug trafficker would choose the vehicles used in his business, the “tools of his trade,” without deliberate design. Only unintentionally used vehicles, which cannot be considered “tools of the drug trafficker,” are protected from forfeiture by the intent-based test.

An intent-based standard for civil forfeiture promotes the policy reasons behind civil forfeiture: deterring drug dealers and depriving them of their resources. Drug dealers would have few, if any, intent-based defenses because they would hardly be able to demonstrate that no “plan” motivated their repeated illegal activities, and certainly any plan would include choice of transportation. A drug dealer would not be able to claim unintentional selection of an automobile for commuting to drug transactions when such transactions are his intended goal. Because the scope of forfeiture as it relates to drug dealers would resemble current standards, the deterrent and practical effects on drug dealers would not be weakened by an intent-based standard.

On the other hand, the first-time, or spontaneous, drug user may receive greater protection under this intent-based test. Individuals who do not actively seek out drug transactions, but instead purchase impulsively, would enjoy some degree of protection from forfeiture because their vehicles might lack the requisite intent if the transaction arose spontaneously. In this respect, an intent-based standard may not be as wide-reaching as the current standards, especially in comparison to the “in any manner” test. The congressional intent of the statute, however, was to deter and attack drug kingpins, not the infrequent im-

135 United States v 1990 Toyota 4Runner, 9 F3d 651, 653 (7th Cir 1993).
136 See notes 5-6 and accompanying text.
137 See Toyota 4Runner, 9 F3d at 653-54 (examining the business/pleasure distinction).
138 The protection accorded the impulse buyer would be very limited; regardless of the level of intent or lack thereof, an intent-focused standard does not protect vehicles directly used in conducting the transaction. For example, a vehicle used as the site of the transaction or one used to store the illicit drugs would not be protected.
139 See Toyota 4Runner, 9 F3d at 653. See also Austin v United States, 113 S Ct 2801, 2811 (1993); note 6 and accompanying text.
pulse buyer. Thus, the potential additional protection accorded to infrequent users does not thwart congressional intent.\footnote{See United States v One 1976 Ford F-150 Pick-Up, 769 F2d 525, 527 (8th Cir 1988); United States v One 1972 Chevrolet Corvette, 625 F2d 1026, 1030 (1st Cir 1980) (noting that Congress did not intend for “minimal involvement to trigger forfeiture”).}

An intent-focused reading of the statute also avoids potential due process pitfalls. Focusing on the wrongdoer’s subjective intent would ensure a particularized connection between the vehicle and the illegal transaction, thereby minimizing the possibility of erroneous or arbitrary forfeiture. An intent-focused standard thus would incorporate the necessary constitutional protections without diminishing the effectiveness of the statute with regard to the drug dealers who are its true targets.

D. Application of an Intent-Focused Standard

Under an intent-focused reading of Section 881(a)(4), the use of a vehicle to transport parties to the scene of a drug transaction would subject the vehicle to forfeiture if: (1) the vehicle directly facilitated the transaction—for example, by transporting or storing the drugs or by serving as the site of the transaction itself; or (2) the vehicle was a planned part of the transaction. As a practical matter, vehicles driven by drug dealers to transactions are planned parts of the illegal activity and hence subject to forfeiture. However, a vehicle that is merely fortuitously involved in a drug transaction should remain beyond the scope of Section 881(a)(4).\footnote{See United States v One Parcel of Real Estate Known as 916 Douglas Avenue, 903 F2d 490, 494 (7th Cir 1990) (holding that even under the “in any manner” test, property which is merely “fortuitously” involved is exempted from forfeiture); United States v $10,000 US Currency, 521 F Supp 1253, 1256 (N D Ill 1981).}

Scenarios have arisen where the use of a particular automobile could be considered unintended. In \textit{United States v 1971 Chevrolet Corvette Automobile},\footnote{496 F2d 210 (5th Cir 1974).} for example, the party drove the vehicle in question to his relative’s house, switched vehicles there for some unknown reason, and subsequently drove to the transaction in a Ford.\footnote{Id at 211.} The current approaches require an arbitrary determination as to whether the first of two vehicles used in reaching the location of a drug negotiation has a sufficient nexus to the transaction to be considered facilitating. However, the intent-focused approach would recognize that the intent behind the use of the first car and the reason for the switch should
properly determine forfeiture in this case. Under an intent-based standard, this same factual situation might result in forfeiture in a case where the switch was made as part of a plan to conceal the party's movements, yet forfeiture might not result in another case where the first car served a merely incidental purpose as an arbitrary mode of transportation prior to the actual planned transaction.144

In application, an intent-focused standard would primarily provide additional protection to vehicles that are fortuitously used in drug transactions,145 usually those involving first-time or infrequent drug users. For example, suppose Jane Doe drives her car to a pawn shop, intending only to pawn her watch, but while in the shop the store owner solicits her to engage in a future drug transaction. Assuming Jane could prove that she lacked illegal intentions in driving the car to the shop,146 this single use of the vehicle to commute to and from the pawn shop would not subject the vehicle to forfeiture under an intent-based standard.147 By contrast, under many of the current definitions of facilitation—for example, the “in any manner” test, or a broad application of the substantial connection test—courts would determine that, because commuting to the scene of a drug transaction constitutes facilitation, the car should be forfeited. Such a determination unfortunately ignores the fact that the vehicle's involvement in the drug transaction was unintentional and that it could hardly be considered a tool of the drug trade.

Under an intent-based test, no distinction would be made between the transport of the proceeds of the illegal transaction and antecedent actions.148 The timing of the acts is inconsequential where the requisite intent is present.149 The proceeds are a part of the transaction, and the intentional transport of the proceeds clearly indicates an intent to facilitate the transac-

144 See United States v One Dodge Coupe, 43 F Supp 60, 62 (S D NY 1942) (finding that the first of two cars used was subject to forfeiture because of the "inescapable inference that the meeting [of the cars] . . . was not accidental but prearranged").
146 Jane could prove that she did not go to the store intending to participate in a drug transaction by demonstrating, through witness testimony or circumstantial evidence, that she was unaware that the store owner was a drug dealer.
147 However, after the first visit to the shop, Jane now knows that the store owner is a drug dealer, and any subsequent trips to the shop during which a drug transaction is arranged or conducted would likely be considered intentional and subject Jane's commuting vehicle to forfeiture.
148 Contrast One 1972 Chevrolet Corvette, 625 F2d at 1029.
149 See Toyota 4Runner, 9 F3d at 654.
The use of a vehicle to transport the proceeds is almost always an intentional, and often crucial, part of the overall conspiracy. It is illogical to consider the transaction "complete" upon delivery of the contraband, and a tremendous loophole in the statute would exist if a court were to hold that the distribution of proceeds from the drug transaction does not constitute part of the entire transaction.

E. Burden of Proof

In a forfeiture action, the government must only establish that "probable cause" exists to believe that the vehicle subject to forfeiture was used to aid the drug transaction. The probable cause standard in actions under Section 881(a)(4) is whether there is "a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion." Once the government establishes probable cause, the owner of the vehicle has the burden of proving by a preponderance of the evidence that the vehicle was not used in the illegal drug transaction.

The proposed intent-based standard would not affect the burdens of proof. Under an intent-based standard, the showing of probable cause could easily be met by circumstantial or direct evidence giving rise to a reasonable belief that the vehicle either directly facilitated, or was intended to facilitate, the illegal transaction. For example, the use of a vehicle to commute to the scene of an illegal drug transaction or negotiation would strongly evidence "intent" to utilize the vehicle in a facilitating manner.

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150 See id ("[S]urely the getaway driver in a robbery facilitates the robbery even though his work begins when the robbery is complete.").

151 Id.

152 "In all suits or actions . . . brought for the forfeiture of any vessel [or] vehicle . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant; . . . Provided, That probable cause shall be first shown for the institution of such suit or action . . . ." 19 USC § 1615 (1988) (emphasis in original). See also United States v One 1979 Porsche Coupe, 709 F2d 1424, 1426 (11th Cir 1983); United States v One 56-Foot Motor Yacht Named Tahuna, 702 F2d 1276, 1282 (9th Cir 1983); United States v One 1983 Pontiac Grand Prix, 604 F Supp 893, 896 (E D Mich 1985); United States v One 1981 Ford F-100 Pickup Truck, 577 F Supp 221, 223 (D Mass 1983).

153 See United States v One 1979 Mercury Cougar XR-7, 666 F2d 228, 230 n 3 (5th Cir 1982), quoting United States v One 1978 Chevrolet Impala, 614 F2d 983 (5th Cir 1980). See also One 56-Foot Motor Yacht Named Tahuna, 702 F2d at 1282.

154 See One 1979 Porsche Coupe, 709 F2d at 1427; One 1983 Pontiac Grand Prix, 604 F Supp at 896.

155 See One 1976 Ford F-150 Pick-Up, 769 F2d at 526 ("The government's initial burden . . . may be satisfied by circumstantial evidence.").
giving the government probable cause to institute forfeiture proceedings under Section 881(a)(4). The burden shifts to the owner to prove lack of facilitation or intent to facilitate. Under an intent-focused standard, the owner could satisfy this burden by proving her "innocent" intentions with regard to the vehicle. Allocating this burden to the owner is especially appropriate because only the owner knows her own intentions. Because the owner must carry this burden, guilty vehicles cannot escape forfeiture merely on the basis of equivocal evidence; rather, the owner must make an affirmative showing of innocence.

While the subjectivity of an intent-focused standard increases the difficulty of administering the test because of the individualized nature of proof, the courts have proven themselves well-equipped to handle intent determinations in criminal cases. More importantly, an intent-based system provides greater guarantees of fairness and due process than the arbitrary categorization of current approaches. The subjectivity of intent allows justice to be meted out more equitably on an individual level, not on the basis of arbitrary distinctions.

CONCLUSION

Civil forfeiture under Section 881(a)(4) requires that some nexus exist between the forfeited vehicle and the illegal drug activity. The current approaches to Section 881(a)(4) attempt to determine the required nexus through arbitrary factual distinctions, resulting in inconsistent holdings. While certain uses of a vehicle in connection with an illegal drug transaction are indisputably facilitating—for instance, the use of the vehicle as a storage site for the contraband or the use of the vehicle as the site of the transaction—in many cases such direct facilitation is not present. In these more complex cases, courts should look to the intent of the party using the vehicle to determine whether the vehicle "facilitated" the crime.

156 In the pawn shop scenario, the use of a vehicle to commute to an illegal transaction would constitute probable cause that it facilitated the transaction, and Jane would bear the burden of proving that she did not drive to the shop intending to participate in a drug transaction.

157 See One 1979 Porsche Coupe, 709 F2d at 1427; One 1983 Pontiac Gran Prix, 604 F Supp at 896.

158 Circumstantial evidence and witness testimony can be used to help discern intent. For example, a "unique" vehicle with special characteristics, such as hidden compartments for smuggling, is clearly intended to facilitate illegal transactions.
Facilitation is not readily generalized, and an intent-focused view avoids an arbitrary definition of facilitation without reference to the circumstances of the particular case. An intent-based interpretation is suggested by the literal language of the statute itself. Concerns of individual justice and due process also require that only vehicles intended for use in connection with an illegal transaction be subject to forfeiture.

An intent-based standard properly balances the individual’s constitutional rights with Congress’s intention to crack down on the tools of the drug trade. Furthermore, this standard recognizes the quasi-criminal nature of Section 881(a)(4) by incorporating intent, or *mens rea*, in the forfeiture determination. Through an intent-focused standard, vehicles that are merely fortuitously connected to drug transactions are spared while those intended as tools of the illegal drug trade remain subject to forfeiture.