Book Notes

The Dangers of Deliberation

Democracy and Disagreement. By Amy Gutmann* & Dennis Thompson.** *Cambridge: Harvard University Press*, 1996. Pp. viii, 422. $27.95.

I

In *Democracy and Disagreement*, Amy Gutmann and Dennis Thompson offer a lucid brief for deliberative democracy, a hot topic in political and legal theory today.[1] Deliberative democracy seeks to synthesize two great norms: that laws should protect individuals' basic rights, and that citizens should rule themselves.[2] The authors argue that to achieve both goals, democracy must give moral reasoning a central place, and they elaborate substantive and procedural principles for such reasoning. Gutmann and Thompson show how citizens committed to these principles might quiet the discordant arguments within American politics over issues like abortion and welfare policy.

Democracy and Disagreement covers vast terrain with great rigor, but its program has costs and risks that the authors do not fully acknowledge. Gutmann and Thompson would make American life more deliberative only by excluding certain forms of life that now flourish. And they might do this without better protecting basic rights; reflection on everyday politics suggests that the security of liberal principles may sometimes require precisely the inflexible commitments and polemical arguments that the authors condemn. Gutmann and Thompson have little to say to such empirical concerns. Although both authors have often applied the lessons of theory to practice[3] and again do so here, *Democracy and Disagreement* is, for all its merits, political philosophy largely aloof from politics.

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1. *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 296–302 (William Rehg trans., 1996) (placing "deliberative process" at center of democracy); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 133–45 (1993) (arguing that Constitution should be interpreted to safeguard "deliberative democracy").

2. *See* HABERMAS, *supra* note 1, at 99–104; SUNSTEIN, *supra* note 1, at 135.

3. *See, e.g.*, AMY GUTMANN, DEMOCRATIC EDUCATION (1987); DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE (1987).

II

Gutmann and Thompson's deliberative democracy is best understood as an intensification of one strand within John Rawls's political liberalism.[4] Beginning with the fact of moral disagreement (p. 1),[5] the authors aim to develop a conception of democracy acceptable to "people who are mutually motivated to find fair terms of social cooperation among political equals" (p. 26).[6] Advancing this Rawlsian ideal of mutual justification amid diversity further than Rawls himself, Gutmann and Thompson conceive more exacting procedural restraints and less severe substantive limits than Rawls's own.

While accepting Rawls's view that a justifiable political process must protect basic rights, the authors criticize Rawls for underestimating the role that morally grounded argument—"deliberation"—must play in securing those rights and in achieving a fair system of cooperation (pp. 34–39). Rawls's "public reason," which specifies the moral and empirical constraints within which citizens may fairly discuss constitutional essentials,[7] does not apply to arguments concerning most social and economic arrangements.[8] Gutmann and Thompson argue that Rawls's project therefore fails on its own terms, because without public reason in debates on all subjects, rights and reciprocity will be at the mercy of interest group politics (pp. 36, 146–47).

The authors similarly criticize Ronald Dworkin for suggesting that courts can serve as a democracy's chief "forum of principle" (p. 45 & n.70).[9] To achieve justifiable results, Gutmann and Thompson say, legislatures must deliberate for precisely the same reasons as courts; indeed, if most citizens only haggle with one another, they cannot expect judges to do otherwise (p. 46). Thus, while the liberalism of Rawls or Dworkin cabins the demand for reciprocal justification, deliberative democracy extends it to virtually all public discussions[10] and institutions.

Gutmann and Thompson adduce three procedural principles of public reason. "Reciprocity" requires that citizens argue in terms that are disinterested, acceptable from different points of view, and empirically "consistent with relatively reliable methods of inquiry" (pp. 55–59). "Publicity" suggests that citizens and legislators act on reasons and information that are public (p. 95). And "accountability" demands that legislators be able to justify their actions

4. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) (arguing that overlapping consensus of different doctrines can sustain rights-based liberalism).

5. *Cf. id.* at xvi (treating reasonable pluralism as "the serious problem" for political liberalism).

6. *Cf. id.* at 217 (expressing same idea).

7. *See id.* at 224.

8. *See id.* at 214–15.

9. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 70–71 (1985).

10. In ideal circumstances, the authors do allow purely prudential bargaining, but only if "legislators and citizens properly consider the moral merits of the whole bargain" (p. 72).

not only to their electoral constituents, but also to their "moral constituents," who include persons in other districts and nations (pp. 144–45).

In sustaining reasonable debate, citizens exhibit certain virtues. Expressing moral positions consistently and not only expediently, they show "civic integrity" (p. 81). Recognizing that reasonable citizens may reasonably disagree, they eschew the "moral dogmatism" from which they might attack their opponents' motives (p. 84). Finally, they are "open-minded," willing to change their positions in response to new arguments (p. 83).

Alongside the three procedural principles, the authors present three substantive values that resemble familiar liberal-egalitarian principles of justice. "Basic liberty" protects the "physical and mental integrity of persons" (pp. 203–04). "Basic opportunity" guarantees that all citizens can secure a social minimum (p. 217).[11] "Fair opportunity" requires that nonbasic goods, like desirable jobs, be distributed based on qualification (p. 217).

Democracy and Disagreement sketches how citizens committed to the six principles of deliberative democracy would reason together about controversial problems. On issues like abortion (pp. 86–87), the authors recognize that moral disagreements will persist even after deliberation, and they seek only to sustain mutual respect among citizens. On other subjects, the authors maintain that deliberation would lead to a specific outcome. In education, the state must teach children how to exercise the public reason of a deliberative democracy, even over parents' religious objections (pp. 63–69). On welfare, the authors seek a middle ground, arguing that the state should require parents to work, but only if it makes work available and guarantees child support, a living wage, and adequate health and child care (pp. 291–300).

III

The liberal tradition from within which Gutmann and Thompson write teaches that social diversity is a great good.[12] Rhetorically, the authors embrace this value (pp. 25, 361).[13] Substantively, their stringent procedures would place a deep strain on common ways of life in at least two respects.

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11. The authors reject Rawls's more exacting and egalitarian "difference principle," *see* RAWLS, *supra* note 4, at 6–7, on the ground that it would strain limited resources in ways that could not be justified to reasonable citizens (pp. 211–16). The authors thus open up more space for democratic deliberation than does Rawls—not because they treat majority rule as a greater intrinsic good, but because they claim to take the ideal of mutual justification more seriously.

12. *See* William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 527 (1995) (describing how liberalisms of Rawls, John Stuart Mill, and Isaiah Berlin cherish diversity).

13. The authors note that their relatively open-ended distributive principles legitimate more social ideals than Rawlsian egalitarianism (p. 216). This may justify a bit more pluralism within the academy, but it does not legitimate new social diversity. The nation is not now struggling to implement the difference principle, and so the notion that the authors secure—that society need not organize itself to improve the lives of the least advantaged—is one that the dominant politics already accepts.

First, while the authors claim to welcome religious citizens to public life (p. 92), the requirements of reciprocity would drive out of debate, and sometimes eliminate entirely, certain religious perspectives that flourish today. The authors' notion of reciprocity leaves little place in deliberation for the expression of orthodox religious views. While reciprocity stresses justification before others, openness to change, and mutually accessible empirical standards, orthodox religiosity may require inflexible commitment to an external authority or to faith achieved through revelation.[14] To participate in deliberation, many religious citizens would have to split their public and private selves (p. 93), checking their personal beliefs at the door of the public forum. Many persons of faith do not and would not do this.[15] As the authors' prescription for state-sponsored civic education makes clear, deliberative democracy seeks to put an end to religious forms of life that do not produce citizens able and willing to deliberate. This view places it at odds with other forms of liberalism,[16] any number of Americans, and the U.S. Supreme Court.[17]

Because of its commitment to universal justification (p. 361), deliberative democracy also has no place for elected officials who simply "bring home the bacon," or for the kinds of people who elect them to do so (pp. 146, 227). While moderating such practices is surely desirable, it is hard to see how a deliberative democracy could do away with them without also asking citizens to commit themselves to much less diverse private lives. Most Americans today are intensely dedicated to their families, their businesses, or their communities. These partial commitments constitute the diversity of American life, but they also limit the possibilities for public-spiritedness.[18] People caught up in their children's schooling or their choral group's singing likely cannot expand their political horizons to weigh evenly the needs of people across the nation, much less the globe. But citizens who became more engaged in public life surely would not have as much time or inclination for those myriad private pursuits. Here once more, a fuller commitment to deliberation has costs for diversity.

Gutmann and Thompson argue that more of their brand of deliberation—and, implicitly, less diversity—would better secure basic rights. But this is just an assumption. Recent political experience suggests that rights may sometimes receive support from the nondeliberative elements of our culture that Gutmann and Thompson would silence. At a minimum, this experience raises empirical questions to which the authors only presume answers.

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14. *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 44 (1991).

15. *Cf. id.* at 173–287 (describing religiously rooted engagements in public life).

16. *See* Galston, *supra* note 12, at 524 (arguing that liberal society does not require critical reflection by all citizens).

17. *See* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that under Free Exercise Clause, state could not require Amish parents to send their children to high school).

18. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 240–50, 305–06 (1991) (describing how "private citizens" lead diverse lives but do not sustain ideal public policies).

Consider welfare. Before 1996, America's welfare system did not require or guarantee work and did not provide adequate health or child care to the working poor.[19] That system was inconsistent with the authors' "basic opportunity" principle. The new welfare law[20] also violates that principle—leaving many of the old problems in place, denying many families support, and making few efforts to assure jobs to parents left without welfare.[21]

Would more deliberation have better secured basic opportunities? The authors convincingly discredit a key argument for the new law—the claim that welfare fosters dependency (pp. 286–88)—and seem to suggest that citizens more committed to deliberation could have done the same. But most citizens lack these two accomplished academicians' skills at sifting evidence. However long our assemblies deliberate, they may just get it wrong. Perhaps this is what happened with welfare, about which our leaders deliberated for years.[22] Having embraced something like the deliberative ideal,[23] President Clinton himself carefully considered the minutiae of the welfare bill.[24] It is hard to imagine public officials deliberating more dutifully about public policy—or reaching a result more clearly unacceptable from the authors' perspective.

Nondeliberative perspectives might have helped. Perhaps the strongest advocates of Gutmann and Thompson's position on welfare over the last two years have been religious leaders, particularly those from Catholic groups.[25] These leaders have often appealed to nondeliberative concepts like "Catholic social teaching" as moral trumps.[26] It is plausible that more arguments of this sort would have driven debate toward the authors' substantive principles. Senator Daniel Patrick Moynihan suggests that public officials embrace welfare reform out of undue confidence in public policy's capacity to improve behavior.[27] Against the rationalism that causes present harm to achieve future

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19. *See* DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 232–35 (1988) (describing defects of old welfare regime).

20. Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub L No 104-193, 110 Stat. 2105 (1996).

21. *See* David T. Ellwood, Editorial, *Welfare Reform in Name Only*, N Y TIMES, July 22, 1996, at A19.

22. *See* Ronald Brownstein, *Welfare Debate Puts Blame for Poverty Mainly on Poor*, L A TIMES, Mar 24, 1995, at A1 (summarizing decades-old debate over welfare policy).

23. *See* William J. Clinton, Remarks at Georgetown University, 32 WEEKLY COMP PRES. DOC 1190 (July 6, 1995) (encouraging national "conversation" that is "flexible" and committed to "reason")

24. *See* Todd S. Purdum, *Clinton Recalls His Promise, Weighs History, and Decides*, N Y TIMES, Aug. 1, 1996, at A1.

25. *See* Robert Scheer, Editorial, *Who is Left to Fight for the Poor?*, L A TIMES, Oct 31, 1995, at B9; Elizabeth Shogren, *Religious Groups Attack GOP Welfare, Medicaid Plans*, L.A TIMES, Nov 9, 1995, at A35.

26. *See, e.g., Filling the Gap, Can Private Institutions Do It? Hearing Before the Subcomm. on Children and Families*, 104th Cong. 5–7 (1996) (statement of Rev. Fred Kammer, President, Catholic Charities USA) (restating "Catholic social teaching" in arguing against welfare bill), Rembert G. Weakland, Editorial, *'Wisconsin Works': Breaking a Covenant*, WASH. POST, July 4, 1996, at A29 (describing "Catholic social teaching" and concluding that welfare law is "patently unjust"); *see also* Shogren, *supra* note 25 (describing statement by interfaith group deploring welfare bill as "unholy")

27. *See* 142 CONG. REC. S9329 (daily ed. Aug. 1, 1996) (statement of Sen Moynihan)

gain, faith-based claims often reinforce norms of compassion. By welcoming these perspectives rather than excluding them, democracy might secure fairer results. We could not know for sure without engaging in a psychologically and historically complex inquiry whose outcome the authors take for granted.[28]

Inflexibility and incivility may sometimes serve basic rights. The authors criticize former Secretary of Health, Education, and Welfare Joseph Califano for stubbornly expressing his position on abortion (p. 84). But as an administrator, not only a citizen, Califano could not have been more open-minded without encouraging his opponents within the nation's vast health bureaucracy to test his resolve and cripple his efforts. The decorous citizens of a deliberative democracy would not charge that Republicans sent President Clinton the welfare bill simply to curry favor with swing voters, or that he signed it for the same reason. Yet the unmasking of hypocrisy might be particularly important for protecting basic rights, to which leaders often proclaim their commitment, and for the poor, who often lack access to the facts to deliberate at Gutmann and Thompson's level. The triumph of kind talk in politics could produce a debate loftier in tone but baser in content.

Finally, deliberative democracy's relentless universalism may disserve individual rights if it asks more of people than they are able to give, alienating rather than inspiring them. Arguably, the American welfare state has failed to sustain citizens' loyalties in part because it has emphasized responsibilities to a uniform but distant bureaucracy, slighting the strong but limited commitments—to neighborhood organizations, for example—that can sustain many services.[29] A theory always unsatisfied with partial perspectives will likely lead to such unsustainable policies. A different approach would seek only to foster what is best in citizens' partial perspectives and to harmonize them for common ends. The authors simply presume that citizens will respond to the universal discourse that deliberative democracy requires.

The commitment to deliberation that Gutmann and Thompson commend to citizens also animates *Democracy and Disagreement*, and this makes it a provocative book. Yet deliberation is not as complete an ideal for politics as it is for political philosophy. The ideal is incomplete for individuals, who often have goals at odds with deliberativeness. And deliberation may also be an incomplete ideal for political discourse, which may depend on nondeliberative values and rhetoric in order to serve individuals. Whatever our politics might gain from heeding *Democracy and Disagreement*, it could lose much as well.

—Robert M. Gordon

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28. Tocqueville famously argued that Americans' religious commitments sustain their liberty by preventing citizens from embracing utopian and destructive social schemes. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 292 (J.P. Mayer ed. & George Lawrence trans., HarperPerennial 1989) (1835).

29. *See* Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 93–94 (1984).

Opposing Forfeiture

A License to Steal: The Forfeiture of Property. By Leonard Levy.* *Chapel Hill: University of North Carolina Press*, 1996. Pp. xi, 272. $29.95.

It is every legal scholar's worst nightmare. What could be worse than writing a book advocating a certain viewpoint on a topic of current debate, only to have the Supreme Court flatly reject your position in the months following publication? This misfortune happened not once, but twice, to Leonard Levy, author of *A License to Steal: The Forfeiture of Property*. Levy argues that current forfeiture practices are both unfair and unconstitutional; within the past year, however, the Supreme Court in both *Bennis v. Michigan*[1] and *United States v. Ursery*[2] upheld forfeiture in the face of constitutional challenges. Although these decisions run counter to Levy's argument, they do not render Levy's work irrelevant. Rather, they underscore the timeliness of Levy's subject and its controversial nature.

Levy's central thesis is that "[l]aw enforcement agencies—federal, state, and local—perpetrate astonishing outrages on owners of private property through forfeitures," in large part because "forfeiture is a seductive source of new revenue for law enforcement agencies" (pp. 1–2). While Levy's criticisms of forfeiture are not altogether new, he provides a detailed history of forfeiture and makes four interesting arguments against forfeiture: that the absurd origins of forfeiture delegitimate its use today; that police officers abuse forfeiture in practice; that many forfeiture laws tread upon the rights of innocent third parties; and that forfeiture violates the Constitution. Levy's argument that forfeiture is abused in practice is compelling, but his other arguments remain unconvincing.

In *A License to Steal*, Levy attempts to explain both historical and modern forfeiture and to describe the serious problems inherent in the practice. Throughout his treatment of the forfeiture issue, Levy ambitiously discusses both civil and criminal forfeiture.[3] Levy devotes much of the book to an in-

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1. 116 S. Ct. 994 (1996) (holding that innocent owner defense not constitutionally mandated in cases of civil forfeiture).

2. 116 S. Ct. 2135 (1996) (holding that civil forfeiture proceeding following criminal sentencing did not violate Double Jeopardy Clause).

3. Criminal forfeiture can take place only after the owner has been convicted of a crime. As Levy describes it: "In a criminal forfeiture case the loss of property follows as a penalty imposed after the conviction of the guilty party. The property need not have a relationship to the crime . . . " (p. 22). In contrast, civil forfeiture employs the legal fiction that the government is actually bringing a case against

depth examination of the history of forfeiture, starting with the Middle Ages.[4] He explains that the legal fiction surrounding civil forfeiture originated with the law of the deodand, which held that an inanimate object that caused a death was tainted and therefore must be forfeited to the king (pp. 8–20). In contrast, criminal forfeiture finds its roots in the king's practice of confiscating the properties of felons and traitors (p. 24). After tracing the development of forfeiture through several centuries, Levy concludes his historical exposition with a section discussing the enactment of modern statutory forfeiture practices.

Following this extensive exploration of the roots of forfeiture, Levy turns his attention to modern practices, vigorously attacking current forfeiture regimes. He argues that forfeiture is improperly implemented, ignores the rights of innocent third parties, and is blatantly unconstitutional. Levy then briefly discusses prospects for reform.[5] He advocates abolishing civil forfeiture, ending the practice of returning the proceeds of forfeiture to law enforcement agencies, and implementing a universal innocent owner defense (pp. 213–17), but he concludes that extensive forfeiture reform may occur only in the distant future (p. 227).

While Levy's frontal attack on forfeiture is thought-provoking, it largely fails because three of the four arguments that Levy invokes are flawed. First, Levy uses his journey through history to demonstrate the senseless origins of forfeiture. Implicit in this discussion is the absurdity of perpetuating a system that attributed evil to an ox, a tree, a boat, and a broadsword (pp. 15–20). But such an argument fails to address the subject on its own terms. The irrational

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the *object* to be forfeited, not the owner. "[I]n a civil forfeiture case the defendant property is somehow connected to the crime regardless of the personal guilt or innocence of its owner" (p. 22).

4. Though perhaps more extended than most, Levy's historical discussion of forfeiture practices is not particularly novel. For good discussions of the history of forfeiture, see *Austin v. United States*, 509 U.S. 602, 611–18 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–86 (1974); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973); Jimmy Gurule, *Introduction: The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 156–59 (1995); and Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 270–80 (1995). Levy's discussion is remarkable primarily for its detailed treatment of the legislative history of modern forfeiture statutes.

5. Levy explains that the Conyers Bill, The Asset Forfeiture Justice Act, H.R. 3347, 103d Cong. (1994) (allowing forfeiture only following criminal conviction, removing financial incentives for law enforcement, and protecting attorney's fees from forfeiture), would "in effect abolish[] civil forfeiture" (p. 213) and describes it as "ideal" (p. 217). He is forced, however, to conclude that it has virtually no chance of passage. Levy also describes the more moderate Hyde Bill, The Civil Asset Forfeiture Reform Act of 1993, H.R. 2417, 103d Cong. (1994) (shifting burden of proof to government, providing counsel for indigents in civil forfeiture cases, and resolving discrepancies in innocent owner defense), but says that it does not go far enough in reforming civil forfeiture (pp. 210–13). Finally, he considers the Department of Justice proposal, The Forfeiture Act of 1994, *quoted in* 4 DOJ ALERT (No. 7) 13 (Apr. 18, 1994) (providing for more onerous innocent owner defense and creating negative inference from assertion of privilege against self-incrimination), a bill Levy considers unconstitutional in a multitude of ways, calling it a veritable "prosecutor's wish list" (p. 225).

origins of forfeiture have only limited relevance in assessing its merits and legality today.

Levy's second antiforfeiture argument is that law enforcement agencies abuse forfeiture practices to collect small fortunes in revenue. According to Levy, "[P]olice become[] dominated by revenue enhancement that benefits them, diverting them from law enforcement for its own sake. Law enforcement becomes subordinated to making money for one's department" (p. 152). Under the practice of equitable sharing, a community receives part of the value of assets it helps seize, so long as that money is spent only on law enforcement (p. 145). Levy claims that equitable sharing exacerbates the potential for abuse at the local level (pp. 149–50). In support, he quotes several agency experts who attest to the importance of equitable sharing (pp. 154–57), refers to a few local police departments that have greatly benefited from forfeiture (pp. 136–37, 144), and cites statistics indicating that forfeiture receipts have skyrocketed since the implementation of the program (pp. 151–52).[6] Perhaps the most compelling evidence offered by Levy is the fact that civil forfeiture is vastly more common than its criminal counterpart. He writes: "[M]ore than three-fourths of the victims of forfeiture are never charged with [a] crime. The state wants their property, not their liberty" (p. x).[7]

Although Levy's point about the potential for abuse by law enforcement agencies is not new,[8] he does succeed in dramatically emphasizing the potential problem and effectively convincing the reader that some law enforcement officers are motivated by improper considerations. By providing primarily anecdotal evidence,[9] however, Levy fails to demonstrate the scope of the problem, and readers are left with little sense of whether these problems are isolated or endemic. Furthermore, he attributes the greater frequency of civil forfeiture solely to an unseemly desire for profit but fails to address other possible causes. Without denying the problem of prosecutorial abuse, others

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6. For instance, Levy notes, "Forfeiture receipts have just about doubled every year from 1985, making the share of state and local law enforcement agencies increase explosively" (p. 151).

7. Levy also points out that the practice of paying informants "as much as 25 percent of the value of assets that are forfeited as a result of tips" (p. 141) leads to perverse and dangerous incentives.

8. For other articles discussing the abuse of forfeiture by law enforcement officers, see Michael F. Alessio, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429, 451–54 (1995); Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994); Sarah Henry, *The Thin Green Line*, 14 CAL. LAW. 46 (Sept. 1994); and Joy Chatman, Note, *Losing the Battle, but Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After* Austin v. United States, 38 ST. LOUIS U. L.J. 739, 745–49 (1994).

9. Levy argues against forfeiture by describing countless tales of (virtually) innocent people who have had their cash (pp. 2–3), homes (p. 128), cars (pp. 128–29), and businesses (pp. 4–5) taken by civil forfeiture. Consider the case of Richard Apfelbaum, who was carrying $9460 on a gambling trip to Las Vegas. Drug Enforcement Administration agents decided that he was behaving suspiciously and asked him to consent to a search. After the agents found Apfelbaum's cash, they confiscated it, and left him with thirty dollars to get home. Apfelbaum contested the forfeiture, but eventually resigned himself to defeat, saying, "'I'm not in a position to spend $10,000 in legal fees trying to get $9,000 back'" (p. 131). These stories have emotional appeal, but they do not substitute for substantive analysis, particularly given that Levy rarely tells the government's side of the story.

have attributed the prevalence of civil forfeiture to less nefarious motives. Some scholars argue that the state initiates civil, rather than criminal, forfeiture proceedings not because the government cannot convict these low-level criminals, but because it desires to take the proceeds of criminal activity away from the upper echelon bad guys—a goal that is radically easier under the relaxed procedural standards of civil forfeiture.[10] Under this vision of forfeiture, the goal is to take away ill-gotten gains, not put people in jail.

Levy's third antiforfeiture argument is that forfeiture, both criminal and civil, fails "to provide adequately for the rights of innocent people" (p. 161). One of the recent Supreme Court cases, *Bennis v. Michigan*,[11] provides a perfect example of the problem Levy (and others)[12] identify. The facts of *Bennis* are simple: A husband and wife co-owned a car in which the husband—without the wife's knowledge or consent—engaged in acts of gross indecency with a prostitute.[13] Following his conviction, the State of Michigan sued to have the car civilly forfeited under state law.[14] Unlike most federal forfeiture statutes, the state law provided no "innocent owner defense," and thus allowed the wife to lose her interest in the car despite the fact that she did not know or consent to its illegal use.[15] The Court upheld the statute, writing, "[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[16] The Court held that an innocent owner defense is not constitutionally required.

Levy argues that the difficulties innocent owners and interested third parties face in regaining their property constitutes a potentially serious policy problem inherent in current forfeiture practices. But he never acknowledges, much less responds to, the arguments against implementing an innocent owner defense. Several groups have argued that requiring owners to be strictly liable for their property helps prevent illegal acts.[17] They note that "many statutes

10. *See* Peter W. Salsich, Note, *A Delicate Balance: Making Criminal Forfeiture a Viable Law Enforcement Tool and Satisfying Due Process After* United States v. James Daniel Good Real Property, 39 ST. LOUIS U. L.J. 585, 593 (1995).

11. 116 S. Ct. 994 (1996).

12. *See, e.g.*, Sandra Guerra, *Family Values?: The Family As an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343 (1996); Jeri Poller, *Government Forfeiture of Collateral: Mortgages and the Innocent Lien Holder Defense*, 112 BANKING L.J. 534, 536–40 (1995); Robert E. Blacher, Comment, *Clearing the Smoke from the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. § 881(7)*, 85 J. CRIM. L. & CRIMINOLOGY 502 (1994); George T. Pappas, Comment, *Civil Forfeiture and Drug Proceeds: The Need to Balance Societal Interests with the Rights of Innocent Owners*, 77 MARQ. L. REV. 856 (1994).

13. *See* 116 S. Ct. at 996.

14. *See* MICH. COMP. LAWS ANN. § 750.338b (West 1987).

15. *See id.* § 600.3815(2).

16. 116 S. Ct. at 998.

17. *See* Brief for Respondent, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729) [hereinafter Brief for Respondent]; Brief of the American Alliance for Rights and Responsibilities et al. as Amici Curiae in Support of Respondent, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729) [hereinafter Brief of American Alliance].

impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."[18] Another expert writes that the effect of such a burden is that owners "must take a more active approach to how [their] property is used, to protect the community and to preclude [their] future exposure to forfeiture."[19] Furthermore, strict liability is common—and accepted—in other areas of the law.[20] After all, if Mr. Bennis had driven the car recklessly and harmed another without his wife's knowledge or consent, she still would have been liable.[21] Unfortunately, Levy never addresses these issues, and instead implies that an innocent owner defense has no critics.

Levy's final antiforfeiture argument is that forfeiture is unconstitutional. He argues that forfeiture violates the First Amendment (because nonobscene books have been forfeited and destroyed) (pp. 177–83), the Fourth Amendment warrant requirement (pp. 185–86), the Fifth Amendment protection against double jeopardy (pp. 186–90), the Sixth Amendment right to counsel (pp. 194–200), the Seventh Amendment right to a jury trial (pp. 200–01), and the Eighth Amendment protection from excessive fines (pp. 201–05). The Supreme Court has agreed that civil forfeiture can be barred on a case-by-case basis by the Eighth Amendment,[22] but has refused to recognize any of the other constitutional arguments made by Levy. The value of Levy's review of these constitutional issues lies not in its novelty,[23] but in the way that it allows even nonlegal readers to grapple with these difficult issues. By digesting the Court's opinions and highlighting the key elements, Levy provides lay readers with accessible versions of the Court's decisions.

The problem is that Levy provides only the bare outlines of the constitutional debate on each issue and leaves the reader with the impression that he has presented only half the story. Levy's discussion of the Sixth Amendment right to counsel (pp. 194–200) illustrates this weakness. The basic

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18. People v. Roby, 18 N.W. 365, 366 (Mich. 1884), *quoted in* Brief for Respondent, *supra* note 17, at 43–44.

19. Brief of American Alliance, *supra* note 17, at 7.

20. *See, e.g.*, Worker's Disability Compensation Act of 1969, MICH. COMP. LAWS ANN. § 418.101 to .171. For a good discussion of statutorily enacted liability without intent, see *Morissette v. United States*, 342 U.S. 246 (1952).

21. *See* MICH. COMP. LAWS ANN. § 257.401 (presuming knowledge and consent of owner when car is driven by immediate family member). For a good discussion of this issue, see Brief for Respondent, *supra* note 17, at 45–47.

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

23. Other scholars have made many of the same constitutional arguments. *See, e.g.*, Todd Barnet & Ivan Fox, *Trampling on the Sixth Amendment: The Continued Threat of Attorney Fee Forfeiture*, 22 OHIO N.U. L. REV. 1 (1995); Mary di Zerega, Austin v. United States*: An Analysis of the Application of the Eighth Amendment to Civil Forfeitures*, 2 GEO. MASON U. L. REV. 127 (1994); Michele Jochner, *The Unjustified Expansion of the Double Jeopardy Doctrine to Civil Asset Forfeiture Proceedings*, 84 ILL. B.J. 70 (1996); Bruno Bier, Comment, *RICO and the First Amendment:* Alexander v. United States, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 369 (1995); William Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309 (1992).

outline of the debate is as follows: Defendants have been prevented from using forfeitable assets to pay attorneys' fees. Those who oppose forfeiture argue that this is a violation of the Sixth Amendment because defendants may not otherwise be able to afford to hire their counsel of choice. The Supreme Court considered this issue in 1989 and concluded that there was no Sixth Amendment violation.[24] Levy criticizes this ruling, but ignores several factors. For instance, he argues that public defenders (an indigent defendant's alternative) are often inexperienced second-raters (p. 195). This does not, however, constitute a Sixth Amendment violation. Furthermore, Levy—and the Supreme Court—recognize that, under the present system, a lawyer who agrees to defend a client whose only funds are subject to forfeiture will not be paid unless he wins an acquittal. Levy argues that this puts the lawyer in the untenable and unethical position of accepting a criminal defense case on a contingency basis (p. 198). He does not mention that the Supreme Court addressed this very problem. Justice White, writing for the majority, noted:

> [T]here is no indication that petitioner, or any other firm, has actually sought to charge a defendant on a contingency basis; rather the claim is that a law firm's prospect of collecting its fee may turn on the outcome at trial. This, however, may often be the case in criminal defense work. Nor is it clear why permitting contingent fees in criminal cases—if that is what the forfeiture statute does—violates a criminal defendant's Sixth Amendment rights.[25]

Levy ignores the Court's dicta on the issue. Instead, he latches onto the Court's pivotal argument in the case—that defendants do not have the right to enjoy the benefits of property that is not theirs (but rather the government's)—and argues that this logic already convicts the defendant. Levy's analysis fails, however, because assets are not forfeited in a criminal context until after trial.[26] Levy's treatment of the Sixth Amendment issue illustrates the lack of depth that unfortunately plagues his examination of the constitutional issues.

Levy's attack on forfeiture in the end succeeds only in part. Levy's arguments about the problems of actually implementing forfeiture are persuasive and suggest that it may be impossible to design a fair forfeiture system. But the one-sidedness of Levy's other arguments renders them unconvincing, and ultimately leaves one wondering how the proforfeiture camp would respond.

—Leslie A. Hakala

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24. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

25. *Id.* at 633 n.10.

26. For more on this issue, see Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 703–17 (1992).