

10-1-2000

Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture

Brant C. Hadaway

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Brant C. Hadaway, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. Miami L. Rev. 81 (2000)
Available at: <https://repository.law.miami.edu/umlr/vol55/iss1/4>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENT

Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture

I. INTRODUCTION

*. . . and we'll live off the fat of the land . . .*¹

In the early morning of August 9, 1999, Mario Paz, a 61-year old Mexican national and grandfather of fourteen, slept quietly with his wife in their house in Compton, a working-class town in the sprawling San Bernardino Valley, east of downtown Los Angeles.² Outside his home, an El Monte police SWAT team shot out both the front and rear door locks, tossed in a “flash-bang” grenade, and stormed inside.³ Apparently awakened by the commotion, and quite probably frightened that he was being robbed, Mr. Paz got up from his bed. What happened next was the subject of constantly changing stories, but officials eventually appeared to agree that Paz was kneeling on the floor at his bedside when one of the SWAT officers entered the bedroom and shot Paz twice in the back.⁴ Paz died shortly thereafter.⁵ Police hurriedly escorted Paz’s wife, clothed only in a towel and underpants, from the house while they secured the scene.⁶

Inside the Paz’s bedroom, police found and seized what they apparently believed, at the time, was the legitimate object of the raid: \$10,000 in cash, which was on Paz’s bed.⁷ Police had recently seized 400

1. JOHN STEINBECK, *OF MICE AND MEN*, 56 (Penguin Books 1993) (1937).

2. Nicholas Riccardi, *FBI Probes Man's Killing in Police Raid*, L.A. TIMES, Aug. 31, 1999, at A1.

3. *Id.*

4. Three alternative stories have emerged from the El Monte police in the aftermath of the Paz shooting. The initial explanation was that the officers believed Paz to be armed. A later explanation stated that the officer saw Paz reaching for a gun. Both of these explanations were hotly disputed by the Paz family. The current explanation states that Paz was reaching towards a drawer which turned out to contain guns. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Paz’s family has stated that Paz had just withdrawn the money from the Tijuana Bank earlier that day.

pounds of marijuana, guns, and \$75,000 in cash at other sites, and made the connection to the Paz home through some telephone bills and other records found at one of those sites.⁸ El Monte Assistant Police Chief Bill Ankeny said that although police had already arrested their narcotics suspect, they went to Paz's home "to further the investigation . . . to find further evidence and proceeds."⁹

Searching for "proceeds" would, to the most casual observer, seem to be a reasonable objective of any drug raid. After all, since it is commonly believed that drug dealing is quite lucrative, it would appear logical to target and seize drug proceeds in order to frustrate the profitability of the trade.¹⁰ Unfortunately, however, law enforcement has become dependent on forfeiture as a revenue generating mechanism, creating a conflict of interest in the way police agencies enforce the law.¹¹ Indeed, forfeiture has become the sole means of fiscal support for various multiple jurisdictional task forces.¹²

For a police department that serves a poor, working class city, the El Monte police are well-equipped and wield an inordinate amount of political power.¹³ Over the last ten years, the department has received about \$4.5 million in forfeiture funds, which it is allowed to keep under federal law.¹⁴ The Paz shooting has raised, among other things, serious concerns about the department's reliance on forfeited assets to support itself, and a number of local officials have voiced concerns that the department may be out of control.¹⁵

The Paz incident was not the first time an innocent man paid with his life for getting in the way of police officers searching for forfeitable assets. In 1992, a multi-agency task force raided the 200-acre Malibu

8. Anne-Marie O'Connor, *No Drug Link to Family in Fatal Raid, Police Say*, L.A. TIMES, Aug. 28, 1999, at A1. The papers, including a driver's license with the Pazes' address, belonged to Chino drug suspect Marcos Beltran Lizarraga, who had once been a neighbor of the Paz family, and who had persuaded the Pazes to allow him to use their home as a mail drop. *Id.*

9. Nicholas Riccardi, Richard Windton, & Joe Mozingo, *Slaying Brings Troubling Scrutiny to El Monte Police Law Enforcement: Tough City Attributes Low Crime Rate to Department. But Critics Say It Has Too Much Power*, L.A. TIMES, Sept. 9, 1999, at A1.

10. That is, of course, assuming *arguendo* that prohibition is the best approach to drug policy.

11. Karen Dillon, *Taking Cash Into Custody Across U.S., Police Dodge State Seizure Laws*, KAN. CITY STAR, May 19, 2000, at A1 available at <http://www.kcstar.com/projects/drugforfeit/new3.htm>.

12. See David E. Kaplan, *A Case Study in Policing for Profit*, U.S. NEWS & WORLD REP. July 10, 2000, at 22-23 available at <http://www.usnews.com/usnews/issue/000710/impact.htm>.

13. Riccardi, et. al., *supra* note 9. "El Monte officers have their own trading cards, a state-of-the-art helicopter, an assault vehicle called the 'peacekeeper' and a five-disc CD changer in the chief's car. With its political clout, the officers union has unseated two mayors." *Id.*

14. *Id.* The department had even used forfeited money to purchase the guns used by the SWAT team that stormed into Paz's house, which was located more than a dozen miles from the El Monte city limits. *Id.*

15. *Id.*

ranch of reclusive millionaire Donald Scott, purportedly in search of marijuana plants.¹⁶ The police never found a single marijuana plant on Scott's property, but they shot and killed Scott in the course of the raid.¹⁷ After a subsequent investigation, the District Attorney for Ventura County concluded that the primary motivation for the raid was the possibility of forfeiting Scott's property. The forfeiture would have netted law enforcement agencies about \$5 million in assets.¹⁸

One might argue that the killings of two innocent men, both in their sixties, have wreaked far more havoc on society than all the marijuana in California.¹⁹ Yet the collective mentality of our nation's ongoing war against narcotics has created an atmosphere in which politicians constantly assure the body politic²⁰ that any price is worth paying to keep the "evil" of drugs from our collective doorsteps. The mere suggestion of reforming drug policy is tantamount to political suicide. Despite decades of abject failure, the trend has been to harden the government's stance on drugs in a campaign which has increasingly militaristic overtones.²¹ Congress took a major step toward solidifying this hard-line stance when it passed the Comprehensive Drug Abuse Prevention and Control Act²² in 1970, and included a provision that law enforcement officials would be able to seize and forfeit assets allegedly related to

16. Michael Fessier, Jr., *Trail's End Deep in a Wild Canyon West of Malibu, a Controversial Law Brought Together a Zealous Sheriff's Deputy and an Eccentric Recluse. A Few Seconds Later, Donald Scott Was Dead*, L.A. TIMES MAG., Aug. 1, 1993.

17. *Id.* Ironically, a commander at a pre-raid briefing told the officers that this was "about plants, not the people." *Id.* No plants were found and, after the raid, one person was dead. *Id.*

18. *Report on the Death of Donald Scott* (Office of the District Attorney, Ventura County, Cal., Mar. 30, 1993), available at <http://www.fear.org/chron/scott.txt>.

19. Despite repeated pronouncements by drug war hawks on the dangers of marijuana, the U.S. Government has not shown that a single person has died from or been seriously injured by marijuana use. In fact, a recent study published by the Institute of Medicine concluded that marijuana appears to have some therapeutic effects. See generally INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (1999), at <http://www.nap.edu/books/0309071550/html>. In light of such scientific evidence, at least with respect to marijuana, the drug war cannot be sustained on objective grounds, but only on grounds of ideology and the self-aggrandizing instincts of law enforcement agencies, prosecutors, and politicians who have built their careers on promises to make streets safe by locking up drug offenders and forfeiting their assets. Whether or not the reader believes that police killed Paz and Scott in the course of searching for assets to seize and forfeit, Paz, Scott and their families are victims of politics in the purest sense of the phrase.

20. The term "body politic," for purposes of this Comment, means those voters and taxpayers who are in a position to hold elected officials accountable for their policies and actions.

21. Especially since the first term of the Reagan Administration, the use of military surveillance technology, as well as military planes, helicopters, and vessels for interdiction purposes, has been on the increase. See Steven Wisotsky, *Crackdown: The Emerging 'Drug Exception' to the Bill of Rights*, 38 HASTINGS L.J. 889, 892-94 (1987).

22. Pub. L. No. 91-513, 84 Stat. 1242 (1970), (codified at 21 U.S.C. §§ 801-886 (1994)).

drug violations.²³ The 1984 amendments to this Act²⁴ broadened the scope of civil forfeitures and provided detailed procedural steps, the lack of which had previously been a stumbling block to the government in forfeiture proceedings.²⁵ Remarkably, the 1984 amendments even gave the Attorney General full control over the disposition of forfeited assets.²⁶

Current federal and state laws that allow police departments to seize and forfeit assets and remit the proceeds to their own budgets have generated a mountain of criticism over the past decade.²⁷ Although acknowledging at least the potential for abuse, the Supreme Court has been reluctant to curb state and federal power to forfeit personal property.²⁸ Perhaps the Court itself has become caught up in the hysteria of the drug war.²⁹ Certainly, the Court has engaged in some acrobatic reasoning to uphold forfeitures,³⁰ basing many of its decisions on an archaic legal fiction,³¹ the usefulness of which was already called into question in the middle of the nineteenth century.³²

23. § 101, 84 Stat. at 1276 (codified at 21 U.S.C. § 881(a)). The civil forfeiture provision of the Act authorized law enforcement to seize and forfeit drugs, drug manufacturing equipment, drug storage, and conveyances used to transport drugs. The 1984 amendment also gave the Attorney General control over the disposition of forfeited assets, thus creating a deeply troubling separation of powers issue which has not been addressed by the courts or by the Reform Act. See 21 U.S.C. § 881(e); see also Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998).

24. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. 98-473, Title II, secs. 306, 309, 518, § 881(e), 98 Stat. 2050, 2051, 2075 (1984) (codified as amended at 21 U.S.C. § 881(e) (1994)).

25. See David B. Smith, *Prosecution and Defense of Forfeiture Cases*, Release 25 ¶ 13.01 at 13-3 to 13-4 (Matthew Bender December 1999).

26. See Blumenson & Nilsen, *supra* note 23.

27. See, e.g., Roger Pilon, *Can American Asset Forfeiture Law Be Justified?* 39 N.Y.L. SCH. L. REV. 311 (1994); Blumenson & Nilsen, *supra* note 23.

28. See *Bennis v. Michigan*, 516 U.S. 442, 456-57 (1996) (Thomas, J. concurring). Justice Thomas expressed concern that, "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice." *Id.* Nevertheless, Justice Thomas found that "[w]hen the property sought to be forfeited has been entrusted by its owner to one who uses it for crime . . . the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result." *Id.* As shall be discussed *infra*, whether the political branches have succeeded in avoiding that result is most certainly an open question.

29. Professor Bernard Oxman once commented that the Court has an unspoken rule: "In drug cases, the government always wins." Conversation with the author, Oct. 1999.

30. See, e.g., *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926), discussed *infra*, text accompanying notes 65 through 77.

31. That a thing can be guilty of a wrong, thus justifying an *in rem* action. See Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916-18 (1991).

32. The Court's decisions over the past decade have left in their wake more contradiction than

As the Paz incident suggests, the Court's failure to proscribe police power in civil forfeiture actions has led to a situation in which self-aggrandizing law enforcement agencies act with near impunity.³³ Because the government can proceed against the property in a civil in rem action that is separate from any criminal prosecution, law enforcement has found it easier to go after "tainted" property via the civil asset forfeiture process.³⁴ As law enforcement agencies have come to increasingly depend on forfeiture to finance their operations, law enforcement priorities have been corrupted: interdiction efforts end up targeting money and property rather than black market drugs and drug sellers.³⁵ More disturbingly, because so few owners can afford to challenge the seizure, or because a plaintiff might not be entitled to Fifth Amendment protection in the course of the proceedings and therefore does not want to risk exposing himself to the possibility of being indicted,³⁶ and because the procedural rules so overwhelmingly favor the government, very few forfeitures are ever challenged. As a result, law enforcement finds in rem civil asset forfeiture to be an excellent means of raising revenue and appropriating funds without having to justify those revenues and appropriations to the body politic.³⁷ This is also a sweet deal

clarity. For example, while the alleged perpetrator of a crime is protected by the Eighth Amendment's Excessive Fines Clause, an innocent owner has no constitutional protection from the "strict liability" imposed by *in rem* forfeiture statutes. Compare *Austin v. United States*, 509 U.S. 602 (1993) and *United States v. Bajakajian*, 524 U.S. 321 (1998) with *Bennis v. Michigan*, 516 U.S. 442 (1996). See also *infra*, note 48 and accompanying text.

33. See Blumenson & Nilsen, *supra* note 23, at 39 (stating that, "however irrational [the drug war] may be as public policy, it is fully rational as a political and bureaucratic strategy").

34. See 21 U.S.C.A. § 881 (West 1999). The procedural rules of the recently amended law allowed the government to seize the property on a mere showing of probable cause. The burden then shifted to the owner, if he wished to contest the forfeiture, to post a bond for ten percent of the property's value, or \$5,000 whichever was less, and then prove to a court that the property should not be subject to forfeiture. Other procedural terms that favored the government included the fact that the government could seize the property years after the property had been "tainted," but the owner had only ten days to respond and challenge the seizure. See discussion, *infra*, text accompanying notes 162 through 229.

35. One reason which commentators and officials have given for this is that, under the law, forfeited drugs must be destroyed, and thus generate zero revenue for the agencies that seize them. See Blumenson & Nilsen, *supra* note 23, at 68. This created an interesting skewing of priorities on I-95 in Florida, where police have focused interdiction efforts on *southbound*, rather than northbound, traffic, because the southbound route has more cash-flush buyers than the northbound side, where most of the dealers are transporting "worthless" drugs out of state. *Id.*

36. See Piety, *supra* note 31, at 921 n.50 and accompanying text (pointing out that a criminal defendant, by testifying in a parallel forfeiture proceeding, may risk waiving his Fifth Amendment right against self-incrimination). This, of course, contradicts the Court's holding in the well-known case of *Boyd v. United States*, 116 U.S. 616 (1886) which held that the Fifth Amendment applied to papers seized in forfeiture cases. The Court has made no particular effort, in recent years, to take notice of *Boyd*. See *United States v. Ursery*, 518 U.S. 267, 303-06 (1996) (Stevens, J., concurring in part and dissenting in part).

37. Indeed, numerous local police departments circumvent state laws that forbid placing

for elected officials, because the revenue generated from forfeited assets allows politicians to promise more action on the drug war without necessarily having to raise taxes or shift appropriations away from politically popular government programs.³⁸ In this post-Reagan era of “no new taxes,” asset forfeiture provides a way for law enforcement agencies to achieve a degree of immunity from the sometimes uncertain political dynamics of raising public revenue.

All of this can drive even a modestly thoughtful citizen to worry about the corrosive effect of the drug war on our democratic institutions. Yet despite nearly thirty years of failure in the drug war, efforts to at least reform the process, let alone consider alternative paradigms,³⁹ seem generally doomed. Some have argued that reforming our asset forfeiture laws would be equivalent to raising the white flag in the war against narcotics and setting a course toward de-criminalization.⁴⁰ For that reason, it came as a surprise to many when the Civil Asset Forfeiture Reform Act passed the House of Representatives in June, 1999, by an overwhelming majority.⁴¹

The margin of passage in the House stirred momentum for a final reform measure to be passed and enacted before the 2000 election season. Through a year-long process of compromise measures in the Senate⁴² and in the joint committee, a final version of the Act emerged in the spring of 2000, and was signed into law by President Clinton on April 25, 2000. The final bill was titled The Civil Asset Forfeiture Reform Act of 2000.⁴³

The Reform Act offers some laudable due process changes, such as

forfeited proceeds directly into law enforcement budgets by referring locally initiated forfeitures to federal law enforcement officials. Such “adoptive” forfeitures allow local police departments to receive about eighty percent of the proceeds, even where state laws mandate sending forfeited proceeds to other programs, such as schools. See Dillon, *supra* note 11.

38. See discussion, *infra*, text accompanying notes 244 through 258.

39. Unfortunately, even though this country now holds one-fourth of the world’s prisoners—two million people, a huge number of them being nonviolent drug offenders—politicians who support alternative paradigms such as legalization are repeatedly denounced by drug war hawks such as our drug czar, General Barry McCaffrey. Matthew Miller, *Just Said No to the Drug War*, N.Y. TIMES, Aug. 20, 2000, at § 6, p.32.

40. See Roger Pilon, *Testimony before the Criminal Justice Oversight Subcommittee of the United States Senate*, July 21, 1999, available at <http://www.cato.org/testimony/ct-rp072199.html>.

41. The Civil Asset Forfeiture Reform Act. H.R. 1658, 106th Cong., § 1 (1999). The vote in favor was by a margin of 375 to 48. This original House version of the Reform Act was stronger than the final version.

42. The Justice Department brought a great deal of lobbying force to bear on the Senate, resulting in a couple of proposals which would have been likely to make things worse, in particular, S. 1701, 106th Cong. (1999).

43. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185 § 14, 2000 U.S.C.A.N. (114 Stat. 202) (hereinafter, “Reform Act”).

shifting the burden of proof onto the government,⁴⁴ eliminating the requirement that an owner post a cost bond, and providing some minimal hardship protections for an innocent party who might be dispossessed of his home. The Reform Act does not, however, offer a cure for forfeiture's greatest ongoing ill, the direct disbursement of forfeited revenues to law enforcement agencies, and the general reliance on forfeited proceeds as a revenue raising device.⁴⁵

It seems appropriate at this time to reflect on the current state of forfeiture in this country, and to examine some likely effects of the Reform Act. Part II of this Comment offers a brief historical overview of forfeiture in the United States, including a distinction between criminal and civil forfeiture. Part III explains some of the more controversial aspects of the current state of the law on asset forfeiture, in particular, highlighting the confusion over whether and for what purposes forfeiture can be deemed a "punishment." Part IV briefly discusses the history of the Reform Act, and some of its key provisions. Part V will discuss some of the issues that the Reform Act leaves unresolved. In particular, this Comment takes the view that the "taint doctrine" needs to be squarely addressed before any meaningful reform can take place, and that forfeiture will still be vulnerable to attack on nondelegation grounds unless strong action is taken to remove the revenue raising incentives which the Reform Act leaves in place. This argument includes a policy discussion on why externalizing the cost of a major government endeavor (such as the drug war) onto individuals makes our democratic system of political accountability less rational, and why it poses the danger that our criminal laws might become irrational, if indeed they are not already so. Part VI offers some concluding thoughts, and offers a principled rule for using forfeiture in limited circumstances.

II. BACKGROUND

Numerous authors have commented on the historical origins and evolution of forfeiture law in the United States, and this Comment does not seek to duplicate their efforts.⁴⁶ Nevertheless, a brief survey of the

44. Previously, the government did not have to prove anything once it had shown probable cause and seized the property. The burden was then upon the owner to prove by a preponderance of the evidence that the property was not subject to forfeiture. The Reform Act shifts this burden of proof back to the government at the "preponderance of the evidence" standard. See *infra* note 171.

45. See Reform Act, *supra* note 43.

46. See generally Piety, *supra* note 31, for a thorough examination of the historical origins of forfeiture law. As a general matter, this Comment in part adopts her thesis that forfeiture is an anachronistic legal device which has no legitimate place in a modern state such as ours, albeit for slightly different reasons.

evolution of forfeiture will serve to acquaint the reader with the issue.

A. *The Deodand*

The conventional view is that forfeiture dates back to the law of the Old Testament.⁴⁷ In England, forfeiture arose from the deodand, which required that the value of an inanimate object directly or indirectly causing the accidental death of a king's subject be forfeited to the Crown.⁴⁸ The deodand has been used to support the concept that the sovereign could take action based on the guilt of a *thing*, which was considered to be quite apart from the culpability of its owner.⁴⁹ But whether the deodand was meant to be a remedial measure, whether it was simply used because there was no action for wrongful death available at common law for a decedent's survivors, or whether there was some other reason, remains obscure.⁵⁰ What is clear is that our Supreme Court continues to pay homage to this historical oddity as doctrinal support for in rem forfeiture.⁵¹

47. "If an ox gore a man that he shall die, the ox shall be stoned, and his flesh shall not be eaten." *Exodus* 21:28-30, cited in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974) as an historical origin of the deodand and in rem forfeiture.

48. *Id.* But see 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). Finkelstein points out that:

Nowhere in the Bible is there to be found the slightest suggestion that an *inanimate* object that had been the direct or indirect cause or agent of a person's death was to be forfeited, or that its value was to be computed in terms of money which then would be claimed by the authorities as a forfeiture. This is proved beyond a shadow of a doubt in the case of the homicide by misadventure where the woodchopper's axe head flies off the haft and kills one who stands nearby. (*Deut.* 19:5).

Id. at 180.

49. The deodand fell out of favor in England by the mid-nineteenth century, and was abolished by law in 1846. *Id.* at 170. Commenting on the survival of the deodand up until that time, Lord Campbell remarked that "[t]he wonder was that a law so extremely absurd and inconvenient should have remained in force down to the middle of the 19th century." *Id.* at 171.

50. See *Piety*, *supra* note 31, at 928-35.

51. As Oliver Wendell Holmes wrote:

The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

O.W. HOLMES, *THE COMMON LAW* 5 (1881), cited in *Calero-Toledo*, 416 U.S. at 681 n.19. Holmes apparently believed that deodand and in rem forfeiture were related in that the concept of motion made both practices understandable. See *id.* at 36, 26-27 (1881).

B. *Evolution in the United States: A Ship Off-Course*

Like a trick candle that re-lights itself after having been blown out, forfeiture has persisted in U.S. jurisprudence despite clear attempts in the early days of the nation to eradicate it. Forfeiture was a hated measure among the colonists,⁵² and both the Constitution and statutes passed by the first Congress forbade the use of criminal forfeiture in convictions for treason and federal felonies.⁵³

Forfeiture remained a tool, however, in certain matters involving the collection of revenue, and at admiralty.⁵⁴ It was from this tradition that the confusion first emanated. As with the revenue section of the Exchequer in England,⁵⁵ forfeiture played a prominent role in enforcing tax laws in the early part of our nation's history. At a time when the government depended on customs duties for at least eighty percent of its tax revenue, seizing and forfeiting a ship for a customs violation was the only reasonable way of enforcing the nation's revenue laws.⁵⁶

Aside from revenue cases, the first *in rem* civil cases in the U.S. appear to have arisen under the country's admiralty laws, which were adapted from the English Navigation Acts.⁵⁷ It seems, though, that a misunderstanding developed in the U.S. courts with respect to the purpose of *in rem* forfeiture under the laws of England, and how it was distinguished from the functions of criminal prosecutions and criminal forfeiture.⁵⁸ Perhaps this confusion developed due to the exigencies

52. The much despised Writs of Assistance allowed officers of the Crown to collect a commission on forfeited goods. See Blumenson & Nilsen, *supra* note 23, at 75 nn.143-44.

53. U.S. CONST. art. III, § 3 forbids the forfeiture of estates resulting from convictions for treason. The first Congress outlawed forfeiture as a consequence of federal criminal conviction.

54. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).

55. *Id.*

56. See, e.g., Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39 (goods unloaded at night or without a permit subject to forfeiture and persons unloading subject to criminal prosecution); § 25, 1 Stat. at 43 (persons convicted of buying or concealing illegally imported goods subject to both monetary fine and *in rem* forfeiture of the goods); § 34, 1 Stat. at 46 (imposing criminal penalty and *in rem* forfeiture where person convicted of remanding goods entitled to drawback).

57. See *Austin v. United States*, 509 U.S. 602, 612 (1993); *United States v. The Brig Eliza*, 11 U.S. (7 Cran.) 113 (1812); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796).

58. Note the argument of Attorney General Lee in *La Vengeance*, 3 U.S. (3 Dall.) at 299-300, that an *in rem* forfeiture was only properly carried out at admiralty to enforce the revenue laws, and any action not intended to collect a debt, but rather for a violation of an embargo such as in this case, could only be properly carried out as part of a criminal proceeding in a trial by jury. *Id.* The Court disagreed, though, holding that, because the violation of the embargo occurred on the water, the action was properly pursued at admiralty. *Id.* at 301. The Supreme Court's decision in *The Palmyra*, appears to have been another one which helped open the door to civil forfeiture being used in a criminal context. Justice Story seems to have confused the purposes of civil *in rem* forfeiture and criminal forfeiture. The *Palmyra* was a Spanish privateer vessel which had been seized on suspicion of piracy. *Id.* at 2. On the government's appeal to the Supreme Court, her owner contested the forfeiture in part on grounds that her crew was never convicted of a

involved in preventing acts of piracy, and because of the need to deter violations of arms trading embargoes during the uncertain years of the late eighteenth and early nineteenth centuries.⁵⁹

In any case, it has left us with the rather odd dual legacy of in rem civil forfeitures being used in a criminal, punitive context, and tried without juries, even when they have nothing to do with admiralty.⁶⁰ Indeed, the argument has been made that this is merely an accident of history.⁶¹ However, accidents of history should not be followed with blind obedience when they produce such manifestly absurd results as civil forfeiture has in this country.

Once the Sixteenth Amendment had been passed and the government came to depend primarily on income taxes, forfeiture became mostly a thing of the past.⁶² Nevertheless, forfeiture played a role in the first half of the twentieth century during the Prohibition era.⁶³ The case of *United States v. One Ford Coupe Automobile*⁶⁴ provides an interest-

crime, and that a conviction was a necessary prerequisite to an in rem proceeding. *Id.* at 7. Justice Story noted that, while criminal forfeiture had traditionally required an accompanying conviction, civil forfeiture under the revenue section of the Exchequer could be carried out merely against the thing. *Id.* at 14-15. Clearly, though, the intent of a civil forfeiture provision under the revenue laws was to create a remedial measure for enforcing the collection of customs duties, the avoidance of which presents a question of injury to the sovereign which forfeiture can legitimately redress. Justice Story failed to explore the pertinent issue, which was to what extent the government was injured by the alleged acts of piracy, and to what extent forfeiture could purport to redress the people for any such injury that could not be sufficiently pursued against the crew under the criminal law.

59. The need to seize contraband, that is, things that are illegal in themselves to possess, is often cited as another justification for in rem forfeiture. See Piety, *supra* note 31, at 948 n.183. But that fails to explain why the common law would have countenanced the forfeiture of a vessel carrying such contraband. In *C.J. Hendry Co. v. Moore*, 318 U.S. 133 (1943), the Supreme Court held that states inherited some common law rights to commerce proceedings in rem against vessels engaging in illegal conduct on navigable waters. *Moore*, 318 U.S. at 135-36. The Court reasoned that in rem proceedings were available to the Exchequer, and that the jurisdiction of the Exchequer had not passed exclusively to the admiralty courts of the United States, but also to the common law courts of the several states. *Id.* at 137-38. This reasoning might have been more sound had the Court accounted for the fact that the Exchequer's authority to forfeit a vessel in rem was grounded in its authority to enforce the revenue laws of England. See discussion, *supra* note 59. But even accepting the Court's reasoning, the issue in *Moore* was over the forfeiture of an illegal fishing net, and the opinion could have simply ended with the reasoning that states have the authority to regulate fishing in their navigable waters. *Moore*, 318 U.S. at 135.

60. See, e.g., *La Vengeance*, 3 U.S. (3 Dall.) at 301 (holding that no jury required in admiralty proceeding). This is particularly ironic in light of the Supreme Court's continuing ode to the deodand. Deodand cases were tried by twelve-man juries, and historical indications are that these juries were not so solicitous of the position of the Crown as are our own judges in forfeiture proceedings to the government. See Piety, *supra* note 31, at 935 n.108 (citation omitted).

61. See Piety, *supra* note 31, at 935-36 n.111.

62. See Smith, *supra* note 25, at ¶ 1.01, 1-1 to 1-2 (Matthew Bender December 1999).

63. Under the National Prohibition Act, ch. 85, 41 Stat. 305, 316 (1919) (repealed 1933), conveyances of intoxicating liquors were subject to forfeiture.

64. 272 U.S. 321 (1926).

ing perspective on how the “smoke and mirrors” logic of forfeiture developed during that time.⁶⁵ In that case, a suspect was arrested for transporting liquor in violation of the National Prohibition Act.⁶⁶ While the liquor agent took no action against the automobile used by the suspect, a revenue agent subsequently brought a forfeiture action against the automobile pursuant to a pre-Prohibition federal revenue statute which rendered conveyances in the transport of untaxed liquor subject to forfeiture.⁶⁷ The owner of the vehicle intervened and claimed that it had no knowledge that the vehicle was being used illegally.⁶⁸

The primary issue before for the Court was whether the innocent owner defense under the National Prohibition Act applied, or whether the revenue statute, which provided no innocent owner defense, ought to prevail.⁶⁹ The owner argued that, since liquor was illegal and tax stamps for liquor were generally unavailable, it would be unreasonable to forfeit the vehicle under the revenue law.⁷⁰ The owner further contended that, by enacting the National Prohibition Act, Congress had shifted emphasis from taxing liquor for revenue purposes to punishing the sellers, and that it would be a violation of due process to punish an innocent owner.⁷¹ The Court disagreed, arguing that just because liquor was now illegal did not mean that Congress had intended to cede its power to tax liquor.⁷² With respect to the owner’s second argument, the Court stated that “[a] tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law breaking less profitable.”⁷³ Similar Kafka-esque reasoning has carried over into the increasingly draconian drug prohibition period in which we now find ourselves.⁷⁴ In light of all the other parallels between the failings of both alcohol and drug prohibition, this seems particularly fitting.⁷⁵

65. The remarkable contortions of logic used by the Court in this case are indicative of the lengths to which otherwise reasonable people will go (and perhaps *must* go) to enforce prohibitions against popular mind-altering substances.

66. *One Ford Coupe*, 272 U.S. at 324.

67. *Id.* at 323.

68. *Id.*

69. *Id.* at 325.

70. *Id.* at 326-27.

71. *Id.* at 328.

72. *Id.* at 326-27.

73. *Id.* at 328. *But see* Dept. of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 783 (1994) (finding that a state tax on marijuana assessed after the state has imposed a criminal penalty for the same offense violates the Double-Jeopardy clause of the Fifth Amendment).

74. *See generally* Wisotsky, *supra* note 21.

75. No one seriously disputes the parallels between the failures of Prohibition and the Drug War. The most obvious of these parallels is that, as efforts at enforcement and interdiction become more aggressive, those efforts merely increase the so-called “crime tariff”; that is, the markup that a black market trafficker must charge to monetize the risk he takes in breaking the

III. SOME DIFFICULTIES WITH THE STATE OF THE LAW ON CIVIL ASSET FORFEITURE

Civil asset forfeiture has generated an enormous amount of statutory and case law throughout this country's jurisprudential history, and it is beyond the purview of this Comment to exhaustively review every aspect of its evolution. It is possible, however, to grasp the current state of the law on forfeiture by examining some key issues.

A confused doctrine has emerged over the years, especially with respect to whether forfeiture is punishment under the Constitution, or whether it is strictly remedial. This distinction seems to keep getting murkier with each new decision.⁷⁶ The Court also has sent worrisome signals that it would endorse the use of forfeiture as a revenue-generating measure for law enforcement.⁷⁷ This section will examine some pertinent aspects of this doctrine.

A. *Forfeiture as a Revenue-Generating Measure*

The use of forfeiture as a means of generating revenue represents one of the most serious threats to personal liberty in U. S. history. Not since the writs of assistance, which helped to inspire our revolution against the British Crown,⁷⁸ has a U.S. government mandated that law enforcement officers be allowed, in essence, to eat what they kill. However, because we now enter the new century at a time when most Americans seem to feel a certain material contentment, and because talk of reforming our drug laws is anathema to most politicians, there is little political agitation for any examination of this problem.⁷⁹

Although forfeiture was made a tool of the war against drugs under the Comprehensive Drug Abuse Prevention and Control Act of 1970,⁸⁰ it was not pursued regularly until the range of property subject to forfei-

law. See Wisotsky, *supra* note 21, at 894-95. This makes trafficking more profitable with each measure taken by the government, and leads to the somewhat counter intuitive result of greater volumes in trafficking. *Id.* at 895. More predictably, it also results in greater street violence as gangs fight over lucrative turf.

76. Compare *Bennis v. Michigan*, 516 U.S. 442 (1996), and *United States v. Ursery*, 518 U.S. 267 (1996), with *United States v. Bajakajian*, 524 U.S. 321 (1998), and *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (D.C. Cir. 1998) (holding that, even though a statute was intended to forfeit property *in rem*, its intent was also sufficiently punitive to implicate the Excessive Fines Clause and make the forfeiture of plaintiff's vehicle excessive).

77. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989).

78. See *Blumenson & Nilsen, supra* note 23, at 75 nn.143-45.

79. At the time of this writing, the United States is in the throes of a political season in which the failings of the war on drugs have barely been broached by either of the two major political parties. And even though the failed drug war was a prominent theme of the Shadow Conventions, the media paid little attention to the issue.

80. Pub. L. 91-513, Title II, § 511, 84 Stat. 1276 (1970) (codified at 21 U.S.C. § 881 (1994)).

ture was expanded under the Psychotropic Substances Act of 1978.⁸¹ From 1979 through fiscal year 1980, the Drug Enforcement Administration claimed a six-fold increase in seizures and a twenty-fold increase in forfeitures.⁸² President Reagan turned up the rhetoric in 1982, creating the political impetus for even more extreme measures in the drug war.⁸³ The Act was further amended in 1984 to include the forfeiture of real property.⁸⁴

Perhaps the most significant change in the 1984 amendments to the Act, aside from the provision for forfeiting real property, was the exclusive earmarking of forfeited assets for law enforcement.⁸⁵ Whereas proceeds realized from forfeitures were previously deposited in the general fund of the U.S. Treasury, the 1984 amendments mandated that such proceeds be deposited directly into the Department of Justice's Forfeiture Fund⁸⁶ and the Department of Treasury's Forfeiture Fund.⁸⁷ These changes have been at the heart of some of the most egregious abuses of asset forfeiture.⁸⁸

Since the 1984 amendments, forfeiture has become an important measure by which law enforcement agencies have sought to raise revenue for their own departments.⁸⁹ The federal laws are advantageous for local or state agencies, because, through federal "adoption" of local forfeitures, such agencies are usually able to receive more of the proceeds

81. Pub. L. 95-633, Title III, § 301(a), 92 Stat. 3777 (1978) (codified at 21 U.S.C. § 881(a)(6) (1994)). This provision greatly expanded the definition of forfeitable assets to include:

[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Id.

82. See Smith, *supra* note 25, at ¶ 1.01, 1-7 n.16.

83. See Wisotsky, *supra* note 21, at 891 (stating that the end of "getting" drug traffickers justified "just about any means" seemed to be an idea whose time had come).

84. Section 306(a) of the Comprehensive Crime Control Act of 1984, (codified at 21 U.S.C. § 881(a)(7) (1990)).

85. See Smith, *supra* note 25, at ¶ 1.01, 1-8.

86. See 28 U.S.C. § 524(c)(4) (1994).

87. See 31 U.S.C. § 9703 (1994).

88. The "real property" provision under 21 U.S.C. § 881(a)(7) led many prosecutors to forfeit the homes of small-time dealers and marijuana growers merely to boost their forfeiture statistics, despite the highly tenuous relationship of those properties to drug dealing and in spite of the hardship that it caused to the families. Smith, *supra* note 25, at ¶ 1.01, 1-8.

89. *Id.* Part of the 1984 Act allows the federal government to share forfeiture "booty" with local police agencies. 21 U.S.C. § 881(e)(1)(A) (1994).

than they would under state law.⁹⁰ Adoptive forfeitures have caused headaches for state lawmakers. Many states have laws restricting the disposition of forfeited assets to either a state's general treasury fund or to special funds for education or other programs unrelated to law enforcement. Local police departments circumvent such laws through the use of adoptive forfeitures.⁹¹

As a result, with the help of the federal government, local police departments are able to directly raise cash for what they determine are their priorities, free from accountability to any political process.⁹² This has led to the alarming development of law enforcement gaining a pecuniary interest not only in forfeited property,⁹³ but in the very profitability of the drug market itself.⁹⁴ Certainly, this cannot be healthy for a democratic society.⁹⁵

Perhaps the most egregious example of the effects of such funding is the creation of Multijurisdictional Task Forces ("MJTFs"), mostly under the auspices of federal law,⁹⁶ and which rely largely on asset forfeitures to fund their operations.⁹⁷ A MJTF called "South Florida Impact" ("Impact"), which operates in cooperation with various South Florida police departments, depends entirely on seizure of laundered

90. Blumenson & Nilsen, *supra* note 23, at 51-54. Under a so-called "adoptive forfeiture," state and local law enforcement officers seize the property and then bring it to a federal agency for forfeiture. This allows the local agency to receive at least eighty percent of proceeds that it would not be allowed to collect under state statutes.

91. Dillon, *supra* note 11.

92. *Id.*

93. Comment, Alison Roberts Solomon, *Drugs and Money: How Successful Is the Seizure and Forfeiture Program at Raising Revenue and Distributing Proceeds?* 42 EMORY L.J. 1149 (1993). Solomon takes the view that, "if raising revenue and financing the drug war with proceeds from asset forfeiture are valid goals of the program, how well these goals are being met is of concern to the taxpaying public." *Id.* at 1158. This Comment disagrees with Solomon's underlying assumption that forfeiture can be a valid means of raising and appropriating revenue, and instead favors the argument of Blumenson & Nilsen, *supra*, note 23, at 84-100, that using forfeiture to raise revenue for law enforcement creates a dangerous conflict of interest, and moreover violates our constitutional separation of powers.

94. This problem in particular may be what has helped turn the drug war into an end unto itself instead of a means to protect public health. If the very survival of bureaucratic institutions depends on cash and property seized from drug dealers, then those institutions automatically have a vested interest in the continuing profitability of the black market.

95. The interest of the police in gaining economic independence has been recognized in the past by such figures as SS Director Heinrich Himmler and his protégé, SS Obergruppenführer Reinhard Heydrich, who was the Reichsprotektor of Bohemia-Moravia and the architect of the Final Solution. Part of their strategy in making Bohemia-Moravia an SS-administered Protectorate was to gain SS control over Czech industry, thus giving the SS a degree of financial independence that would consolidate its political power. CALLUM MACDONALD, *THE KILLING OF SS OBERGRUPPENFUHRER REINHARD HEYDRICH* 132-33 (1st American ed. 1989).

96. Blumenson & Nilsen, *supra* note 23, at 42-43.

97. *Id.* at 64.

money for its operating budget.⁹⁸ Impact has to launder drug money itself in order to attract money launderers to its accounts.⁹⁹ This technique, which Impact officials call “pickup,” allows Impact to identify money launderers and seize their assets.¹⁰⁰ In a telephone interview, an unidentified Impact official explained that Impact’s ratio of funds laundered to funds seized was one-to-one, a ratio which the official called “the best in the industry.”¹⁰¹

It is not just Impact’s reliance on forfeiture as an organization that raises suspicions about its motives; the compensation arrangement with one of its founders appears to have been facially corrupt. Woody Kirk, a retired customs officer and full-time consultant to Impact, originally had a deal by which he received a twenty-five percent commission on all assets he helped seize.¹⁰² While the Justice Department put a stop to Kirk’s commissions, it apparently was unable to prevent him from arranging for kickbacks from his network of informants.¹⁰³

Drug Czar Barry McCaffrey has cited Impact as an effective law enforcement operation, but other law enforcement experts have stated that Impact is an example of what has gone wrong in the pursuit of criminal money.¹⁰⁴ Impact does not appear to be accountable to any elected government body. Available information only indicates that Impact is supervised by a “steering committee of state and local officials,” and that its books are audited by the City of Coral Gables.¹⁰⁵ It is thus not clear whether any political body, such as the governing bodies of Miami-Dade County or Coral Gables, would have the authority to

98. Kaplan, *supra* note 12.

99. *Id.*

100. Telephone Interview with unidentified Impact official (July 13, 2000).

101. *Id.* An unidentified Impact official explained that the “one-to-one ratio” means that South Florida Impact generally seizes one million dollars for every one million dollars in drug money that Impact launders.

102. Kaplan, *supra* note 12. This arrangement earned Kirk \$625,000 in Impact’s first year of existence. *Id.*

103. *Id.* According to Kaplan:

On learning of Kirk’s commissions, the U.S. Justice Department threatened to cut off all cooperation unless the commissions stopped. Impact complied, putting Kirk on a retainer that pays him \$10,666 each month. But Kirk’s deals with informants continued. In an interview, Kirk confirmed that, as the commissions ended, he asked two of his informants to sign contracts pledging him a share of the 15 percent they received as a reward from asset seizures. One agreement . . . reveals that Kirk lent the man \$50,000 and, in return, was to receive 60 percent of the informant’s reward money. Kirk admits lending another informant \$115,000, also an advance on reward money.

Id.

104. *Id.*

105. *Id.* Impact was invited by the author to meet for a personal interview in which this and other matters might be clarified, but Impact did not respond to the invitation.

“pull the plug” on Impact.¹⁰⁶ Especially in light of Impact’s broad and amorphous jurisdictional sweep,¹⁰⁷ the circumstances seem to add up to a law enforcement task force that bears greater resemblance to a band of roving “executive privateers” than it does to a law enforcement agency or police department.¹⁰⁸

To the average spectator, this might look like a chance for a slam dunk for lawyers fighting the excesses of the drug war. But in the area of civil forfeiture, past decisions indicate that one should beware of assuming the obvious.¹⁰⁹ The Supreme Court has, in fact, indicated approval of the use of forfeiture as a revenue-generating mechanism for law enforcement in *Caplin & Drysdale, Chartered v. United States*.¹¹⁰ In a 5-4 opinion by Justice White, the Court stated that:

[t]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways. . . . The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government’s interest in using the profits of crime to fund these activities should not be discounted.¹¹¹

The dissent’s criticism of this point was mild, at best.¹¹²

The argument could be made that, since *Caplin* was really about the relationship of the Sixth Amendment to forfeited assets, the passage quoted above is mere dicta; however, the language is unequivocal and courts may be forced to engage in unabashed sophistry if they wish to avoid it. One can only hope that the Supreme Court will reconsider its endorsement of forfeiture as a revenue-generating tool if and when it is

106. It is clear, however, that federal law enforcement agencies such as the D.E.A. have refused to continue cooperating with Impact. Kaplan, *supra* note 12.

107. For example, a small business in Oklahoma saw its bank account seized by Impact when a Colombian client made a cash deposit into that account. *Id.*

108. In telephone discussions with the author, South Florida Impact officials deplored the Kaplan article as having failed to report that South Florida Impact is one of the most effective law enforcement units in the “industry.” One official ascribed negative comments from other law enforcement officials to “professional jealousy” of South Florida Impact’s success. This Comment submits that South Florida Impact seems to miss the point: under our Constitution, law enforcement’s effectiveness cannot be the only criteria for determining the validity of its methods. Telephone Interviews with unidentified impact officials (July 13, 2000).

109. In light of *Austin v. United States*, 509 U.S. 602 (1993), conventional wisdom held that, if forfeiture against a guilty person could be an excessive fine, then *any* forfeiture against an innocent person would have to be excessive. But that was before *Bennis v. Michigan*, 516 U.S. 442 (1996), was decided. See Stephen Chapman, *Almost-Blind Justice: Sometimes, Even the Innocent Are Guilty*, CHI. TRIB., Mar. 6, 1996, at N27 available at 1996 WL 2650144.

110. *Caplin*, 491 U.S. at 629.

111. *Id.* (internal citation and footnote omitted).

112. *Id.* at 640 n.6 (Blackmun, J., dissenting).

faced squarely with the issue of whether such use of forfeiture violates the nondelegation doctrine.¹¹³

B. *Is Civil Forfeiture Remedial or Punitive?*

There are two types of forfeiture proceedings: civil and criminal.¹¹⁴ Under English law before the American Revolution, civil forfeitures were only brought by the Crown in the Exchequer in matters concerning the collection of revenue. Criminal forfeitures could only be brought in the King's Bench pursuant to a criminal conviction.¹¹⁵ As for our current forfeiture statutes, only criminal forfeiture bears any resemblance to its common law heritage.¹¹⁶ Civil forfeiture currently bears little resemblance to its common law ancestor because many civil forfeiture statutes do not relate to any particular revenue interest that the government might have in the property.¹¹⁷

Both the civil and criminal forfeiture statutes contain a "relation back" clause which provides for the vesting of title in the United States at the time that the act giving rise to the forfeiture is committed.¹¹⁸ The criminal version provides an innocent owner defense for bona fide purchasers,¹¹⁹ whereas the civil version does not. The Supreme Court, however, read such a defense for bona fide purchasers into the civil forfeiture statute in *United States v. 92 Buena Vista Ave.*¹²⁰

The most clear and pertinent distinctions between criminal and civil forfeiture are that (1) a criminal forfeiture must be preceded by a conviction, whereas a civil forfeiture is only against the property and is generally subject to a lower standard of proof; and (2) criminal forfeiture is meant to be entirely punitive, whereas the constitutionality of civil forfeiture is often justified by the government on grounds that it is more of a remedial measure than a punitive one.¹²¹ The meaning of "punitive"

113. See discussion, *infra* notes 245-48 and accompanying text.

114. Compare 21 U.S.C. § 881 (civil) with 21 U.S.C. § 853 (criminal).

115. See *Vengeance*, 3 U.S. (3 Dall.) at 299 (Lee, Attorney General, brief of).

116. See 21 U.S.C. § 853(a) (1994).

117. See discussion, *infra* note 125.

118. See 21 U.S.C. § 853(c) (1994); 21 U.S.C. 881(h) (1994).

119. 21 U.S.C. § 853(c) (1994).

120. 507 U.S. 111 (1993) (stating that "neither the [1984] amendment nor the common-law rule makes the Government an owner of property before forfeiture has been decreed"); see also 21 U.S.C. § 881(a)(7)(1994).

121. Note the incoherence of the Court's discussion of this topic in *Austin v. United States*, 509 U.S. 602, 612-14 (1993), where the Court conflates the issues of revenue collection and punishment of individuals for criminal acts. As noted by Solomon, *supra* note 93, the government is somewhat ambivalent on the issue. In cases where the government loses money on forfeitures, it posits that the purpose of forfeiture is punitive, whereas when forfeiture turns a profit, the government claims that the purpose is pecuniary. See Solomon, *supra* note 93, at 1158-59.

seems clear enough,¹²² but it would be helpful if the court provided an objective definition of what “remedial” means, as well as guidelines that would enable us to determine whether the punishment or remedy imposed by a forfeiture is commensurate to the harm supposedly caused by the offending property.

The problem has been, at least since the early history of our nation, to clearly define the limitations of the term “remedial.”¹²³ This proves to be most problematic in areas where the property has been legally acquired, is legal to possess, and is not subject to any tax or maritime liens.¹²⁴ Consistent holdings that legally obtained property can be subject to remedial forfeiture as an instrumentality of a crime have sent us down a slippery slope from which it will be difficult to recover.¹²⁵ But, despite the importance of understanding the limitations of remedial measures, the courts have given us little to no guidance. As one commentator has noted, the only reasoning the courts seem to provide is that forfeiture is remedial whenever it is “not punishment.”¹²⁶

122. See Roger Pilon, *Can American Asset Forfeiture Law Be Justified?* 39 N.Y.L. SCH. L. REV. 311 (1994). In setting the proper tone for how a free society can justify punishment, Professor Pilon writes:

To violate a right . . . is to create and incur an obligation to make one's victim whole again . . . to restore the equilibrium between the parties Thus does the world of rights and obligations change by the commission of a tort or a crime; thus must it change again if the moral world is to be set right.

Id. at 324-25. As shall be discussed, fitting consensual crimes into this moral calculus is a difficult task indeed, and it makes the remedial arguments for civil forfeiture in the drug war all the harder to rationally justify.

123. See *Austin*, 509 U.S. at 613-14.

124. See, e.g., *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926).

125. Cases such as *The Palmyra*, set our nation's legal understanding of forfeiture off on a wrong footing primarily due to a failure by the Court to apprehend the limitations of remedial measures. As previously noted, the Court conflated the issues of forfeiture for purposes of revenue enforcement (remedial forfeiture) and forfeiture for acts of piracy (criminal forfeiture). *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15. It is even more interesting to note that, thirty years prior to *The Palmyra* decision, the executive branch took the position that a forfeiture that was not brought to enforce the revenue laws could only be brought pursuant to a criminal conviction. See *La Vengeance*, 3 U.S. (3 Dall.) at 299. In reviewing these decisions, one can only conclude that the Court was either not being careful, or that it had a secondary agenda, perhaps related to the problems of privateering from foreign vessels that so bedeviled our ships at the time. Whatever the case might have been, one cannot help but wonder whether we would be in the mess we now find ourselves had the Court been more precise in those early cases.

126. See Piety, *supra* note 31. One conventional justification for civil forfeiture as a remedial measure is the degree of harm caused to society by the illegal drug trade. But this argument ignores the fact that legal drugs such as alcohol and tobacco have been proven to be at least as harmful, through deaths, addiction, lost productivity, etc., as illegal drugs. Yet no one has suggested that the government should appropriate the property of Anheuser-Busch as a remedy for alcoholism, nor that we should deprive Ben and Jerry's of its profits in response to obesity.

C. *Forfeiture and the Bill of Rights*

A number of arguments contesting forfeiture have been raised under the U.S. Constitution. The most crucial of those arguments are (1) that forfeiture violates the Double Jeopardy Clause of the Fifth Amendment;¹²⁷ (2) that forfeiture violates the right to choice of counsel under the Sixth Amendment;¹²⁸ (3) that forfeiture violates the Due Process Clause and Takings Clause of the Fifth and Fourteenth Amendments;¹²⁹ and (4) that it violates the Excessive Fines Clause of the Eighth Amendment.¹³⁰

Perhaps the most controversial opinions of the Court have surrounded the Due Process Clause of the Fifth and Fourteenth Amendments,¹³¹ the most infamous of which is *Bennis v. Michigan*.¹³² In order to understand why the Court has upheld forfeitures in the face of clearly unfair circumstances, it must be remembered that, first and foremost, civil asset forfeiture is an action by the state against a thing.¹³³ It is not a proceeding against a person.¹³⁴ Indeed, most civil asset forfeiture statutes do not require any sort of proceeding against the owner at all, not

127. *United States v. Ursery*, 518 U.S. 267 (1996).

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

129. *See, e.g., Bennis v. Michigan*, 516 U.S. 442 (1996).

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

131. *See, e.g., Bennis*, 516 U.S. at 442.

132. *Id.*

133. *See The Palmyra*, 25 U.S. (12 Wheat.) at 14-15. "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing [T]he proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam." *Id.* The current Supreme Court is fond of quoting this passage from *The Palmyra* to justify many of its current holdings on in rem civil asset forfeiture. *See Bennis*, 516 U.S. at 446-47. It is difficult to understand why the Court insists on applying such a clearly archaic doctrine—especially one which arose out of the necessities of securing liens in maritime and assuring the collection of import duties—to modern-day jurisprudence. As Justice Kennedy noted in his dissenting opinion in *Bennis*, forfeiture evolved "from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the practical reach of the law and its processes." *Id.* at 472 (Kennedy, J., dissenting). The holding of the Court in *The Palmyra* suggests this very point. "In the judgment of this Court, no personal conviction . . . is necessary to enforce a forfeiture . . . in cases of this nature." *The Palmyra*, 25 U.S. (12 Wheat.) at 15. In any case, as noted above the opinion explains that the power of in rem forfeitures in England was created by statute "on the revenue side of the Exchequer." *Id.* This implies that in rem forfeiture was created, in terms of State action, as a remedial measure for the enforcement of customs laws, not for the forfeiture of personal vehicles used "in a criminal act in the tangential way" that the *Bennis*' car was used. *See Bennis*, 516 U.S. at 473 (Kennedy, J., dissenting).

134. However, action against a person may be implicated in a criminal forfeiture proceeding. In such cases, the owner must have already been convicted, and the State must still initiate a separate action against the property. *See* 21 U.S.C. § 853 (1994). *See also The Palmyra*, 25 U.S. (12 Wheat.) at 14 (explaining that, at common law, criminal forfeiture required a conviction before the owner could be divested of his property).

even a formal charge.¹³⁵ Even if the owner is completely innocent of any wrongdoing, her property may be subject to forfeiture if the relevant statute does not specifically provide for an innocent owner defense.¹³⁶

On the other hand, the Court has at least signalled that there are some due process protections regarding forfeiture actions. In *United States v. James Daniel Good Real Property*,¹³⁷ the Court held that, where the government seeks to seize property for purposes of asserting ownership and control, its actions must conform to the requirements of due process.¹³⁸ Absent exigent circumstances, the government violates due process when it does not provide notice of the seizure to the owner.¹³⁹

In *United States v. Ursery*,¹⁴⁰ the Court held that *in rem* forfeitures did not constitute "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment.¹⁴¹ As in *Bennis*, the Court hung its opinion upon the *in rem* fiction that the forfeiture action was a remedial civil action against the property, not a punitive sanction against the individual.¹⁴² However, as Justice Kennedy pointed out in his partial dissent,¹⁴³ this distinction was inconsistent with a line of cases beginning with *United States v. Halper*,¹⁴⁴ which established the following rule respecting the relationship of the Double Jeopardy Clause to civil proceedings:

[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to under-

135. With respect to federal civil forfeitures, the result has been that at least eighty percent of all forfeitures involve owners against whom no criminal charges are ever brought. Blumenson & Nilsen, *supra* note 23, at 77.

136. See *Bennis*, 516 U.S. at 442 (1996). Tina Bennis jointly owned a used car with her husband. Police caught her husband having sex with a prostitute in the car and forfeited the car on grounds that it constituted a public nuisance. The Supreme Court held that the forfeiture did not violate Mrs. Bennis's constitutional rights to due process because of the *in rem* nature of the proceeding. In other words, Mrs. Bennis's innocence was irrelevant because the car was guilty. In her concurring opinion, Justice Ginsburg made the startling argument that the Bennis's car was worth such an insignificant amount of money that, after subtracting costs, there was "practically nothing" to give Mrs. Bennis. *Id.* at 458. For an in-depth discussion of what could arguably be called the *Dred Scott* of forfeiture cases, see Elizabeth B. Cain, Note, *The Absurdity of Civil Forfeiture Law Exposed: Supreme Court Upholds Punishment of Innocent in Bennis v. Michigan and Highlights the Need for Reform*, 47 DEPAUL L. REV. 667 (1998).

137. 510 U.S. 43 (1993).

138. *Id.* at 52.

139. *Id.*

140. 518 U.S. 267 (1996).

141. *Id.* at 292.

142. *Id.* at 278-79.

143. *Id.* at 305-306.

144. 490 U.S. 435 (1989); see also *Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994); *Austin v. United States*, 509 U.S. 602 (1993).

stand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.¹⁴⁵

As if such contradictions were insufficient to cloud the waters of debate over whether civil forfeiture is punitive or remedial, there are indications that the Eighth Amendment might end up being the horse to upset the apple cart of forfeiture.¹⁴⁶ In a line of cases beginning with *Austin v. United States*,¹⁴⁷ the Court has stated that a forfeiture that has a partially punitive purpose is subject to scrutiny under the Excessive Fines Clause. More recently, in *United States v. Bajakajian*,¹⁴⁸ the Court took the unprecedented step of overturning a criminal forfeiture on grounds that it constituted an excessive fine. Writing for the majority, Justice Thomas first stated that, pursuant to the Court's holding in *Austin*, even where a forfeiture's primary purpose is remedial, if a forfeiture is in any way meant to be punitive, it is subject to Eighth Amendment scrutiny.¹⁴⁹ Having laid this foundation, Thomas held that a forfeiture may be deemed an excessive fine if the amount forfeited is "grossly disproportionate" to the offense charged.¹⁵⁰

A major problem with the *Bajakajian* holding, however, is that it might have the unintentional effect of allowing the government to use forfeiture more widely.¹⁵¹ Also, the proportionality test, rather than providing an objective measure of whether forfeitures are excessive, will be subject to how individual judges view certain offenses.¹⁵² The most important question that this line of cases leaves unanswered is whether the Eighth Amendment affords greater protection to convicted offenders whose property is subject to criminal forfeiture than it does to those

145. *Ursery*, 518 U.S. at 306 (citing *Halper*, 490 U.S. at 448-49) (Kennedy, J., concurring in part and dissenting in part).

146. See U.S. CONST. amend. VIII; *United States v. Bajakajian*, 524 U.S. 321 (1998); *Austin v. United States*, 509 U.S. 602 (1993); see also *Ex Parte Kelley*, No. 1971725, at 1, June 11, 1999 WL 378606 (Ala. 1999).

147. 509 U.S. 602 (1993).

148. 524 U.S. 321 (1998).

149. *Id.* at 329 n.4.

150. *Id.* at 334.

151. See Melissa A. Rolland, Comment, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and United States v. Bajakajian*, 74 NOTRE DAME L. REV. 1371, 1399 (1999).

152. See *Ex Parte Kelley*, No. 191725, 1999 WL 378606, at *1 (Ala. June 11, 1999). Comparing the majority opinion with that of the dissent, it is clear that cases such as these will be decided according to how seriously individual judges view the underlying offense; see also *One 1995 Toyota Pick-up Truck v. District of Columbia*, 718 A.2d 558 (D.C. 1998) (holding that, where claimant had been arrested for solicitation offense, the fine for which was \$150, forfeiture of pick-up truck worth \$15,500 was an excessive fine for purposes of the Eighth Amendment).

whose property is subject to civil forfeiture.¹⁵³ In this respect, the courts have painted themselves into a corner, because it is patently unjust to say that an innocent owner—or at least, an owner who is never charged with a crime—does not deserve at least the same degree of protection as the person who actually uses the property in connection with an offense for which he is convicted. This dilemma highlights the absurdity of the taint doctrine, and why that doctrine's applicability to modern jurisprudence needs to be reconsidered.¹⁵⁴

IV. THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000: PROCEDURAL REMEDIES

The Reform Act was the culmination of seven years of effort, mainly on the part of Congressman Henry Hyde (R. Ill.).¹⁵⁵ Rep. Hyde stated that he first became aware of the abuses of civil forfeiture laws through the reporting of Stephen Chapman of the Chicago Tribune.¹⁵⁶ By 1993, Rep. Hyde had introduced a reform bill into Congress,¹⁵⁷ however, it took until the spring of 2000 for a final bill to pass both the Senate and the House of Representatives.¹⁵⁸ A group of organizations that spanned the ideological spectrum from the American Civil Liberties

153. *Compare* *Bennis v. Michigan*, 516 U.S. 442 (1996) (husband arrested for solicitation, but innocent wife-owner of car unable to contest in rem forfeiture of said car), *with* *One 1995 Toyota Pick-up Truck*, 718 A.2d at 558 (owner arrested for solicitation, but forfeiting his pick-up truck deemed excessive fine) *and* *United States v. (1) \$398,950 in U.S. Currency*, Nos. 87-0263-Civ-Hofveler 1999 WL 984424 (S.D. Fla. 1999) (distinguishing *Bajakajian* on grounds that it was a criminal forfeiture, whereas in the instant case the forfeiture proceeded in rem against the currency itself). *But see* *Austin v. United States*, 509 U.S. 602 (1993) (holding that the Eighth Amendment is applicable to in rem civil forfeitures under 21 U.S.C. §§ 881(a)(4) and (a)(7)).

154. As a result of this strange disparity in which criminals have greater constitutional protections than owners of property forfeited in rem, we have ended up 180 degrees from the government's position in *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796).

155. *See* 146 Cong.Rec. H2040-01, 2046 (delayed Apr. 11, 2000) (statement of Rep. Hyde).

156. *Id.* Mr. Chapman wrote a series of stories reporting a number of particularly harsh applications of state and federal forfeiture laws. *See, e.g.*, Stephen Chapman, *The Awful Price of Fighting the War on Drugs*, CHI. TRIB. May 21, 1992, at C23 available at 1992 WL 4484289.

157. *See* Stephen Chapman, *A Weapon in the Drug War Provokes Growing Disgust*, CHI. TRIB., July 1, 1993, at N23 available at 1993 WL 11080888.

158. Civil Arrest Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 2000 U.S.C.C.A.N. (114 Stat 202) (to be codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 26 U.S.C., 28 U.S.C., & 42 U.S.C.). The final bill was a far cry from what many organizations had been working toward. *See* Comments of F.E.A.R. at <http://www.fear.org/whatview.html>. After the House passed H.R. 1658, 106th Cong. § 1 (1999), which would have, among other things, raised the government's burden of proof to the "clear and convincing" evidentiary standard, Senators Sessions (R. Ala.), Feinstein (D. Cal.) and Schumer (D. N.Y.) introduced S. 1701, 106th Cong. (1999). S. 1701 was generally believed to have been written by the Justice Department, and many analysts agreed that it would have actually made the law on forfeiture worse than it was. *See* Brenda Grantland, Chart comparing H.R. 1658 with S. 1701, available at http://www.fear.org/s1701vs_hr1658.html; chart comparing S. 1701 with H.R. 1965, 105th Cong. (1999), available at <http://www.fear.org/s1701chart.html>.

Union to the National Rifle Association joined Rep. Hyde in his pursuit of a reform bill, indicating that forfeiture had garnered a long list of enemies.¹⁵⁹

The 1999 House version of the Reform Act¹⁶⁰ contained eight provisions which Rep. Hyde believed to be important: (1) shifting the burden of proof so that once a claimant challenged a forfeiture, the government would have to prove by clear and convincing evidence that the property was subject to forfeiture; (2) providing a universal innocent owner defense for all federal forfeitures; (3) providing counsel for indigents faced with forfeiture proceedings; (4) a provision requiring the release of property pending a final outcome if the government's continued possession was likely to cause a substantial hardship on the property owner; (5) eliminating the cost bond requirement; (6) amending the Tort Claims Act to allow claimants to sue the government for property destroyed while in the government's possession; (7) extending the deadline by which an owner must challenge a forfeiture; and (8) awarding post-judgment and, in some cases, pre-judgment interest to those property owners who prevail against the government.¹⁶¹ This Part will discuss the extent to which these various key provisions were incorporated into the final version of the Reform Act, as well as a couple of other interesting provisions and their likely effects.

A. *A Review of Some Key Components of the Civil Asset Forfeiture Reform Act of 2000:*

1. BURDEN OF PROOF

Prior to the Reform Act,¹⁶² once the government had shown probable cause that a property was subject to forfeiture, the burden of proof fell on the owner contesting the forfeiture to show, by a preponderance

159. Among the organizations thanked by Rep. Hyde were the National Association of Criminal Defense Lawyers, Americans for Tax Reform, the American Civil Liberties Union, the National Rifle Association, the American Bar Association, the National Association of Realtors, the Credit Union National Association, the American Bankers Association, the Aircraft Owners and Pilots Association, the National Association of Home Builders, the Boat Owners Association of the United States, United States Chamber of Commerce, the National Apartment Association, the American Hotel and Motel Association, and Brenda Grantland of Forfeiture Endangers American Rights ("F.E.A.R."), who worked for years to get a reform bill passed. See Cong. Rec. H2040.01, 2046-47 (delayed, Apr. 11, 2000) (statement of Rep. Hyde).

160. H.R. 1658, 106th Cong. (1999).

161. *Id.* See also Statement of Henry Hyde, Chairman, House Judiciary Committee, *Forfeiture Reform: Now or Never?* CATO INSTITUTE, May 3, 1999, available at <http://www.aclu.org/congress/1050399a.html>.

162. President Clinton signed the Reform Act into law on April 25, 2000. By its terms, the Reform Act was to have taken effect 120 days thereafter, which would have been on or about August 23, 2000. Pub. L. No., 106-185, § 2, 2000 U.S.C.C.A.N. (114 Stat 202, 225) (to be codified at 18 U.S.C. § 983).

of the evidence, that the property was not subject to forfeiture.¹⁶³ As such, the government could meet its burden without obtaining a criminal conviction against the owner or even charging the owner with a crime.¹⁶⁴ In fact, once the government had seized the property, its burden of probable cause was already met, and the government could simply sit and wait for the claimant to prove his case.¹⁶⁵

The House Judiciary Committee found, quite correctly, that this burden required the owner to prove a negative,¹⁶⁶ while the government was required to prove almost nothing.¹⁶⁷ By contrast, the committee noted, some states required the prosecution to prove its case beyond a reasonable doubt,¹⁶⁸ while others required clear and convincing evidence before property would be forfeited.¹⁶⁹

The Reform Act remedies this inequity under federal law by forcing the government to prove by a preponderance of the evidence that the property is subject to forfeiture.¹⁷⁰ This represents a compromise from the "clear and convincing" standard of Rep. Hyde's original bill,¹⁷¹ but is a move in the right direction. Nevertheless, this low evidentiary threshold still leaves the door open for abuse. Especially because law enforcement will continue to have a pecuniary interest in forfeited proceeds, there is little reason to think that this slightly higher burden of proof will cause law enforcement officials to shift their emphasis from seizing property and cash to fighting dangerous criminals.

The Attorney General and the Justice Department argued that preponderance of the evidence was the correct standard because it is the

163. See 19 U.S.C. § 1615 (1999).

164. Report of the Judiciary Committee, 69006, 106th Congress Report, House of Representatives, 1st Session, 106-192, at 11 n.47.

165. *Id.*

166. Under 21 U.S.C. § 881(a)(7) (1999), the claimant had to prove the "innocent owner" defense by a preponderance of the evidence, to wit, that the act subjecting the property to forfeiture was committed without the owner's knowledge or consent.

167. Report of the Judiciary Committee, *supra* note 164, at 12 n.48.

168. *Id.* at 13 n.53 (citing *A 1983 Volkswagen v. County of Washoe*, 699 P.2d 108, 109 (Nev. 1985)).

169. See, e.g., *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 967 (Fla. 1991) (holding that the Florida Constitution "requires substantial burdens of proof where state action may deprive individuals of basic rights"). Of course, with the availability of federal adoptive forfeitures facilitating the circumvention state forfeiture laws, there is no reason why a local police department should have to concern itself with such substantial burdens of proof.

170. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 2000 U.S.C.C.A.N. (114 Stat 202, 205-06) (to be codified at 18 U.S.C. § 983(c)(1)).

171. H.R. 1658, 106th Cong. (1999) provided for a "clear and convincing" evidentiary burden. The compromise arose from the fact that "preponderance of the evidence" standard appeared to be as far as the Senate was willing to go. See S. 1901, 106th Cong. (1999); S. 1701, 106th Cong. (1999).

standard used in other civil proceedings.¹⁷² This argument exhibits an almost laughable contempt for reality. At best, forfeiture is used most often as a proxy for punishing those who are suspected of engaging in criminal activity. At worst, forfeiture is used strictly as means for generating revenue. Both of these inferences are supported by the fact that approximately eighty percent of people whose assets are seized and forfeited are never charged with a crime.¹⁷³ Thus, the only meaningful reform would be to require that (1) forfeited assets be deposited into a general treasury fund instead of being funneled to the seizing agency, and (2) a forfeiture can only occur pursuant to a criminal conviction.¹⁷⁴

In addition to shifting the burden of proof onto the government in general terms, the Reform Act requires that "if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a *substantial connection* between the property and the offense."¹⁷⁵ This language looks good on its face, and was probably needed to set a uniform standard across the country.¹⁷⁶ The precise meaning of "substantial connection," however, will be hard for courts to quantify, and it may be that one judge's "substantial connection" will be another judge's "fortuitous" or "incidental" connection.

The problem with setting reasonable, bright-line rules is a difficulty that is inherent in the taint doctrine itself: if property becomes tainted by its association with a crime, how tainted does it have to be in order for it to be subject to forfeiture?¹⁷⁷ The lack of a clear, principled answer to

172. See Weekly Media Briefing with Attorney General Janet Reno, Justice Department, Washington, D.C., available on Federal News Service, June 24, 1999.

173. See Blumenson & Nilsen, *supra* note 23, at 77 n.155.

174. See *id.* at n.152.

175. Pub. L. No. 106-185, § 2, 2000 U.S.C.A.N. (114 Stat. at 206) (to be codified at 18 U.S.C. § 983(c)(3)) (emphasis added).

176. Many courts require there to be a substantial connection. See, e.g., *United States v. 28 Emery St.*, 914 F.2d 1, 3-4 (1st Cir. 1990); *United States v. Forfeiture, Stop Six Center*, 781 F. Supp. 1200, 1205-06 (N.D. Tex. 1991); *United States v. 26.075 Acres, Located in Swift Creek Township*, 687 F. Supp. 1005 (E.D.N.C. 1988), *aff'd sub nom. United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989). Others do not. The Seventh Circuit has ruled that the facilitating property need only have "more than an incidental or fortuitous connection to criminal activity." *United States v. 916 Douglas Ave.*, 903 F.2d 490, 493 (7th Cir. 1990), *cert. denied sub nom. Born v. United States* 498 U.S. 1126 (1991). See also *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1269 (2nd Cir. 1989) (holding that the test is "sufficient nexus").

177. For a full discussion of the broad range of standards and circumstances by which courts have found property to have been sufficiently tainted to invoke forfeiture, see 146 Cong.Rec. at H2050-51 (2000). Significantly, Congress notes that "[i]n one area in particular, courts have been much too liberal in finding facilitation. An especially high standard should have to be met before we dispossess a person or family of their home. A primary residence should be accorded far greater protection than mere personal property." *Id.*

this question highlights the need to reconsider the validity of the taint doctrine.

2. APPOINTMENT OF COUNSEL

One of the major reasons that so few forfeitures are challenged is the arduous procedures and expense of challenging the forfeiture, particularly when the seizure may leave the owner without resources with which to fight the forfeiture.¹⁷⁸ This problem is compounded by the fact that there is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases, because they are not threatened with imprisonment.¹⁷⁹ The House Judiciary Committee concluded that “civil forfeiture proceedings are so punitive in nature that appointed counsel should be made available for those who are indigent, or made indigent by a seizure, in appropriate circumstances.”¹⁸⁰

As a result of these findings, the original House version of the Reform Act contained a provision for the appointment of counsel for indigents in civil forfeiture cases.¹⁸¹ The criteria for determining who should be appointed counsel included whether or not the person had standing to bring the claim and whether the claim had been brought in good faith.¹⁸² As a result of Senate compromises, however, the Reform Act in its final form does very little in this regard because, with respect to claims on personal property, the Reform Act limits appointment of counsel to those who are already represented by appointed counsel “in connection with a related criminal case.”¹⁸³ This almost defeats the purpose of the measure, as it grants criminal defendants greater protection than claimants not charged with any crime. This may give police and prosecutors more incentives to pursue civil forfeitures than to prosecute criminals, because there will still be fewer barriers between the police and a briefcase full of cash than stand in the way of winning a conviction against an individual.

The Reform Act does, however, offer the appointment of counsel to indigents where the property subject to forfeiture is real property used by the indigent person as a primary residence.¹⁸⁴ This seems to reflect a general policy concern, noted frequently in the record, that homes

178. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623-24 (1989) (holding that the Sixth Amendment does not protect against the forfeiture of assets used to pay attorney’s fees).

179. Report of the House Judiciary Committee, *supra* note 164, at 14 n.55 (citations omitted).

180. *Id.* at 14.

181. H.R. 1658, 106th Cong. (1999).

182. *Id.*

183. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 2000 U.S.C.C.A.N. (114 Stat. 202, 205) (to be codified at 18 U.S.C.A. § 983(b)(1)).

184. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 205) (to be codified at 18 U.S.C.A. § 983(b)(2)).

should be given greater protection than personal property.¹⁸⁵ How much meaning this will have in the real world, of course, remains to be seen. It seems likely that this will channel police toward placing a greater emphasis on seizing cash, cars and other personal property.

3. INNOCENT OWNER DEFENSE

*Bennis v. Michigan*¹⁸⁶ demonstrated that the Supreme Court, on grounds that the *in rem* fiction made the guilt or innocence of the owner irrelevant to the property's guilt, would not read an innocent owner defense into any civil forfeiture provision that did not specifically provide one. With respect to federal forfeiture laws, however, the impact of *Bennis* was limited because most federal statutes explicitly provided for an innocent owner defense.¹⁸⁷ Many other federal forfeiture statutes contain no such defense.¹⁸⁸

The Reform Act provides a uniform innocent owner defense for all federal civil forfeiture proceedings.¹⁸⁹ It defines an innocent owner as one who either "did not know of the conduct giving rise to the forfeiture" or, upon learning of the conduct, did "all that reasonably could be expected under the circumstances to terminate such use of the property."¹⁹⁰ Ways of demonstrating that an owner did "all that reasonably could be expected under circumstances" may include timely notification of law enforcement authorities, and/or reasonable good faith efforts to terminate the illicit use of the property.¹⁹¹ The owner is not required to take steps that would endanger anybody other than the person whose conduct gives rise to the forfeiture.¹⁹² This provision might help protect landlords who, in some jurisdictions, may not be able to evict a tenant until after that tenant has been convicted of a crime.¹⁹³

The Reform Act also contains a protection against potential relation-back hazards, stating that an "innocent owner" is also a person who, at the time he acquired the interest in the property, "was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value) and did not know and was reasonably without cause

185. See 146 Cong.Rec. at H2050-51 (2000).

186. 516 U.S. 442 (1996).

187. Report of the House Judiciary Committee, *supra* note 164, at 14 n.58 and accompanying text.

188. See, e.g., 18 U.S.C. § 1955(d) (1999).

189. § 2, 2000 U.S.C.A.N. (114 Stat. at 206) (to be codified at 18 U.S.C. § 983(d)).

190. *Id.*

191. *Id.*

192. *Id.*

193. Report of the House Judiciary Committee, *supra* note 164, at 14 and text accompanying n.66.

to believe that the property was subject to forfeiture.”¹⁹⁴ This provision is in part intended to prevent criminals from making fraudulent, gratuitous transfers to innocent family members.¹⁹⁵

An otherwise valid claim under the foregoing subsection will not be denied for lack of consideration if (1) the property is the claimant’s primary residence, (2) the claimant has no reasonable alternative means of shelter, (3) “the property is not, and is not traceable to, the proceeds of any criminal offense,” and (4)

the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate, except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.¹⁹⁶

At first glance, this looks like a reasonable provision for protecting the widows, divorcees, and dependent orphans of drug dealers from being rendered homeless by the forfeiture of their residences. But the third part, which provides that the property cannot be, or be traced to, “the proceeds of any criminal offense” is troubling because it looks like a strict liability provision that defeats the entire purpose of the innocent owner defense. Indeed, this provision engages the reader in a bit of circular logic, because, if the property is not traceable to the proceeds of a criminal offense, then it is unlikely that the property would be subject to forfeiture at all unless it was used in substantial connection to facilitate the offense¹⁹⁷ (which would tend to call into doubt the innocence of any cohabitating family members).

This provision also calls into the question the very purpose of the forfeiture. If the purpose is to punish the criminal, or to at least deprive him of the fruits of illicit activity, then it makes no sense to deprive innocent family members of the property once the criminal is dead or otherwise no longer in possession of the property. The original House version of the Reform Act provided that the person inheriting the property could prove innocent ownership by demonstrating that, at the time he acquired the property, he was reasonably without cause to believe that the property was subject to forfeiture.¹⁹⁸ This would have been a

194. § 2, 2000 U.S.C.A.N. (114 Stat. at 206) (to be codified at 18 U.S.C. § 983(d)(3)(A)).

195. Report of the House Judiciary Committee, *supra* note 164, at 16-17.

196. § 2, 2000 U.S.C.A.N. (114 Stat. at 206-07) (to be codified at 18 U.S.C. § 983(d)(3)(B)(1994)).

197. See discussion *supra* notes 177-79 and accompanying text.

198. H.R. 1658, 106th Cong. (1999).

reasonable provision to include in the final version of the bill, one that could have protected innocent family members from losing their homes.¹⁹⁹

4. HARDSHIP PROVISION

Prevailing against the government in a forfeiture proceeding would be a hollow victory if, during the time that the government held the property following the seizure, the owner has suffered irreparable damage due to lost business or other hardship. The Reform Act attempts to protect against this eventuality by providing that the property may be released immediately to the claimant if (1) the claimant has a possessory interest; (2) the claimant has sufficient ties to the community to assure the availability of the property; (3) the continued possession by the government would cause a substantial hardship, such as the loss of business, work, or leaving the claimant homeless; and (4) the substantial hardship outweighs the likelihood that the property will be lost, damaged, concealed, destroyed, or otherwise disposed of during the pendency of a forfeiture proceeding.²⁰⁰ The foregoing only applies if the property is not contraband or funds, unless those funds constitute "the assets of a legitimate business which has been seized," if the property is not to be used as evidence of a violation of the law, or if, "by reason of design or other characteristic, [the property] is particularly suited for use in illegal activities," or if the property "is likely to be used to commit additional criminal acts if returned to the claimant."²⁰¹

This reform appears laudable on its face. Like other provisions, however, it seems to underscore a more troubling aspect of civil asset forfeiture: that civil forfeiture is often used as a proxy for a criminal prosecution. This once again underscores the absurdity of the taint doctrine. For example, if the government has evidence that a business owner has committed a crime, then why not arrest the business owner instead of "arresting" his property? On the other hand, if the government does not have sufficient evidence to build a criminal case against the business owner, the government should not be able to punish that person by seizing his or her property. One could only believe otherwise if one were to accept that property can be "guilty" of criminal activity entirely apart from the culpability of its owner.

199. This Comment recognizes the cynical response to this argument, which is that spouses are never ignorant of the sources of their families' income. This Comment simply believes that the adage, "never say never," has some bearing on such circumstances, and that fundamental justice requires that a spouse not be presumed guilty by association.

200. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 208) (to be codified at 18 U.S.C. § 983(f)(1)).

201. *Id.* at 209 (to be codified at 18 U.S.C. § 983(f)(1)(E)(8)).

5. COMPENSATION

Successful claimants have been frustrated in their attempts to get compensation for damage caused to their property while the government had possession during the pendency of a forfeiture. In 1989, customs agents seized and fruitlessly searched a brand new twenty-nine-foot sailboat for drugs.²⁰² The search destroyed the sailboat's gas tank and its engine, and damaged its woodwork, resulting in damages to the sailboat of over \$30,000.²⁰³ After finding that federal law prohibited the government from paying him damages, the owner sold the boat for scrap.²⁰⁴ A private bill eventually brought the owner a mere \$8,900, the amount he needed to repay his boat loan.²⁰⁵

The Reform Act would amend the Federal Tort Claims Act²⁰⁶ to provide for tort claims against the U.S. government for the injury or loss of goods, merchandise, or other property while in the possession of any law enforcement officer if the property was seized for purposes of forfeiture, if the property was not forfeited, and if the claimant was not convicted for a crime giving rise to the forfeiture.²⁰⁷ The potential impact of the phrase, "if the property was seized for purposes of forfeiture," is unclear. It seems that law enforcement could easily get around this language if they first seize property as evidence, and initiate the forfeiture proceedings only later.

The Reform Act also provides for an award of attorney's fees, costs, and post-judgment interest in the event that the claimant should "substantially prevail" against the government in a forfeiture proceeding.²⁰⁸ The precise meaning of "substantially prevail" is also unclear. It could mean either that a claimant came close to winning, or that the government did not have much of a case against the property (although the latter is more likely). It would have been better to have simply used the word "prevail" without any qualifier, because it seems likely that courts will develop inconsistent standards for the meaning of the term "substantially."

6. ELIMINATING THE COST BOND

Under recent law, a claimant contesting a forfeiture had to post a cost bond in the amount of \$5,000 or ten percent of the seized property's

202. See Red Marston, *Customs Destroys a Boat and a Dream*, ST. PETERSBURG TIMES, Feb. 5, 1993, at 8C.

203. *Id.*

204. *Id.*

205. *Id.*

206. 28 U.S.C. § 2680(c).

207. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 211) (to be codified at 28 U.S.C. § 2680(c)).

208. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 212) (to be codified at 28 U.S.C. § 2645(b)(1)).

value, whichever was less, but not less than \$250.²⁰⁹ The potential effect of deterring indigents from even trying to contest forfeitures was obvious. Indeed, the Report of the House Judiciary Committee concluded that the bond was “unconstitutional in cases involving indigents, because it would deprive such claimants of hearings simply because of their inability to pay.”²¹⁰ The Reform Act eliminates the cost bond entirely.²¹¹

7. NOTICE AND SET-ASIDE PROVISIONS

The Reform Act calls for the government to notify an owner of a seizure within sixty days, with some possibilities for extension, unless in the interim the government initiates a forfeiture action and provides notice to the owner.²¹² Once notice has been provided, the claimant has at least thirty-five days in which to challenge the forfeiture.²¹³ This procedure has been viewed as necessary because, under the former rules, a claimant often had little or no time to adequately contest a forfeiture after receiving notice.²¹⁴

If the government fails to provide notice, the owner can enter a motion to set aside the forfeiture.²¹⁵ The court can then order the government to return the property to the owner without prejudice to the government’s ability to initiate a forfeiture at a later time.²¹⁶ This is unfortunate, as the original House version of the bill provided that failure of notice would result in dismissal of the government’s claim with prejudice.²¹⁷ The final version might allow the government to continually harass a property owner ad infinitum, or at least until the end of the expanded statute of limitations provided in the Reform Act.²¹⁸

8. OTHER INTERESTING PROVISIONS

Because civil asset forfeiture is a civil proceeding, a claimant has access to all the discovery tools of the Federal Rules of Civil Procedure. At least with respect to discovery, this places a claimant in a far better position than a criminal defendant in the federal system. Congress has seen fit to alter this balance by allowing the government to move for a

209. 19 U.S.C. § 1608 (1999).

210. Rep. of the H.R. Judiciary Comm., *supra* note 164, at 18 n.73 (citing *Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976)).

211. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 204) (to be codified at 18 U.S.C. § 983(a)(2)(E)).

212. *Id.* at 202-03 (to be codified at 18 U.S.C. § 983(a)).

213. *Id.*

214. *See* David B. Smith, *supra* note 25, at ¶ 9.03(1), 9-44-9-45.

215. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 207-08) (to be codified at 18 U.S.C. § 983(e)).

216. *Id.*

217. H.R. 1658, 106th Cong. (1999).

218. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 217) (to be codified at 19 U.S.C. § 1621).

stay of forfeiture proceedings in order to avoid causing prejudice to a pending criminal case.²¹⁹ On the other hand, the Reform Act allows a claimant to do likewise if allowing the forfeiture proceeding to go forward might burden his right against self-incrimination.²²⁰ A court may also choose to issue a protective order limiting the scope of discovery instead of granting a stay.²²¹

In *Degen v. United States*,²²² the Supreme Court declined to apply the "fugitive disentitlement doctrine" to forfeiture cases where a criminal defendant is unavailable to face criminal charges. The Court's reasoning was that the absence of a fugitive did not remove jurisdiction over the property from the court, and that the fugitive's challenge of the forfeiture did not in any way prejudice the government's ability to have a judgment enforced.²²³ The Court found that the government was on stronger ground in arguing that discovery in the proceeding might prejudice a concurrent criminal case; there was no reason, however, why a court could not issue protective orders to limit the scope of discovery.²²⁴ The Reform Act overrules *Degen* by instating the applicability of the fugitive disentitlement doctrine to civil forfeiture cases,²²⁵ thus confronting claimants with the choice between giving up their property or facing criminal charges.

One of the most difficult aspects of studying current forfeiture policy is the lack of information from the government about how much it collects annually in forfeited assets.²²⁶ The Reform Act attempts to remedy this with a provision entitled "Enhanced Visibility of the Asset Forfeiture Program."²²⁷ This provision calls for an annual report from the Attorney General which would show a break-down of assets deposited by state of deposit, total expenses paid from the fund, as well as other reporting and auditing requirements.²²⁸ If nothing else, this will provide some measure of accountability as to how assets are disbursed. More importantly, it will provide concerned citizens a better understanding of how much the cost of government is being externalized from the political process.²²⁹

219. *Id.* at 215 (to be codified at 18 U.S.C. § 981(g)(1)).

220. *Id.* at 216 (to be codified at 18 U.S.C. § 981(g)(2)).

221. *Id.* (to be codified at 18 U.S.C. § 981(g)(3)).

222. 517 U.S. 820 (1996).

223. *Id.* at 825.

224. *Id.* at 826.

225. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 219) (to be codified at 28 U.S.C. § 2466).

226. As previously noted, the Justice Department has not provided an audit of its forfeiture fund since 1996. See Dillon, *supra* note 11.

227. § 2, 2000 U.S.C.C.A.N. (114 Stat. at 223-24) (to be codified at 28 U.S.C. § 524(e)(6)).

228. *Id.*

229. See discussion, *infra* notes 243-55 and accompanying text.

V. LOOSE ENDS: WHAT THE REFORM ACT DOES NOT ADDRESS.

When a law and order Congress passes reform legislation by such an impressive margin, one ought to step back and inquire as to whether perhaps more is happening than meets the eye, and whether the Reform Act itself is mere slight of hand to obscure some other purpose. The intentions of the Reform Act would appear to withstand this scrutiny; however, despite its laudable procedural reforms, it leaves a lot of business yet to be done. While it raises the government's burden of proof, for example, the Reform Act only moderately clarifies, and does not attempt to seriously justify, the continued use of the taint doctrine. Consensual behavior does not provide us with a clarified wrong against which we can measure a remedy, which leads to the ultimate conclusion that ending the drug war (as well as prohibitions against other consensual behavior) is the only rational way to reform civil asset forfeiture. Given the likelihood that the drug war will continue into the indefinite future, the Reform Act will not cure the problems inherent in a policy that allows a roving executive branch to generate revenues by means which are outside the normal democratic processes of political accountability. Without addressing these fundamental concerns, the relationship among our democratic institutions, our laws, and our consumption of public goods such as law enforcement²³⁰ are in danger of becoming increasingly irrational.

A. *Forfeiture and the "Taint" Doctrine: A Remedy in Search of a Wrong*

One particularly troublesome aspect of civil asset forfeiture is the apparent strict liability which attaches to the property once it has been "tainted" by being either the proceeds or instrumentality of criminal conduct, or by the mere presence of illegal substances or instrumentalities. Whereas our traditional system of criminal justice attaches guilt or innocence to the person, the taint doctrine attaches guilt to the property itself, and therefore the guilt or innocence of the owner can easily be irrelevant.²³¹ Although the Reform Act makes it clear that an innocent owner, or an owner who did "all that could reasonably be done" to prevent the property from being used illegally, may successfully challenge a forfeiture, it will still not be entirely clear what act or acts an owner must

230. For a discussion on why law enforcement is a "public good," see Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665 (1997).

231. Although the Reform Act would place this burden back onto the government, to prove by a preponderance of the evidence that the property is subject to forfeiture, the taint doctrine still manifests an erosion of the presumption of innocence.

undertake to prevent the property from being subject to forfeiture. Moreover, although the Reform Act establishes a higher burden on the government to prove that the property "is subject to forfeiture," it does not sufficiently address the problems inherent in the taint doctrine itself, thereby leaving the system open for continued abuse.

The taint doctrine also has implications for the presumption of innocence on which our system of criminal jurisprudence is based.²³² Civil forfeiture has often been justified by its proponents as an effective tool for "separating criminals" from the proceeds of their criminal enterprises.²³³ A criminal, so the conventional wisdom goes, fears losing his money, his house, and his expensive cars more than he fears going to jail.²³⁴ But this reasoning presupposes, as a first matter, that the owner of the subject property is "criminal." It is therefore important to answer this question: from where does the government's power to label someone a "criminal" emanate? The answer is that such power can only emanate from a properly conducted criminal trial, in which the jury converts the criminal defendant from a person who is "presumed innocent" to one who has been proven guilty "beyond a reasonable doubt."²³⁵

It necessarily follows, then, that the government lacks the power to label anyone a "criminal" who has not been duly prosecuted and found guilty for the charged offense. In this regard, the proponents of civil asset forfeiture as a tool for law enforcement ignore the presumption of innocence, and have thus turned upside down the rationale which has long stood behind that presumption: that the power of the state to determine who is guilty of a crime should not be arbitrary. Thus, by labeling individuals as "criminal" as a pretext for seizing and forfeiting their assets, the state usurps the presumption of innocence, a fundamental cornerstone of our jurisprudential heritage, and replaces it with an arbitrary exercise of state will that is repugnant to our system of political beliefs.

232. See, e.g., *Victor v. Nebraska*, 511 U.S. 1, 8 (1994).

233. See Stefan D. Cassella, *Forfeiture Is Reasonable, and It Works*, CRIM. L. PROC. NEWS, (Federalist Society) Vol. 1, No. 2 (1997).

234. *Id.* Cassella's reasoning here is patently fraudulent. He has never cited a survey or other study which empirically backs his assertion. In point of fact, his assertion flies in the face of what is common knowledge about the role of forfeitures in plea-bargaining, where prosecutors agree not to prosecute in exchange for defendants' agreement not to challenge forfeitures of their property. See Smith, *supra* note 25, at ¶ 10.06(3)(e), 10-100.22(5)-24. Moreover, the value that individuals place on their freedom of movement vis-a-vis their property is not for Cassella or anybody else in the government to presuppose, because the two are inextricably intertwined. Our democracy is simply based on the fundamental principle that freedom is the highest possible state of being for human individuals to live under, and that ownership and control of property is a vital expression of that freedom. See Pilon, *supra* note 122, at 322-23. Whether the government puts one in jail, or takes one's property, the government has taken one's freedom, and therefore has exercised its ultimate power (short of taking life, which is another form of taking away freedom).

235. See *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

Of course, the proponents of civil forfeiture will reply to this argument that, because civil forfeiture is a proceeding in rem, the guilt or innocence of the owner is irrelevant.²³⁶ But such circular reasoning stoops to an unseemly level of intellectual dishonesty because it ignores the punitive nature of in rem forfeiture.²³⁷ Worst still, civil forfeiture in drug cases seeks to penalize individuals for wrongs that are impossible to quantify because those “wrongs” are grounded in consensual behavior that the state has declared illegal through the raw exercise of political power.²³⁸ Roger Pilon correctly points out that when consensual activities are criminalized, “the task of crafting principled remedies is made impossible, for there is no victim to come forward, no wrong from which to derive a remedy.”²³⁹ With no wrongs against which to measure the remedies, those remedies become widely varied, because “in the end they reflect little more than moral outrage at unpopular behavior,” and, indeed, they become “remedies for nothing.”²⁴⁰

As has been noted, civil in rem forfeiture was historically justified as a measure for enforcing customs laws. In an era in which the government relied heavily on customs revenue, it was rational and just for the government to base the seizure of goods for customs violations on the notion that the government had a “property interest” in goods that were subject to customs duties.²⁴¹

Today, asset forfeiture is aimed only at disgorging a particular pathology of prohibition, that of extraordinary street profits.²⁴² Outrage at the amounts of wealth amassed by drug dealers is misplaced because we, as a nation, have only made such wealth possible through prohibition. Such outrage is therefore a poor platform from which to rationally consider our drug policy. Thus, the ultimate civil asset forfeiture reform measure would be to dispose of the drug war altogether.

236. Indeed, this was precisely the rationale behind the court’s decision in *Bennis v. Michigan*, 516 U.S. 442 (1996).

237. See *Austin*, 509 U.S. at 611-14. But see *id.* at 618 (stating rather incoherently that “[i]n sum, even though this Court has rejected the “innocence” of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner.”).

238. While this Comment posits that the early Supreme Court, in cases such as *La Vengeance*, 3 U.S. (3 Dall.) 297 (1796) and *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827), mistakenly conflated the issues of common law criminal forfeiture and in rem forfeiture, it should be pointed out that those cases involved acts of piracy: acts which at least bore the *arguable substance* of wrongs for which the government could permit a remedy.

239. See Pilon, *supra* note 122, at 328.

240. *Id.* at 328-29.

241. See, e.g., *Boyd v. United States*, 116 U.S. 616, 623 (1886).

242. The retail markup on black-market drugs has been estimated at anywhere from 5,000 to 20,000 percent. See Robert Sweet, NAT. REV., Feb. 12, 1996, at 44-45 available at <http://www.nationalreview.com/12feb96/drug.html>.

B. *The Problem of Externalizing the Cost of a Public Good*

In recognition of the political reality that drug prohibition is unlikely to end in the near future, it is appropriate to consider some issues for future efforts at reform. Although its purported intent may have been to deprive drug dealers of the fruits and instrumentalities of their activities, as it is practiced by the government, forfeiture is, for all intents and purposes, a means of raising revenue,²⁴³ and it will most likely continue to be so in a post-Reform Act world. Eric Blumenson and Eva Nilsen have argued that this particular feature of the current law of forfeiture, beyond its obvious corruptive potential, violates the constitutional separation of powers as contained in the Appropriations Clause of Article I.²⁴⁴ This argument is sound, and is worth exploring in a litigation context.

Because 21 U.S.C. § 881(e)(2)(B) mandates the depositing of forfeited proceeds directly into the Justice Department's Asset Forfeiture Fund, the core congressional power found in the Appropriations Clause is bypassed in favor of an agency of the executive branch raising its own revenue and setting its own budget.²⁴⁵ But since Congress granted this power to the Justice Department, the question becomes whether this was an impermissible delegation of a core congressional power. The nondelegation doctrine provides that "so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred."²⁴⁶ However, "[i]f some delegations of legislative power are constitutionally suspect, giving law enforcement agencies the opportunity to set the size of their own budgets through police seizures must be one of them."²⁴⁷

The nondelegation concerns on this point are compelling, and, by themselves, should be sufficient for finding that asset forfeiture in a post-Reform Act world would still be unconstitutional. Nevertheless, implicit in these arguments is an important policy matter which must be examined, one which takes into account the externality effect²⁴⁸ of fund-

243. See, e.g., *Caplin & Drysdale*, 491 U.S. at 629.

244. See Blumenson & Nilsen, *supra* note 23, at 84-100. The Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl.7.

245. Blumenson & Nilsen, *supra* note 23, at 84-85.

246. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (internal quotation marks omitted).

247. Blumenson & Nilsen, *supra* note 23, at 88.

248. The meaning of the term "externality" has been much debated by economists over the century, and the question still seems unsettled. We will not involve ourselves in that debate,

ing significant government operations, such as law enforcement, with assets forfeited from individuals.

If indeed it is agreed upon that drugs must be illegal, the logic of making drug trafficking unprofitable is compelling. The power conferred by drug profits is well-known, and has proven to be highly corrosive to the rule of law wherever illegal drug markets exist.²⁴⁹ Complications arise, however, when a government declares an interest in those profits through forfeiture, especially when the government is not required to pursue a criminal conviction as a prerequisite to forfeiture. Through a perverse irony, the government soon finds that it has a financial interest in the profitability of the drug market, and, therefore, a fiscal stake in keeping drugs illegal. Law enforcement agencies that depend on drug asset forfeiture come to have their own stake in the profitability of illegal drugs. In fact, one of the key measures of the success of drug interdiction efforts—driving up the street price of drugs—has an additional ironic effect of making black market trading in drugs even *more* profitable for those who remain market players.²⁵⁰ The end result is that law enforcement develops a stronger stake in *not* winning the drug war than in winning the drug war.

The second prong of this problem is that, because dependence on forfeiture causes the funding of law enforcement to become detached from legislative accountability,²⁵¹ the body politic has no sense of the

because the meaning in terms of the law seems pretty clear: An externality occurs where one derives a benefit for which one has not paid, but somebody else had (in other words, the cost of that benefit has not been *internalized*). Some of the most common examples the impact of externalities in our legal history come from the common law of property. For example, a factory might decide that it can produce a good more cheaply if it pollutes the environment. Thus, the cost of producing the good “cleanly” is not internalized, and the cost of making it cheaply is externalized onto the environment and the surrounding community, and the factory will have to pay damages to its neighbors as a way of fully internalizing the costs of its manufacturing processes. It is not only possible to *derive* external benefits, but also to confer them. An example might be a property owner whose investment in a drainage system benefits his neighbors.

249. Perhaps the notion that drug money creates a public nuisance through its corruptive power on local politicians and law enforcement presents a stronger remedial argument for forfeiting drug profits than those arguments in which the Court has indulged. The problem is that the influence of drug money is so pervasive that it cannot possibly be abated without some fundamental shift in drug policy such as legalization. All that forfeiture really accomplishes is to compound the misery associated with drug trafficking.

250. Indications are that this effect is, at best, fleeting. Seizures and arrests come and go, but the long-term trend has been for the street price to decrease and for purity to increase. See Eric E. Sterling, *Statement to the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives on D.E.A. Oversight*, available at <http://www.cjpf.org/speeches/deahear.html>. Tallies of how many tons of drugs and how many millions of dollars in assets have been seized and forfeited provide no real helpful guidance on what progress is being made in the effort to eradicate illegal drugs. In this respect, daily news reports on the government’s progress in the war on drugs can be likened to the “body count” reports of the Vietnam war.

251. See Blumenson & Nilsen, *supra* note 23, at 84.

real cost of enforcing drug laws, and, therefore, the laws themselves are in danger of becoming irrational. Our democracy is founded on a fundamental principle: that freedom allows for a marketplace of political ideas to flourish. However, a political idea cannot be effectively tested by that marketplace if its cost cannot be weighed rationally against its impact or utility.

It flows from this precept that, in order for the body politic to rationally determine which public goods it wants from the government, it must have some sense of the cost of those goods through taxation, duties, user fees, and so on. The body politic must register consent to the cost of public goods by approving or disapproving of the actions of its elected representatives. This is, in part, the essence of "no taxation without representation" upon which our nation was founded. Without this ability to weigh the cost against the utility and effectiveness of public goods, we risk losing the underlying rationality of our system of government to arbitrary exercises of state and federal power.

Even under the best of circumstances, unlike the situation with private goods, taxpayers have "an incentive to give false signals concerning their preferences"²⁵² as to their demand for public goods. Public goods are not price-rationalized by the market in the same sense that private goods are, so public goods are necessarily funded by a system of externalized costs and benefits. Because individual taxpayer demand has a minimal effect on the supply of a public good,²⁵³ "by understating their demand they can aspire to enjoy the public good without paying the costs of provision."²⁵⁴ In other words, everybody hopes to pay less tax while enjoying more benefits from public goods.

252. ANDREAS A. PAPANDREOU, EXTERNALITY AND INSTITUTIONS 27 (1994).

253. "A 'true-blue' public good also requires that it is not possible to limit the consumption of the good to any particular group or person. This condition is known as non-excludability." *Id.* at 26 n.16. Non-excludability is also called "non-divisibility" or "indivisibility." An indivisible good is one which a person may use without depriving others of their ability to use it, such as public transit or freeways. See RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (1986). The definition, however, seems misleading. While an interstate highway might appear to be an indivisible good, common experience tells us that there comes a breaking point at which such goods must be modified, or new or alternative ones built, in order to maintain their "indivisible" character. Perhaps a more "pure" example of a non-excludable public good would be a lighthouse. See PAPANDREOU, *supra* note 252, at 27 n.18.

254. *Id.* Papandreou points out that:

By not revealing one's true preferences . . . any one person can hope to snatch some selfish benefit in a way not possible under the self-policing competitive pricing of private goods; and the 'external economies' or 'jointness of demand' intrinsic to the very concept of collective goods and governmental activities makes it impossible for the grand ensemble of optimizing equations to have that special pattern of zeros which makes *laissez faire* competition even *theoretically* possible"

Id.

This tension between the promise of public goods and the need to pay for them constitutes, to a large extent, the very essence of politics. Voters tend to scoff at campaign promises precisely because they know that, while the ideal political accomplishment would be to offer the body politic a valuable public good which costs them nothing, every promise to create or expand the availability of a public good has a price which the body politic must eventually bear if that is indeed what it wants. This tension extends not just to government-provided goods and services themselves, but also to the underpinning laws which make them necessary. The cost of law enforcement, for example, ought to be considered in conjunction with the decision of whether or not to criminalize a certain thing or activity. Notwithstanding the litany of campaign promises to the contrary, making something illegal does not, in and of itself, end that thing's existence. This is only common sense, and one would hope that the tension between costs and political goals would be enough to keep the government from reaching beyond the rational in determining what goods it promises to provide for the body politic's consumption.

But what if politicians found a way to pay for an expanded public good without having to either raise additional revenue from their constituents or transfer revenue out of other programs? In a very real sense, this is what asset forfeiture has brought us. In explaining the need for a federal power of taxation, Hamilton wrote:

Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue, *either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants*, or the government must sink into a fatal atrophy, and in a short course of time perish.²⁵⁵

That Hamilton put the choice in such stark terms should give us pause when contemplating the revenue raising functions of any activity of the government, for these words express the very inherent danger in externalizing the costs of public goods (and thus government itself) onto individuals. Civil forfeiture, as it is practiced today by our government and the several states, is an exercise in arbitrary will in which individuals are indeed subjected to the very sort of "continual plunder" of which Hamilton warned. By giving law enforcement agencies the power to

255. Alexander Hamilton, *No. 30*, in *THE FEDERALIST* 237-38 (Philadelphia, J.B. Lippincott & Co. 1873) (emphasis added).

loot, plunder, and eat what they kill, our laws teeter on the brink of losing their necessary rational relationship with our institutions of democracy.

Simply put, if the body politic desires drug prohibition, the body politic must pay for that public service directly in the form of taxes. It is only by "paying through the nose" that taxpayers will ever be able to objectively measure the effectiveness of what they are buying. Allowing the government to plunder hundreds of millions of dollars annually²⁵⁶ from individuals, just so politicians can make bold promises to perpetuate the drug war, takes the law one step farther away from rationality. Simply diverting forfeiture proceeds directly into the general Treasury fund, rather than the current Justice Department-controlled forfeiture fund, is not likely resolve this fundamental dilemma.

VI. CONCLUSION: A PRINCIPLED APPROACH TO FORFEITURE

As it stands today, civil asset forfeiture has become an end unto itself, a force for bureaucratic preservation masquerading as a principled remedy for the ills of the drug war. The series of miscues that have led to the current status quo can be likened to a multiple-car collision on a fog-bound highway, and a complete post-mortem on the precise causes might require volumes of discussion. What is clear is that civil asset forfeiture came to be applied in a criminal context through some sloppy work in the early history of our Supreme Court.²⁵⁷ While those early Justices can be forgiven, we should be less patient with ourselves. Reforming the process of forfeiture is a welcome start, but it is small change in comparison to the deeper, more troubling difficulties that underlie our current drug policy. The inescapable fact is that the drug war, and the forfeiture laws that help fund it, are incompatible with our constitutional notions of freedom and individual sovereignty. But even if one were to accept the drug war's policy goals, the carrying-out of that

256. *Agency Budget Summary of the Office of National Drug Control Policy*, available at <http://www.whitehousedrugpolicy.gov/policy/99ndcsbudget/assets.html> (last visited Sept. 6, 2000):

At the end of 1998, a total of 24,903 seized assets were on hand with a total of \$1 billion on deposit in the Seized Assets Deposit Fund. This consists of 7,799 cash seizures with a value of \$349.2 million; 1,181 real properties valued at \$204.5 million; 45 businesses valued at \$48.7 million; and 15,878 other assets with an estimated value of \$397.9 million.

Id. These figures only account for direct federal and federally adopted forfeitures. They do not account for forfeitures conducted at the state and municipal level. It is also not clear whether these were cumulative funds or annual deposits. As noted in the report by Karen Dillon, *supra* note 11, at 8, the Justice Department has not produced a complete audit of the Forfeiture Fund since 1996.

257. See discussion, *supra* notes 59, 61, 118, 128, 156 and 240.

policy must be accountable to rational political processes as outlined in Article I of our Constitution.

For forfeiture to work as a legitimate tool of justice in our society, we must return to the principle, set forth by Roger Pilon, of addressing remedies to fit measurable wrongs.²⁵⁸ This is, in essence, the argument outlined over two hundred years ago by Attorney General Lee in *La Vengeance*.²⁵⁹ An in rem forfeiture may only be justified where the government has an established revenue interest in the property seized.²⁶⁰ If the forfeiture is not being brought to enforce a revenue interest in the property, such as a customs duty, then it should only be brought subsequent to a criminal conviction, whereby the forfeiture is justified by proof beyond a reasonable doubt that the owner committed the offense, and that the property forfeited was a proceed or instrumentality of the crime.²⁶¹ Only by framing the forfeiture remedy in such principled terms, and by removing the pecuniary interest of law enforcement, will forfeiture ever be truly reformed.

BRANT C. HADAWAY*

258. See Pilon, *supra* note 122, at 324-27.

259. Civil in rem forfeitures may also be justified by the need to abate nuisances or acquire abandoned property.

260. In the modern context, civil in rem forfeitures may also be justified by the need for abating nuisances or condemning unsafe buildings.

261. Forfeiture proponents often argue that a primary function of forfeiture is to provide restitution for crime victims. See Cassella, *supra* note 233, at 1. However, there is little evidence to suggest that much is made of this potential benefit of forfeiture. As a matter of fact, the evidence suggests that police use federal adoption of forfeitures to circumvent state laws that require forfeited assets to be deposited in victim restitution funds. See Dillon, *supra* note 11, at 1. In any case, it would probably be more reasonable to allow crime victims to sue for their injuries in civil court, and thus allow a jury to measure the wrong and determine the remedy.

* This Comment is dedicated to my daughter, Saskia, that she may grow up in a country that has re-apprehended the true meaning of freedom.