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FAMILY VALUES?: THE FAMILY AS AN INNOCENT VICTIM OF CIVIL DRUG ASSET FORFEITURE

Sandra Guerra†

[F]or I am a jealous God, visiting the iniquity of the fathers upon the children¹

INTRODUCTION

The peculiarly expansive reach of civil forfeiture laws has placed the property of people not involved in the drug trade at risk of confiscation by the federal government. When a non-owner uses another's property as the site for a drug offense,² the owners must, to prevent forfeiture of the property, prove to a federal court either that they had no knowledge of any wrongdoing or that they did all they reasonably could have done to prevent the illegal conduct. This is known as the "innocent owner" defense.³ It forces federal courts to judge the adequacy of property owners' behavior in policing the conduct of non-owners with access to property used by the non-owners to commit a

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¹ *Exodus* 20:5-6 (Revised Standard) (found in the first of the Ten Commandments God spoke to Moses). This biblical notion has found its way into several literary works over time. One of the earliest examples comes from the Greek playwright Euripides (c. 485-406 B.C.). The narrator tells of Heracles' killing of a young child, after which he yelled, "There lies one, . . . One of Eurystheus' cubs has paid his father's debt." EURIPIDES, *HERACLES, MEDEA AND OTHER PLAYS* 183, fragment 970 (Philip Vellacott, trans., Penguin Books 1963). This biblical passage also finds its way into the Shakespearean work, *The Merchant of Venice*, in which Launcelot tells Jessica that she will be treated with no mercy in heaven because her father is a Jew. He tells her, "Yes, truly; for, look you, the sins of the father are to be laid upon the children: therefore, I promise ye I fear [for] you." WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* AT III act 3, sc. 5, at 92 (George Coffin Taylor & Reed Smith eds., Ginn & Co. 1936).

² For a discussion of the federal drug asset forfeiture laws, see *infra* notes 70-95 and accompanying text.

³ See Anthony J. Franze, Note, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner,"* 70 NOTRE DAME L. REV. 369 (1994); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984,* 58 FORDHAM L. REV. 471 (1989); see also *infra* notes 96-136 and accompanying text.

drug violation. In the context of the family, this civil forfeiture regime has generated some troublesome rulings.

The Second Circuit's decision in *United States v. 19 & 25 Castle Street*⁴ prompted this examination of the role of the family vis-à-vis the government in criminal investigations and prosecutions. In *19 & 25 Castle Street*, the federal government seized the family home of José and Virginia Gonzalez because their adult children possessed narcotics on the premises.⁵ The court found that the Gonzalezes were not "innocent owners" because they had "failed to undertake every reasonable means of preventing the narcotics activity at the residence."⁶ The court stated:

Although [the Gonzalezes] were hesitant to do so because drug dealers had retaliated against them for informing the police about narcotics activity in the neighborhood, it would not have been unreasonable for them to ask the police to take some action in regard to the narcotics activity at their dwelling. [Furthermore,] Mr. and Mrs. Gonzalez could have given their adult children an ultimatum: Comply with the law or move out.⁷

The court permitted the government to take the most important family asset—the homestead—from an apparently hardworking, law-abiding couple simply because the court felt that they had failed in their duties as citizens either to report their children to the police or to throw them out of the house.

In addition to the parent-child scenario, another common situation in which families face civil forfeiture concerns a drug-dealing husband, an uninvolved wife, and their children.⁸ These cases raise different issues than the parent-child cases in that they involve marital property laws and marital relations,⁹ but the ultimate legal question is similar: did the wife take all reasonable steps to prevent her husband's illegal activity? The very question ought to give courts pause; the forfeiture laws have placed courts in the awkward position of determining the appropriateness of a wife's conduct toward her husband within a home that they jointly own.

⁴ 31 F.3d 35 (2d Cir. 1994).

⁵ For a full discussion of this decision, see *infra* notes 190-222 and accompanying text.

⁶ *19 & 25 Castle St.*, 31 F.3d at 40.

⁷ *Id.*

⁸ This Article uses the term "uninvolved" rather than "innocent" because under the "innocent owner" defense, owners are adjudged guilty if they have knowledge of and are deemed to have consented to unlawful conduct on their property, even if they are not sufficiently involved to be charged with a drug offense themselves. See *infra* notes 96-136 and accompanying text (discussing the "innocent owner" defense).

⁹ See *infra* notes 150-88 and accompanying text (discussing spousal property forfeitures).

The application of civil forfeiture law within the family is a new legal development. For the first time, this system imposes duties on family members to act as police officers in their own homes. Parents and spouses are expected to report their relatives' violations to the police, search their relatives' possessions for contraband, evict their children or divorce their spouses, and otherwise cooperate with the authorities.¹⁰ By requiring family members to police each other or risk the loss of the family's assets, the law eliminates other options family members may have for dealing with relatives who have gone astray.¹¹

This Article considers the following question: What should the duties of uninvolved family members be toward loved ones who take part in illegal activities and, in particular, in drug crimes? Where, in other words, should the boundaries of familial privacy—that sphere beyond which the government should not transgress, even in the name of truth and justice—be drawn? The law has long struggled to define the parameters of family privacy and the corresponding limits on governmental authority to regulate conduct within the home.¹² What is striking about the civil forfeiture cases involving family members is, however, the universal failure of courts even to recognize that the rules in this area constitute an unprecedented intrusion by the government into private familial relations. Moreover, the number of family home forfeitures is likely to increase as the federal government's "war on drugs" continues its steady and dramatic growth and becomes increasingly sophisticated.¹³

Part I of this Article addresses the historical treatment of the family in criminal law enforcement. Part II examines the use of civil forfeiture in drug cases. Part III assesses the duties imposed on uninvolved family members under that regime, and Part IV evaluates the importance of shielding family relations from governmental intrusion that may threaten the viability of such relationships. The Article

¹⁰ The "all reasonable steps" requirement applies to many other categories of property owners, including landlords whose tenants may bring drugs onto the property, banks whose clients may deposit drug proceeds, and individuals who do business together. See, e.g., *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994) (defense attorney); *United States v. 141st St. Corp.*, 911 F.2d 870 (2d Cir. 1990) (apartment building owners), *cert. denied*, 498 U.S. 1109 (1991); *United States v. 3100 N.E. 48th St., Unit 618*, 871 F. Supp. 437 (S.D. Fla. 1994) (bail bond company); *United States v. 2639 Meetinghouse Rd.*, 633 F. Supp. 979 (E.D. Pa. 1986) (business partners). Property owners who do business with people they suspect to deal in drugs "do so at their own risk." *United States v. 15603 85th Ave.*, 933 F.2d 976, 982 (11th Cir. 1991); *United States v. \$4,255,000*, 762 F.2d 895, 905 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

¹¹ Other options may exist for families in higher socioeconomic classes. For a discussion of incidental class bias in the application of the civil forfeiture process, see *infra* part IV.

¹² See *infra* notes 17-69 and accompanying text.

¹³ See *infra* notes 74-81 and accompanying text.

concludes by proposing a number of alternatives to the current civil forfeiture regime that would relieve uninvolved family members from the ancient "double bind" of loyalty to the government versus loyalty to the family¹⁴ without creating a sanctuary for criminal activity.

I

THE LEGAL SIGNIFICANCE OF FAMILY RELATIONSHIPS IN THE ENFORCEMENT OF CRIMINAL LAW

Generally speaking, the preservation of family relationships and the administration of justice are at odds when one family member commits a crime and another has knowledge of it. In some situations, the uninvolved family member may find that the family's interests coincide with those of law enforcement. In many other situations, however, the family member may believe that the errant relative's brightest prospect for long term rehabilitation involves avoiding criminal prosecution. As this Part will demonstrate, the law has long recognized the importance of family relationships, and the goals of law enforcement have yielded to society's interest in maintaining those bonds. In particular, this Part will examine the American legal tradition that protects the sanctity of the home and the rights of individuals "to be let alone"¹⁵ by the government, and the criminal laws that specifically recognize and protect the parent-child and marital relationships.

A. The Right "To Be Let Alone" and Family Privacy

Various provisions of the Bill of Rights create a sphere of privacy and autonomy for individuals, especially within their homes.¹⁶ The

¹⁴ The predicament of having to choose between government and family serves as the theme of the ancient Greek play *Antigone* by Sophocles. Antigone defies the edict of Creon, King of Thebes, forbidding the burial of her brother Polynices whom the King considers a traitor. Antigone tells her sister Ismene who refuses to help Antigone:

I will bury him myself.
If I die for doing that, good:
I will stay with him, my brother;
and my crime will be devotion.

SOPHOCLES, *ANTIGONE* lines 87-90, at 23 (Richard Emil Braun trans., Oxford Univ. Press 1973). In the end, Antigone is put to death for her actions. *Id.* lines 710-40, at 44-45.

¹⁵ See *infra* note 21 and accompanying text.

¹⁶ The Supreme Court has on numerous other occasions addressed the constitutional protection of individual autonomy and privacy in personal relationships and in the home. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("The Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (The home "provide[s] the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance."); *United States v. Orito*, 413 U.S. 139, 142 (1973) ("The Con-

division between the public realm and the privacy of the home reflects the post-revolution *laissez faire* tradition that safeguards individual rights from governmental interference.¹⁷ The Supreme Court's "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."¹⁸

The rights of individuals to privacy in their "persons, houses, papers, and effects," as well as in their thoughts and beliefs, receive greatest protection from the Fourth and Fifth Amendments.¹⁹ Simply

situation extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education.").

¹⁷ Legal historian Michael Grossberg chronicles the profound changes experienced by the American family and its relationship to the state from colonial times to the post-revolutionary period. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 3-30 (1985). The changes in the economic and political systems of post-revolutionary America are reflected in the transition of the family from a public to a private institution. Grossberg writes:

Led by middle-class households, families began to shed their public, multifunctional forms and stand apart in an increasingly segregated, private realm of society.

....

The family and the outside world came to be viewed as separate entities, often pictured as bitter adversaries.

....

Under the sway of republican theory and culture, the home and the polity displayed striking similarities. These included a deep aversion to unaccountable authority and unchecked governmental activism, . . . [and] a commitment to self-government . . . Most important, the American family, like the republican polity, suffered from the uncertainties of sovereignty and from the pressures of democratization and marketplace values unleashed by the Revolution's egalitarian and *laissez faire* ideology.

Id. at 6-7. In time, "families became less and less willing to sacrifice domestic autonomy to the dictates of communal supervision." *Id.* at 5. Reciprocally, "[p]ublic officials were increasingly reluctant to curb generation or gender rebellions with the weapons of community authority." *Id.* at 6. Quoting literary analyst Jay Fliegelman, Grossberg suggests that "[t]he American revolution against patriarchal authority in the second half of the eighteenth century provided the paradigm by which Americans for the next two hundred years would understand and set forth the claims of both individual and national independence." *Id.* at 7.

¹⁸ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

¹⁹ The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fifth Amendment states: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; *see also* *Boyd v. United States*, 116 U.S. 616, 630 (1886) (describing the Fourth and Fifth Amendments as protecting against all unreasonable governmental invasions "of the sanctity of a man's home and the privacies of life").

stated, the Constitution permits law enforcement officials to do their jobs but insists that in doing so they respect the privacy of each individual and that of families within the home.²⁰ Justice Brandeis, in his famous dissenting opinion in *Olmstead v. United States*, said it best: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."²¹ Thus, the Fourth Amendment prohibits the police from making warrantless entries into one's home to make an arrest or to search for evidence of a crime.²² Indeed, the Court has interpreted the Amendment to reach the invasion of any place or thing in which a person has a "reasonable expectation of privacy" from government interference, whether or not it involves physical invasion.²³

The Fifth Amendment protects, among other things, the right of the individual to remain silent in the face of criminal accusations by the government.²⁴ Although it would arguably be more expedient for the government to demand that individuals produce whatever evidence they may have that would either incriminate or exonerate them, the Constitution instead protects the individual's right to privacy and provides an accused a privilege against self-incrimination and presumes that he is innocent until proven guilty.²⁵

Furthermore, in a long line of cases, the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to

²⁰ For example, the majority opinion in *Payton v. New York*, 445 U.S. 573 (1980), citing a lower court decision, observes that: "[a] greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.* at 587 (citing *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970)).

²¹ 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

²² *Payton*, 445 U.S. at 588-89 (warrantless entry to effectuate a felony arrest is impermissible as is warrantless entry to search for evidence).

²³ In *Katz v. United States*, 389 U.S. 347, 353 (1967), the Supreme Court abolished a rule that granted Fourth Amendment protection only to physical intrusions into certain protected places, like the home. The *Katz* Court considered the legality of government eavesdropping on a telephone call placed from a public phone booth. Declaring that "the Fourth Amendment protects people—and not simply areas," the Court determined that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* Rather, the Court found that a person who places a call from inside a telephone booth "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352.

²⁴ See *Carter v. Kentucky*, 450 U.S. 288, 304 (1981) (explaining the right of a defendant in a criminal trial to remain silent); *Miranda v. Arizona*, 384 U.S. 436, 455 (1966) (requiring that the police warn criminal suspects of their right to remain silent before extracting a confession because "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals").

²⁵ See *infra* note 30 and accompanying text.

create a "private realm of family life which the State cannot enter."²⁶ In *Meyer v. Nebraska*, for example, the Court described the liberty guaranteed by the Fourteenth Amendment as encompassing: "the right . . . to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."²⁷ The Supreme Court has similarly recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control."²⁸ This jurisprudence "establish[es] that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."²⁹

This *laissez faire* tradition also manifests itself in American criminal law. Although criminal law generally prohibits bad behavior, it rarely requires any affirmative action.³⁰ Criminal law ordinarily punishes only culpable acts, not culpable omissions, unless the omission involves a failure to perform a legally recognized and voluntarily-assumed duty to act.³¹ For example, if an injured individual needs immediate medical assistance, a stranger to that individual has, under

²⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Seventh Circuit has viewed this jurisprudence as divisible into two categories. *United States v. Davies*, 768 F.2d 893, 897 (7th Cir. 1985), *cert. denied*, 474 U.S. 1008 (1985). The first group of cases challenges the constitutionality of state intrusion into the structure or definition of the family. *Id.* at 898 n.2 (citing cases). The second group of cases involves the right to make important family decisions. *Id.* at 898 n.3 (citing cases).

²⁷ 262 U.S. 390, 399 (1923) (citations omitted).

²⁸ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *see also Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (observing that one of the basic presuppositions of the American "tradition of individual liberty" is the maintenance of parental authority); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting that the Constitution protects the integrity of the family unit and the essential right to raise one's children); *Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

²⁹ *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

³⁰ *See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 9 (1993). Consistent with this approach is the policy that the law presumes a person accused of a crime to be innocent until the government satisfies its burden of proving guilt beyond a reasonable doubt. The law does not require an accused to take action to defend himself or herself; the government bears the entire burden. *See In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause requires the government to prove a defendant's guilt beyond a reasonable doubt); *see generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §3.3 (2d ed. 1986) [hereinafter LAFAVE & SCOTT] (explaining theories of criminal omissions in American law).

³¹ The law recognizes at least five situations in which one has a duty to act such that failure to act may be punished as a crime: (1) where a statute imposes a duty to act; (2) where one stands in a certain status relationship to another; (3) where one has assumed a contractual duty to act; (4) where one has voluntarily assumed a duty to care for another and has secluded the helpless person thereby preventing others from rendering aid; (5) where one has created the peril. *See* LAFAVE & SCOTT, *supra* note 30, § 3.3(a), at 203-07; *see*

American law, no legal duty to render aid, even if he or she could do so without creating any danger to him or herself.³² The hypothetical example of the child lying face down in a puddle and the passerby who refuses to turn the child's head to prevent her from drowning provokes angry responses and an instinctive desire to punish the passerby. Fortunately, however, few horrific instances of such callous behavior have actually occurred in American history.³³ In most cases, people will help one another and provide assistance out of a sense of civic responsibility and moral obligation. On balance, American criminal law reflects a preference for punishing only bad acts and not the failure to do good.

If the law does not require an individual to provide assistance to a dying person, one might expect that it should not require an individual to provide assistance to law enforcement, even if he or she can do so without creating any danger to himself or herself. The criminal law adopts this view with only a few exceptions.³⁴ Traditional criminal law

also *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (discussing the duty of a guardian to safeguard the health of an infant child).

³² American law differs from that of Eastern and Western Europe. Since the Russian Criminal Code of 1845, nearly every continental European country has called on its citizens to act as good samaritans and render aid to others in jeopardy if they can do so without endangering themselves. See John Kleinig, *Good Samaritanism*, 5 PHIL. & PUB. AFF. 382, 385 (1975).

In the United States, state laws typically absolve good samaritans from civil liability for aid they render to persons in danger, Diane Kiesel, *Who Saw This Happen? States Move to Make Crime Bystanders Responsible*, 69 A.B.A. J. 1208, 1208 (1983), but they do not require people to help others, even if they can do so in complete safety. Kleinig, *supra*, at 385. Minnesota and Vermont have, however, criminalized the failure to act as a good samaritan. See MINN. STAT. ANN. § 604A.01 (West Supp. 1996) ("A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person."); VT. STAT. ANN. tit. 12, § 519 (1973):

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

³³ But see Kiesel, *supra* note 32, at 1208-09 (recounting the gang rape of a woman in a Massachusetts tavern while patrons gaped and cheered, and the stabbing death of a New York City woman while neighbors watched, from the safety of their homes, for 30 minutes before calling the police).

³⁴ A few states statutorily require citizens to report crimes to the police. For example, many states require drivers involved in auto accidents to stop, furnish identification and render aid. See David R. Bonelli, Annotation, *Sufficiency of Showing of Driver's Involvement in Motor Vehicle Accident to Support Prosecution for Failure to Stop, Furnish Identification, or Render Aid*, 82 A.L.R. 4TH 232 (1990). All 50 states, the District of Columbia, and the Virgin Islands have enacted a statute of some form requiring doctors, teachers, and other classes of persons to report their suspicions of child abuse. See Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statutes Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R. 4TH 782, 789-91 (1989). A landowner, moreover, has a duty to intervene if a violent crime is being perpetrated against a third-person invitee of the landowner, if the landowner can do so without placing himself or herself in danger. See *supra* note 31

principles generally do not require individuals to act as citizen-police when they have information concerning the commission of a crime. If a person has specific knowledge concerning the commission of a crime—even a felony—the person does not, as a result of this knowledge, have a legal duty to report the offense to the authorities or otherwise to intervene to prevent it.³⁵

These principles apply equally to family members and unrelated individuals. When one family member in a household commits a crime, other family members will likely learn of it, if due only to the proximity of their living quarters. The uninvolved family members may obtain specific knowledge of a crime or merely general knowledge of some wrongdoing. This knowledge does not, however, create a duty to act. If a teenage or adult child possesses child pornography in his parents' home, for example, only the child is punishable. Even if his or her parents are aware of the child's conduct and do not alert the authorities, the parents would suffer no criminal punishment or other penalty.³⁶ Although one may have moral qualms concerning the parents' failure to take action, their omission is not legally punishable.³⁷ The parents have no legal duty to report the crime,³⁸ to conduct random searches of the home for illegal pornography, or to evict the child upon learning that he or she has violated the law.

and accompanying text. At a minimum, one would expect the property owner to call the police.

³⁵ The crime of misprision under English common law imposed a duty on citizens to prevent the commission of a crime or, having knowledge of its commission, to reveal it to the proper authorities. 4 WILLIAM BLACKSTONE, COMMENTARIES 119-26. Every man was bound, "under pain of punishment, to make himself an informer as to any treason or felony that he may have witnessed or that came to his knowledge." 21 AM. JUR. 2D *Criminal Law* § 34 (1981 & Supp. 1995).

American criminal law derives in large part from English common law, but the offense of misprision rarely, if ever, found its way into American courts. In *Pope v. State*, 396 A.2d 1054, 1078 (Md. 1979), the Maryland Court of Appeals overturned a guilty verdict for common-law misprision, holding that the offense is not indictable. The court cited author P.R. Glazebrook for the proposition that "[n]o court in the United States has been prepared to adopt the English doctrine in its simplicity, and hold that a mere failure to disclose knowledge of a felony is itself an offence." *Id.* at 1070 (citing P.R. Glazebrook, *How Long, Then, is the Arm of the Law to be?*, 25 MOD. L. REV. 301, 307 n.51 (1962)). See generally P.R. Glazebrook, *Misprision of Felony—Shadow or Phantom?*, 8 AM. J. LEGAL HIST. 189 (1964) (surveying the English legal history of misprision); cf. *infra* note 46 (discussing the federal misprision statute).

³⁶ See *supra* text accompanying note 34.

³⁷ The most recent United States Supreme Court decision addressing misprision viewed the defendant's failure to disclose known criminal activity as a badge of irresponsible citizenship and characterized the reporting of a crime as a "social obligation." *Roberts v. United States*, 445 U.S. 552, 558 (1980).

³⁸ The Seventh Circuit has observed that "unlike [a] probation officer . . . [a] father is not a state employee duty bound to report his son's wrongdoing." *United States ex rel. Riley v. Frazen*, 653 F.2d 1153, 1160 (7th Cir.) (referring to *Fare v. Michael C.*, 442 U.S. 707 (1979)), *cert. denied*, 454 U.S. 1067 (1981).

Similarly, although police officers may, upon obtaining information that an individual has committed a crime, question the child's parents, the parents may refuse to answer. In *United States v. Mendenhall*, the Supreme Court acknowledged this right in the context of police encounters that culminated in the arrest of the persons questioned.³⁹ The Court ruled that police officers have a right, like that of any other citizen, to question individuals.⁴⁰ Justice White articulated this so-called "right-to-inquire" rule in *Florida v. Royer*. "Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen" ⁴¹ Police may ask whatever questions they like of whomever they choose—even without any suspicion of wrongdoing. However, the person accosted has the reciprocal right—as is true in any citizen-to-citizen encounter—to ignore the questioner and walk away. The *Royer* opinion states:

[A person] need not answer any question put to him; indeed he may decline to listen to questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.⁴²

Thus, a police officer may approach a person on the street, by telephone, or at the threshold of his or her home and question the individual regarding a criminal investigation. The person approached may, however, choose to speak or not to speak. The Supreme Court has referred to such police-citizen discussions as "classic consensual encounters."⁴³

When the suspect is one's son or daughter, even the courts have acknowledged the important role played by the parent as a quasi-legal

³⁹ 446 U.S. 544 (1980). The issue the Court faced was whether the questioning transformed the encounter into a "seizure" for purposes of the Fourth Amendment in which case the police would need a reasonable suspicion of wrongdoing. *Id.* at 553-54.

⁴⁰ *Id.* at 553. In his concurring opinion in *Terry v. Ohio*, 392 U.S. 1, 34-35 (1967), Justice White emphasized that a police officer is always free to ask questions of citizens on the street, but "[a]bsent special circumstances, [such as those found in *Terry*], the person approached may not be detained or frisked but may refuse to cooperate and go on his way." See also *id.* at 32-33 (Harlan, J., concurring) (arguing that a police officer has "the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away"). For a helpful discussion of the origins of the right-to-inquire rule, see Tracy Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1266-70 (1990); see also Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966) (suggesting the institutionalization of police questioning procedures to curb discrimination and to protect privacy rights).

⁴¹ 460 U.S. 491, 497 (1983) (plurality opinion).

⁴² *Id.* at 498 (citations omitted).

⁴³ *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 221 (1984).

advisor to the child.⁴⁴ Addressing the significance of a parent's advisory role during a custodial interrogation of his or her child, the Seventh Circuit commented that a parent may choose not to report a child's confession to the police: "Even a lay parent [as opposed to a parent who happens to be an attorney] . . . may not encourage the suspect to talk with the police or feel bound to report any confession which the child may make in confidence."⁴⁵

For family members who share a home with a person who commits a crime, however, the dividing line between lawful and unlawful conduct can seem very fine. If family members take positive steps to conceal the crime, such as giving false statements to the police, they risk conviction for the crime of misprision, obstruction of justice, or giving false statements to the authorities.⁴⁶ Providing shelter to a criminal or otherwise helping an offender avoid arrest may constitute

⁴⁴ See *infra* note 60 and accompanying text.

⁴⁵ United States *ex rel.* Riley v. Franzen, 653 F.2d 1153, 1160 (7th Cir.), *cert. denied*, 454 U.S. 1067 (1981).

⁴⁶ The federal misprision statute reads:

[W]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C.A. § 4 (West Supp. 1996). Misprision requires an affirmative act to conceal the crime. See, e.g., United States v. Ciambrone, 750 F.2d 1416, 1417 (9th Cir. 1984); United States v. Baez, 732 F.2d 780, 782 (10th Cir. 1984); Lancey v. United States, 356 F.2d 407, 409 (9th Cir.), *cert. denied*, 385 U.S. 922 (1966); see also *supra* note 35 (addressing the English common-law crime of misprision).

Not surprisingly, many of the misprision cases involve people related to the person who committed the predicate crime. Older federal cases frequently involved bank robberies. See, e.g., United States v. Gravitt, 590 F.2d 123 (5th Cir. 1979) (bank robbery); United States v. King, 402 F.2d 694 (7th Cir. 1968) (defendant erroneously charged with misprision for concealing information regarding bank robbery committed by his brother); Lancey, 356 F.2d at 407 (husband and wife defendants harbored a bank robber); United States v. Triggilio, 255 F.2d 385 (2d Cir. 1958) (defendant concealed brother-in-law's bank robbery).

Nearly all of the more recent cases involve drug-related crimes and often involve a wife or girlfriend possessing drugs or drug proceeds. See, e.g., United States v. Young, 32 F.3d 563 (4th Cir. 1994) (girlfriend of drug dealer convicted of misprision and money laundering); United States v. Braggs, 16 F.3d 417 (10th Cir. 1994) (after directing common-law wife to hold drugs in her bra while police searched residence, her drug dealer husband later informed police that she possessed the drugs); United States v. Wilkes, 972 F.2d 344 (4th Cir.) (defendant's brothers ran a drug importation and distribution ring, she harbored her brothers from police and gave them money to flee), *cert. denied*, 506 U.S. 1025 (1992); United States v. Adams, 961 F.2d 505 (5th Cir. 1992) (defendant's drug dealer boyfriend purchased a house for her with drug proceeds). The federal criminal code proscribes "Obstruction of proceedings before departments, agencies, and committees." 18 U.S.C. § 1505 (1994). It also makes it a felony to give false statements to federal law enforcement. See 18 U.S.C. § 1001 (1994); United States v. Rodgers, 466 U.S. 475 (1984) (applying false statements law to law enforcement).

harboring a fugitive or other similar offenses.⁴⁷ Of course, if the family members played an active role in furtherance of the offense itself, they could be charged as accomplices.

In short, American law generally imposes no duties on citizens to behave as police officers, either within their homes or in public. Citizens ordinarily need not report offenses, provide information to the police, or otherwise take measures to prevent the commission of crimes. They are expected to cooperate with the police voluntarily, as a matter of civic duty. In intrafamily situations, however, by shielding domestic life from public scrutiny, the law has effectively granted individual family members the right to decide how best to respond to their loved one's misconduct.⁴⁸

B. Legal Rules that Specifically Protect Family Relationships

Some legal rules specifically address family relationships and their significance in the enforcement of criminal laws. In fact, such rules often place a higher priority on the preservation of family relationships than on the efficiency of the justice system. The few laws that explicitly protect the family do so in one of two ways: (1) by preserving the bond of legal marriage, or (2) by promoting the well-being of children.

First, the common law has long recognized the importance of protecting the institution of marriage.⁴⁹ Although people with information pertaining to a crime can generally be compelled to testify before a grand jury or during a criminal trial,⁵⁰ the rules of evidence

⁴⁷ See, e.g., 18 U.S.C. § 792 (1994) (harboring and concealing persons suspected of espionage); *id.* § 1071 (concealing persons from arrest); *id.* § 1072 (concealing an escaped prisoner).

⁴⁸ See *infra* parr IV.

⁴⁹ Earlier in our history, a number of criminal statutes sought to curb sexual behavior that was considered inconsistent with the "natural" practices of legally married couples. Laws against fornication, adultery, the use of birth control, sodomy, and abortion confined lawful sexual relations and reproductive practices to those ostensibly practiced by traditional, natural families. Such laws were widely viewed as extremely intrusive, and most have either been repealed by the state legislatures or struck down by the Supreme Court as unconstitutional. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a criminal law against abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (overturning prohibition on the distribution of contraceptives to unmarried people); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down prohibition of contraceptive use by married people). *But see Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of a state sodomy statute).

⁵⁰ During the prosecution phase of a criminal case, a tribunal may compel citizens to testify for the government or the defense. A party has the power to compel testimony of a witness by issuing a *subpoena testificandum* which requires a person to appear in court and testify. Refusal to appear or to testify may result in an adjudication of contempt which usually results in a period of confinement. See generally Note, *Coercive Confinement and the Federal Grand Jury*, 79 COLUM. L. REV. 735 (1979) (surveying the historical background of coercive contempt citations against recalcitrant grand jury witnesses).

create two exceptions for spouses. The first, known as the "adverse testimony privilege," grants them the privilege to refuse to testify against one another. The second privilege permits a spouse to testify without revealing spousal confidences.⁵¹ Legally-recognized marriage is the only family relationship that has traditionally been shielded by the privilege rules,⁵² and then only under narrowly-drawn circumstances.⁵³

The Supreme Court has cited the prevention of marital discord as the primary rationale for the adverse spousal testimony privilege,⁵⁴ and courts have touted the privilege against revealing marital confidences as a means of encouraging openness in marital discussions.⁵⁵ Thus, the rules are designed to preserve the bond of marriage and to ensure that the partners in a marital relationship feel comfortable sharing intimate secrets, even if those secrets concern a spouse's illegal activities. The law does not impose a duty on the spouse receiving such information to violate that trust.

Second, the law recognizes that parents have certain rights and responsibilities regarding the well-being of their children.⁵⁶ Traditionally, the law viewed children as helpless dependents of their parents who required nurturing, guidance, and protection.⁵⁷ This

⁵¹ See generally *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1565-74 (1985) [hereinafter *Developments*] (discussing marital privileges).

⁵² Unmarried partners, even if they have long held themselves out as husband and wife, may not invoke the spousal privileges. See, e.g., *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977) (upholding district court's rejection of spousal privilege for defendant's unmarried partner because the state did not recognize common-law marriages), *cert. denied*, 434 U.S. 1045 (1978); *United States v. White*, 545 F.2d 1129 (8th Cir. 1976) (same); *In re Ms. X*, 562 F. Supp. 486 (N.D. Cal. 1983) (holding that an unmarried couple who held themselves out as husband and wife for years and who had four children could not invoke spousal privilege). In *In re Matthews v. United States*, 714 F.2d 223, 225 (2d Cir. 1983), the Second Circuit declined to recognize a "family privilege" not to testify against in-laws, stating, "the marital bliss of Lawrence and Denise Matthews will have to endure whatever strains might result from his testimony against his in-laws." Similarly, the privilege not to testify does not extend to siblings or more remote relations. See *United States v. (Under Seal) In re Antitrust Grand Jury Investigation*, 714 F.2d 347, 349 (4th Cir.) (implicitly rejecting an adverse testimony privilege for brother and cousin of defendant), *cert. dismissed*, 464 U.S. 978 (1983).

⁵³ See *supra* note 52.

⁵⁴ *Trammel v. United States*, 445 U.S. 40, 52 (1980) (finding that adverse testimony privilege belongs to witness-spouse because if witness is willing to testify against spouse, "their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve").

⁵⁵ See *Developments*, *supra* note 51, at 1579.

⁵⁶ This discussion also applies to guardians who have voluntarily assumed the duties of parents in becoming guardians.

⁵⁷ J. AREEN, *FAMILY LAW: CASES AND MATERIALS ON FAMILY LAW* 864-958 (2d ed. 1985); H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 241-42 (1968); M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 36-40 (1981); M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 8 (1985); Martha Minow, "Forming Underneath Everything that Grows": *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 833; see also H.

perspective persists to some extent in the rules applicable to criminal law enforcement.⁵⁸ For example, the law punishes parents who fail to provide adequate care to, or who otherwise harm, their children.⁵⁹ The law also supports the role of the parent as advisor and confidante of the child. In many state juvenile justice systems, parents are allowed to accompany their children as advisors during custodial interrogations. In these states, prosecutors cannot use a juvenile's confession unless a parent was present when the police obtained it.⁶⁰

Once the criminal proceedings reach the point of a grand jury investigation or a trial, the protection for the parent-child relationship ceases in most states. Only a few states have found that the compelled testimony of a parent concerning the child's confidential communications might be detrimental to the parent's role as confidante and advisor.⁶¹ Courts in these jurisdictions have expressed concerns that

COHEN, EQUAL RIGHTS FOR CHILDREN 1-27 (1980) (discussing the notion of children's rights).

⁵⁸ The criminal law has become more punitive with regard to crimes committed by children. See generally Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821 (1988) (analyzing the sentencing practices of juvenile courts); Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991) (proposing changes in the legal framework of the juvenile justice system); see also *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding the application of the death penalty to 16-year olds).

⁵⁹ See 39 AM. JUR. *Parent and Child* § 46 (1942):

It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent.

See also Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311 (discussing decision-making authority for medical decisions concerning children).

⁶⁰ See, e.g., *People v. Saiz*, 620 P.2d 15, 19 (Colo. 1980) (quoting COLO. REV. STAT. § 19-2-102(3)(c)(I) (1973)); *Lewis v. State*, 288 N.E.2d 138, 142 (Ind. 1972). But see *People v. Lara*, 432 P.2d 202 (Cal. 1967) (en banc), cert. denied, 392 U.S. 945 (1968); *State v. Young*, 552 P.2d 905 (Kan. 1976); *Theriault v. State*, 223 N.W.2d 850, 854 nn.11, 12 (Wis. 1974).

⁶¹ In New York, the courts have created a parent-child privilege. See *In re A & M*, 403 N.Y.S.2d 375, 378 (App. Div. 1978) (finding a parent-child privilege based on family privacy and psychological evidence, asking "Shall it be said to . . . parents, 'Listen to your son at the risk of being compelled to testify about his confidences?'); *People v. Fitzgerald*, 422 N.Y.S.2d 309, 313 (Westchester County Ct. 1979) (finding that a privilege exists for an adult child's communication to a parent since "[t]he parent-child relationship of mutual trust and confidence . . . is one that should be and must be fostered throughout the life of the parties"); cf. *In re Mark G.*, 410 N.Y.S.2d 464 (App. Div. 1978) (affirming the lower court's rejection of privilege because statement was not made in confidence for the purpose of obtaining advice and support).

The Idaho and Minnesota legislatures statutorily provide a limited parent-child privilege, applying only to a minor child's confidential statements to a parent. See IDAHO CODE § 9-203(7) (1994); MINN. STAT. ANN. § 595.02(j) (West 1995).

compelling parental testimony might encourage perjury or cause parents to refuse to testify, resulting in contempt citations.⁶² They have also addressed claims that parental testimony would violate certain religious beliefs and the constitutional right to family privacy.⁶³ Nonetheless, most states and the federal courts have declined to create a parent-child testimonial privilege.⁶⁴

Traditionally, the commission of a crime by an individual has not resulted in criminal punishment of his or her parents except in circumstances in which a statute has imposed a particular duty on a parent with respect to the conduct of the child, or if the child performed the criminal act under fear of, or compulsion by, his or her parent.⁶⁵ Although some states have recently enacted "parental responsibility" laws in an attempt to criminally punish parents whose children commit crimes, these attempts have been met with disapproval by courts and commentators alike.⁶⁶

⁶² Cf. *United States v. (Under Seal) In re Antitrust Grand Jury Investigation*, 714 F.2d 347, 351 (4th Cir.) (addressing defendant's claim that the prosecutor attempted to coerce a guilty plea from a relative of a witness by threatening the witness with imprisonment for contempt if he refused to testify after the witness expressed great reluctance to do so), *cert. denied*, 464 U.S. 978 (1983).

⁶³ In *Port v. Heard*, 764 F.2d 423, 431-32 (5th Cir. 1985), the Fifth Circuit rejected the claims of the defendant's father and step-mother that their religious views prohibited them from testifying, and that compelling them to testify violated the Free Exercise Clause of the First Amendment. The Ports claimed that as Jews, they were prohibited by "Talmudic proscription, applied in Rabbinical Courts, from . . . testifying against their . . . child." *Id.* at 431. In *In re Agosto*, 533 F. Supp. 1298 (D. Nev. 1983), the witness raised a similar claim, asserting that his religious views prohibited him from testifying against his parents. The witness cited "the Canons of the Roman Catholic Church, which prohibit a child's being forced to testify against its parent in ecclesiastical tribunals" and the Biblical Commandment to "honor thy father and mother." *Id.* at 1300. See also *In re Antitrust Grand Jury Investigation*, 714 F.2d at 347 (witness refused to testify against his family, claiming that it would cause the family "immeasurable suffering" and "place him in an impossible conflict with his religious and moral convictions").

⁶⁴ See *In re Starr*, 647 F.2d 511, 512-13 (5th Cir. Unit A May 1981) (finding "no federal judicial support for recognition of a 'parent-child' privilege, and declin[ing] to create one") (footnote omitted); *In re Terry W.*, 130 Cal. Rptr. 913 (Ct. App. 1976) (rejecting a son's invocation of the parent-child privilege to preclude his mother's testimony against him); *People v. Sanders*, 457 N.E.2d 1241, 1244-45 (Ill. 1983); *Cissna v. State*, 352 N.E.2d 793, 795 (Ind. 1976); *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203, 1206 (Mass. 1983), *cert. denied*, 465 U.S. 1068 (1984).

⁶⁵ See Eunice A. Eichelberger, Annotation, *Criminal Responsibility of Parent for Act of Child*, 12 A.L.R. 4TH 673, 676 (1982). The types of statutes that criminally punish parents for their children's behavior include operation of motor vehicle statutes, contributing-to-the-delinquency-of-minors statutes, curfew ordinances, and compulsory school attendance laws. *Id.*

⁶⁶ See, e.g., David Bernstein, Note, *Parents' Criminal Liability for Acts of Minor Children: Current Status of California Penal Code Section 272*, 15 J. JUV. L. 79 (1994); Penelope D. Clute, Comment, "Parental Responsibility" Ordinances—Is Criminalizing Parents when Children Commit Unlawful Acts a Solution to Juvenile Delinquency?, 19 WAYNE L. REV. 1551 (1973); Note, *Criminal Liability of Parents for Failure to Control their Children*, 6 VAL. U. L. REV. 332 (1972); S. Randall Humm, Comment, *Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123 (1991); Sharon A. Ligorsky, Note, *Williams*

Moreover, this author could find only one case in which a court granted a child the privilege not to testify against a parent.⁶⁷ Because children do not ordinarily serve as advisors to their parents, courts have not extended the parent-child privilege to excuse children from testifying when they have information that could incriminate their parents. Unlike the marriage relationship, the parent-child relationship is a blood relationship, thus courts do not fear that compelling testimony of a child might cause the dissolution of the child's relationship with his or her parent.⁶⁸ The public interest in learning the truth and in bringing the alleged wrong-doing parent to justice is believed to outweigh whatever emotional or psychological harm a child might suffer if required to speak out against his or her parent, as well as the potentially harmful effects on the family as a whole.⁶⁹

In sum, the American legal system provides a zone of privacy for family life and respects the rights of individuals to make important decisions regarding their personal affairs without government intrusion. Even at the prosecution phase of a criminal trial, family relationships, especially the marital relationship, receive a shroud of protection from the law. Only rarely have states attempted to punish parents for the crimes of their children, and then without much success.

II

FORFEITURE OF REAL PROPERTY THAT FACILITATES A DRUG OFFENSE

Viewing the civil forfeiture system against the backdrop of the constitutional ideals of family privacy and autonomy, one can better

v. Garcetti: *Constitutional Defects in California's "Gang-Parent" Liability Statute*, 28 LOY. L.A. L. REV. 447 (1994); Kathryn J. Parsley, Note, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of their Children*, 44 VAND. L. REV. 441 (1991) (discussing the constitutionality of "contributing to the delinquency of a minor laws"); Toni Weinstein, Note, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859 (1991).

⁶⁷ *In re Agosto*, 553 F. Supp. at 1325.

⁶⁸ *See Port*, 764 F.2d at 431 ("[T]he parent-child relationship, based as it is on the bonds of blood, [is] . . . less susceptible of dissolution and therefore less in need of judicial protection than the marital relationship.")

⁶⁹ *See, e.g., Doe v. United States*, 842 F.2d 244, 247-28 (10th Cir.), *cert. denied*, 488 U.S. 894 (1988) (holding that the government's interest in investigating crimes outweighs a 15-year-old's interests, including the observance of his religious beliefs, in not testifying against his parents); *United States v. Davies*, 768 F.2d 893, 898 (7th Cir.) (rejecting parent-child privilege to preclude minor child from testifying against his parents, focusing instead on the need for truth), *cert. denied*, 474 U.S. 1008 (1985); *United States v. Penn*, 647 F.2d 876 (9th Cir.) (rejecting a general family privilege in a case involving evidence provided by a son against his mother), *cert. denied*, 449 U.S. 903 (1980); *DeLeon v. State*, 684 S.W.2d 778, 782 (Tex. Ct. App. 1984) (rejecting parent-child privilege to preclude minor child from testifying against his parents because it would not be "consistent with the ends of justice").

appreciate the novelty of the forfeiture doctrine as applied to uninvolved family members of drug offenders. The following sections examine the use of civil asset forfeiture in the fight against illegal drugs and the emerging jurisprudence concerning the defense of innocent ownership.

A. Asset Forfeiture as a Weapon to Combat Drugs

Civil forfeiture law as it exists today probably originated from British admiralty law.⁷⁰ Since colonial times, federal law has provided for the forfeiture of assets, such as ships and cargos involved in customs offenses and piracy,⁷¹ and the use of forfeiture actions to enforce customs law continues to the present.⁷² Forfeiture provisions also appear in over 100 statutes and are used to control a wide variety of activities.⁷³ Yet forfeiture never received the widespread, systematic use that now exists in law enforcement aimed at illegal drug traffic.

The advent of the "war on drugs" wrought fundamental changes in law enforcement and has increased the scope and intensity of the enforcement effort.⁷⁴ Drug prosecutions dwarf all other cases

⁷⁰ For a discussion of the history of civil forfeiture law in this country, see *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118-23 (1993). In disputes between maritime traders, the owners of seafaring vessels were likely to live abroad and thus outside the jurisdiction of U.S. courts. The *in rem* civil action therefore provided a convenient way to resolve maritime disputes. See Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 295 (1992); see also *Austin v. United States*, 113 S. Ct. 2801, 2807-08 (1993) (stating that of the three types of forfeiture used in England, only statutory forfeitures, such as those found in the navigation acts and those used to enforce revenue or customs laws, took hold in this country). In fact, scholars have traced the principle of forfeiting "guilty" property to punish a property owner for the misuse of his or her property back to biblical times. For a thorough discussion of the history of forfeitures and deodands, 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).

⁷¹ See, e.g., *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) (forfeiture of foreign-owned ship whose crew had engaged in piracy against American ship); *The Palmyra Case*, 25 U.S. (12 Wheat.) 1 (1827) (same).

⁷² See, e.g., 1991 ANN. REP. OF THE DEP'T OF JUSTICE ASSET FORFEITURE PROGRAM 29 [hereinafter 1991 ANN. REP.] (noting that the Immigration and Naturalization Service forfeits vehicles seized at the border because of their owners' immigration law violations).

⁷³ Alok Ahuja, Comment, *Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment*, 5 YALE L. & POL'Y REV. 428, 430 (1987).

⁷⁴ See generally Sandra Guerra, *Domestic Drug Interdiction Operations: Finding The Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109, 1112-38 (1992) (addressing the transformation of police work and the use of novel drug search operations). The national drug control budget has grown dramatically in the past few years. From 1981 to 1994, the budget for all federal drug control measures grew 750% from 1.7 billion to 12.1 billion dollars. See OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFF. OF THE PRES., NATIONAL DRUG CONTROL STRATEGY, BUDGET SUMMARY 2 (1994). For 1995 and 1996, the budget is expected to grow by approximately one billion dollars per year. See OFFICE OF NAT'L DRUG CONTROL POL'Y, EXECUTIVE OFF. OF THE PRES., NATIONAL DRUG CONTROL STRATEGY, BUDGET SUMMARY 23 (1995).

brought in federal courts.⁷⁵ And the emergence of civil asset forfeiture has, perhaps more than anything else, dramatically altered the law enforcement landscape in this country.⁷⁶ According to the Supreme Court, drug forfeiture laws represent an "important expansion of governmental power."⁷⁷ Moreover, in the last seventeen years, Congress has made numerous changes in the reach of civil drug asset forfeiture law, dramatically increasing its scope.⁷⁸ Through forfeiture actions, the government can seize any type of property even minimally connected to drug activity⁷⁹ and convert it to law enforcement uses.⁸⁰ The lure of collecting asset forfeiture proceeds has driven the development of a vast, multijurisdictional drug law enforcement system.⁸¹

⁷⁵ In 1994, 41.8% of all offenders sentenced under the Federal Sentencing Guidelines for offenses committed after November 1, 1987 were convicted of drug offenses. U.S. SENTENCING COMM'N, ANN. REP., at 39, tbl. 12 (1994). The next most commonly sentenced offense was fraud, which represented 14.3% of all cases. *Id.* According to Bureau of Justice Statistics, "[t]he number of convicted drug offenders increased ninefold (from 19,000 to 172,300) from 1980 through 1992." BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE CORRECTIONAL POPULATIONS IN THE UNITED STATES, EXECUTIVE SUMMARY 2 (Apr. 1995).

⁷⁶ For a discussion of civil drug asset forfeiture laws, see Sandra Guerra, *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 811-39 (1994) (detailing the emergence and reformation of civil drug asset forfeiture laws).

⁷⁷ *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 121 (1993).

⁷⁸ Prior to 1978, the only items that could be seized were "illegal substances themselves and the instruments by which they were manufactured and distributed," including conveyances. *Id.* In 1978, Congress enacted a forfeiture provision for drug proceeds. *Id.*; see 21 U.S.C. § 881 (1994). The federal asset forfeiture program focuses on drug offenses, but it also includes racketeering activity. In addition to the drug asset forfeiture statutes, the government relies on the following statutes to confiscate property: Organized Crime Control Act of 1970 § 803(a), 18 U.S.C. § 1955 (1994) (civil forfeiture for gambling violations); Organized Crime Control Act of 1970, § 901(a), 18 U.S.C. § 1963 (1994) (criminal forfeiture for RICO violations); Money & Finance Act, § 5317, 31 U.S.C. § 5317 (1988 and Supp. V 1993) (civil forfeiture for money laundering violations); Anti-Drug Abuse Act of 1986, § 1366(a), 18 U.S.C. § 981 (1994) (civil forfeiture for money laundering violations and felony drug violations against foreign nations); see also 1991 ANN. REP., *supra*, at 107 app. I. For a thorough discussion of the range of government imposed punitive civil sanctions, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

⁷⁹ See *infra* note 84 and accompanying text.

⁸⁰ The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund to collect the proceeds of forfeited assets, Pub. L. No. 98-473, § 310, 98 Stat. 1837, 2052 (codified at 28 U.S.C. § 524(c)(1) (1988 & Supp. V 1993)). Congress amended 21 U.S.C. § 881(e)(1)(A) to provide for this transferred property to go directly to law enforcement, rather than to the general fund of the United States Treasury as previous forfeiture statutes required. Section 881(e)(1)(A) reads: "Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—(A) retain the property for official use or . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property . . ." 21 U.S.C. § 881(e)(1)(A) (1994). The ability to seize drug-related properties has emerged as a huge boon for law enforcement. Guerra, *supra* note 76, at 824-27.

⁸¹ Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1182-85, 1187-88 (1995) (discussing the "federally-

The most significant expansion in civil forfeiture law occurred in 1984 when Congress added a provision making forfeitable "[a]ll real property . . . in the whole or any lot or tract of land . . . which is used, or intended to be used . . . to commit, or to facilitate the commission of, a [controlled substance] violation."⁸² If a child sells drugs in his or her parents' home (and the property thus "facilitates" the offense), not only is the child criminally liable, but his or her parents risk forfeiture of their property. A drug offense committed anywhere inside the property line renders the entire lot and dwelling place subject to forfeiture.⁸³ Similarly, drug proceeds and property purchased with them, as well as "conveyances" such as automobiles, boats, and planes are forfeitable.⁸⁴

zation" of law enforcement such that state and local agents work under the control of federal law enforcement officials as joint drug task forces).

⁸² Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1994)).

⁸³ In *Austin v. United States*, 113 S. Ct. 2801, 2811-12 (1993), the Supreme Court held that, if the civil forfeitures are punitive in nature, the Eighth Amendment's proscription against excessive fines requires trial courts to limit the value of the assets forfeited according to the severity of the crime. The *Austin* Court distinguished the remedial forfeiture of "instrumentalities" of crime and "contraband" from the punitive forfeiture of real property and conveyances, which the Court viewed "as payment to a sovereign as punishment for some offense." *Id.* at 2812 (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)); see also Guerra, *supra* note 76, at 833-39 (discussing *Austin*).

The circuit courts have applied different tests for excessiveness. The Fourth Circuit examines how extensively the property was involved in the drug offense. This has been referred to as an "instrumentality" test. See *United States v. Chandler*, 36 F.3d 358, 364 (4th Cir. 1994) (holding that the constitutional limitation applies to the degree of taint, not to the value of the involved property or the gravity of the offense), *cert. denied*, 115 S. Ct. 1792 (1995). The Eighth and Ninth Circuits consider the "egregiousness of the crime [in relation] to the amount of the forfeiture" and take into account the "in personam punishment of the owner, the hardship to the defendant and the defendant's family, and the culpability of the owner in relation to the crime." See *United States v. \$69,292*, 62 F.3d 1161, 1166 (9th Cir. 1995); see also *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330-31 (8th Cir. 1994) (applying a similar standard). The Second Circuit takes into account both the degree to which the property was an instrumentality in the offense and other factors related to proportionality. See *United States v. Milbrand*, 58 F.3d 841, 846 (2d Cir. 1995); see also *United States v. 1215 Kelly Rd.*, 860 F. Supp. 764, 756-66 (W.D. Wash. 1994) (adopting a multi-factor test for excessive fines analysis); see generally, Michael J. Munn, Note, *The Aftermath of Austin v. United States: When is Civil Forfeiture an Excessive Fine?*, 1994 UTAH L. REV. 1255; Douglas S. Reinhart, Note, *Applying the Eighth Amendment To Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235 (1994).

⁸⁴ In 1970, Congress provided for the forfeiture of contraband and containers and conveyances used to transport contraband. Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 881(a) (1994)). The reach of the law was extended in 1978 by authorizing the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished . . . in exchange for a controlled substance . . . or intended to be used to facilitate any violation . . ." Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a)(2), 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1994)).

Prosecutors prefer to invoke the civil asset forfeiture law, rather than its criminal counterpart, because the civil process offers the government many important advantages.⁸⁵ As previously mentioned, civil forfeiture law allows the government to seize the property of persons who have not themselves violated the law.⁸⁶ A civil forfeiture action is brought against the property, not the offender, based on the fiction that the property is itself "guilty" and therefore the owner has no interest in its disposition.⁸⁷ Forfeiture actions are thus styled as the government versus the property, identified by its address or other description. The law allows the government to take the "guilty" property because it has been misused, regardless of who misused it. Thus, civil forfeiture laws permit the government to take property prior to obtaining a conviction, and indeed, without ever bringing criminal charges at all.⁸⁸

⁸⁵ The anti-drug laws provide for criminal forfeiture. *See, e.g.*, 21 U.S.C. § 853 (1994). The procedures for seizures under the criminal forfeiture law are more cumbersome for prosecutors and thus, are used less often. *See Guerra, supra* note 76, at 822 nn.61-62 (discussing criminal forfeiture procedure). Although the criminal forfeiture process gives greater protection to the constitutional rights of criminal defendants who own property, it nonetheless creates grave problems for the property interests of innocent third parties. *See Michael Goldsmith & Mark J. Linderman, Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1263-64 [hereinafter Goldsmith & Linderman] (discussing the government's use of restraining orders to prevent the transfer of property, placing the interests of third parties in limbo until after conviction and sentencing).

⁸⁶ The criminal forfeiture law, by contrast, provides for the forfeiture of an offender's property after conviction as part of the sentence imposed. The federal criminal forfeiture statute provides, in relevant part:

Any person convicted of a violation . . . punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

- (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
- (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
- (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit . . . any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853(a) (1994).

⁸⁷ The Supreme Court first enunciated the guilty property theory of civil asset forfeiture in *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844). The Court stated that "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *Id.* This legal fiction persists in civil forfeiture law to date. *See Bennis v. Michigan*, 116 S. Ct. 994, 998 (1996) (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974); *see also* 1991 ANN. REP., *supra* note 72, at 7-8; Terrance G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, CATO INST. POL'Y ANALYSIS, Sept. 29, 1992, at 3, 6-7 (discussing the fiction of proceeding against the property).

⁸⁸ *See Guerra, supra* note 76, at 821-22. Traditionally, civil forfeitures were not considered criminal "punishment," but rather a civil "penalty." The Supreme Court's decision in

By virtue of the fact that the forfeiture action is considered a civil lawsuit, the government can avoid providing property owners with many of the protections the Constitution affords criminal defendants.⁸⁹ Of greatest consequence to property owners is the lower standard of proof—in this case, probable cause⁹⁰—that the government must satisfy to seize property.⁹¹

The very factors that make civil forfeiture attractive to prosecutors make it devastating to property owners. The broad powers given to prosecutors authorize them to take action to seize a family's home based on the wrongdoing of any member of the household or a guest.⁹² The family must defend against the forfeiture to keep its

Austin departs from tradition in finding that federal drug-related forfeitures of real property and conveyances are punitive and hence subject to the Excessive Fines Clause of the Eighth Amendment. See *supra* note 83; cf. also *Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994) (holding that state tax assessment on illegal drugs constitutes "punishment" for purpose of double jeopardy analysis).

⁸⁹ Numerous commentators have criticized the paucity of protection for the constitutional rights of property owners under the civil forfeiture scheme. See generally Goldsmith & Linderman, *supra* note 85 (assessing the due process rights of third parties); William P. Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309 (1992) (suggesting incorporation of Fourth Amendment protections in forfeiture cases); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When is Everything Too Much?*, 53 U. PITT. L. REV. 1 (1991) (discussing Eighth Amendment concerns in RICO forfeiture cases); Stahl, *supra* note 70 (arguing that the allocation of the burden of proof in civil forfeiture cases violates the Due Process Clause); Ahuja, Comment, *supra* note 73 (advocating strict application of Fourth Amendment standards in civil forfeiture cases); 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 (1991) (endorsing the proposition that "draconian" civil forfeiture laws violate defendants' due process rights); Damon G. Saltzburg, Note, *Real Property Forfeiture as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217 (1992) (discussing the need to balance the government's interests against the due process rights of innocent owners); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990) (proposing reform of forfeiture laws to adequately safeguard due process rights); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165 (1990) (finding a constitutional need to narrow the scope of drug forfeitures).

⁹⁰ See *infra* note 125 and accompanying text.

⁹¹ As in any criminal case, the government would have to prove the property owner's guilt beyond a reasonable doubt to obtain a conviction. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged").

⁹² For real property seizures, the Supreme Court has determined that due process requires pre-seizure notice to the owner and the right to a hearing. *United States v. James Daniel Good Property*, 114 S. Ct. 492, 505 (1993). The government can, however, file a *lis pendens* on the property which makes it non-transferable during the pendency of the forfeiture litigation. See, e.g., *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1265 (2d Cir. 1989).

The government can obtain summary judgment granting a warrant to seize the property unless the claimant can produce evidence to raise a "genuine issue as to any material fact." *United States v. Lot 4, Block 5 of Eaton Acres*, 904 F.2d 487, 490 (9th Cir. 1990).

home.⁹³ To do so, the family will need adequate legal representation. But, because forfeiture actions are civil actions, the property owners are not constitutionally entitled to appointed counsel, as are indigent criminal defendants.⁹⁴ Moreover, lawyers may not accept civil asset forfeiture cases on a contingent fee basis because winning the lawsuit results only in retaining the property and not in a monetary award.⁹⁵ Property owners faced with forfeiture will have no choice but to hire an attorney, and to pay fees and litigation costs outright to present their defense of innocence.

B. The "Innocent Owner" Defenses

Throughout most of the long history of civil asset forfeiture, the pleas of innocent property owners whose property had been used unlawfully fell on deaf ears in the courts.⁹⁶ Courts adhered religiously to

The claimant must "produce evidence on which a reasonable trier of fact could find in its favor, viewing the record as a whole in light of the evidentiary burden the law places on that party." *Id.* (citation omitted). In forfeiture cases, the property owner may offer evidence on two issues to defeat a summary judgment motion: (1) that the property was not used to facilitate a drug violation or (2) that the owner was innocent. If the evidence offered consists only of the owner's "self-serving declarations," these must be "detailed" and not merely "conclusory allegations." *Id.* at 490 n.3. A ruling that the owner's testimony consists of only "self-serving" and "conclusory allegations" would be insufficient to defeat the summary judgment motion and would result in the expeditious and final seizure of the property. *Id.*

⁹³ Mortgagees and lienholders, on the other hand, can have their interests in the property settled and paid by the government through an expedited process. See generally EXECUTIVE OFF. FOR ASSET FORFEITURE, OFFICE OF THE DEPUTY ATT'Y GEN., EXPEDITED FORFEITURE SETTLEMENT POLICY FOR MORTGAGEES AND LIENHOLDERS (1993).

Sometimes family members' cases can be settled out of court as well. See, e.g., *United States v. 163 Renwick St.*, 859 F. Supp. 93, 94 n.1 (S.D.N.Y. 1994) (government agreed to settlement of innocent wife's interest in family home). In joint tenancies, however, the innocent spouse may nonetheless be required to vacate the premises and receive only his or her share of the proceeds from the sale of the home. See *infra* notes 178-85 and accompanying text.

⁹⁴ See *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (holding that the Sixth Amendment requires appointed counsel for defendants charged with petty offenses punishable by incarceration); *Douglas v. California*, 372 U.S. 353, 358 (1963) (holding that the Equal Protection Clause requires appointed appellate counsel for the first appeal); *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (holding that the Sixth Amendment grants an indigent the right to appointed counsel in all felony cases).

⁹⁵ In *United States v. A Single Story Double Wide Trailer*, 727 F. Supp. 149 (D. Del. 1989), a Delaware district court considered and rejected a trailer home owner's claim that his inability to find an attorney should be grounds for setting aside a default judgment. The court stated that this claim was "not easily verifiable by the court." *Id.* at 153. It did, however, agree that "[e]xtreme difficulty in obtaining representation is a mitigating factor in the analysis." *Id.* at 152-53 (citation omitted). But in regards to this particular owner, the court found that his "repeated efforts to find an attorney," without more, constituted culpable negligence because he had not attempted to enter a *pro se* appearance or to explain his difficulty to opposing counsel or to the court. *Id.* at 153.

⁹⁶ Early cases upheld the forfeiture of properties and conveyances notwithstanding the innocence of the owners. See, e.g., *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877).

the fiction that guilt attached to the property itself and that therefore, the possible innocence of the owner was irrelevant.⁹⁷

Dicta in the Supreme Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.* opened the door slightly for innocent property owners to raise a defense based on the Fifth Amendment's takings clause.⁹⁸ A decade later, in 1984, Congress began amending the civil drug forfeiture laws to include a defense for innocent owners.⁹⁹ The following sections discuss these constitutional and statutory defenses and assess the jurisprudence these defenses spawned.

1. *The Constitutional Defense*

Ironically, the Supreme Court first acknowledged the possibility that civil forfeiture might infringe upon an owner's constitutional rights in a decision rejecting the claim of an owner who neither committed a crime nor had any knowledge of wrongdoing on the property. The claimant in *Calero-Toledo* had leased a yacht to two Puerto Rican residents who had brought a marijuana cigarette on board.¹⁰⁰ The yacht leasing company argued that the forfeiture amounted to a government taking without just compensation because the company was an innocent owner.¹⁰¹ The Court held that the Constitution did not forbid Congress from authorizing the forfeiture of illegally-used property even if the owner had no involvement with or knowledge of the offense.¹⁰²

While rejecting the claim of an owner who had no prior knowledge that its property would be wrongfully used, the Court carved out a narrow exception for owners who could demonstrate a greater degree of innocence.¹⁰³ The Court distinguished the situation in *Calero-Toledo*, in which the owners exercised judgment and control in leasing the yacht, from one in which the property owners exercised no control in entrusting the property to others.¹⁰⁴ The Court identified two types of truly innocent owners: those whose property had been taken

⁹⁷ See, e.g., *J.W. Goldsmith, Jr.-Grant Co.*, 254 U.S. at 511 (the view of property as offender "is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced"); *Dobbins's Distillery*, 96 U.S. at 400 ("[t]he thing . . . is primarily considered as the offender"); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.").

⁹⁸ 416 U.S. 663, 689-90 (1974). The Fifth Amendment forbids "private property [to] be taken for public use, without just compensation." U.S. CONST. amend. V.

⁹⁹ See *infra* notes 119-22 and accompanying text.

¹⁰⁰ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665 (1974); *id.* at 693 (Douglas, J., dissenting in part).

¹⁰¹ *Id.* at 680.

¹⁰² *Id.* at 688.

¹⁰³ *Id.* at 689.

¹⁰⁴ *Id.* at 690.

"without . . . privity or consent,"¹⁰⁵ and those who "had done all that reasonably could be expected to prevent the proscribed use."¹⁰⁶ In either case, the Court reasoned, "it would be difficult to conclude that forfeiture served legitimate purposes, and was not unduly oppressive."¹⁰⁷ The Court observed that forfeiture of property involving a truly innocent owner would "give rise to serious constitutional questions."¹⁰⁸

In a case that involved the very intra-family issues addressed by this Article, the Supreme Court recently reaffirmed the doctrine of *Calero-Toledo*, but implicitly called into question the viability of the constitutional claim of owners who "[have] done all that reasonably could be expected to prevent the proscribed use."¹⁰⁹ The Court's 5-4 decision in *Bennis v. Michigan* upholds the forfeiture of a car owned jointly by a married couple and seized by the state upon a finding that the husband had used it for purposes of engaging in illegal sexual activity with a prostitute.¹¹⁰ The wife claimed that her lack of knowledge or consent of the illegal use to which her husband put the vehicle rendered her "innocent," and therefore the forfeiture violated her rights under the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.¹¹¹

Writing for the majority, Chief Justice Rehnquist relied on the "long and unbroken line of cases [that hold] that an owner's interest in property may be forfeited by reason of the use to which the prop-

¹⁰⁵ *Id.* at 689.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 689-90.

¹⁰⁸ *Id.* at 689; *see also* *Austin v. United States*, 113 S. Ct. 2801, 2809-10 (1993) (relying on the notion that an owner was negligent in allowing his property to be misused).

¹⁰⁹ *Bennis v. Michigan*, 116 S. Ct. 994, 999 (1996).

¹¹⁰ *Id.* at 1001. The state obtained an "order of abatement" under Michigan law which characterized such misused property as a nuisance. *Id.* at 996 n.3. A dissenting opinion authored by Justice Stevens and in which Justices Souter and Breyer joined points out the novelty of Mrs. Bennis's plight: "[I]t was not until 1988 that any state decided to experiment . . . by confiscating property in which, or on which, a single transaction with a prostitute has been consummated." *Id.* at 1003 (Stevens, J., dissenting).

¹¹¹ *Id.* at 998. In a concurring opinion, Justice Thomas expressed the view that although "the Federal Constitution does not prohibit everything that is intensely undesirable," the property that can be made subject to forfeiture for misuse should be strictly limited to "instrumentalities." *Id.* at 1002 (Thomas, J., concurring).

Justice Ginsburg also concurred in a separate opinion, stating that at most Mrs. Bennis was entitled to a portion of the proceeds of the sale of the car, but the trial court in an "equitable action" had declined to award her the proceeds for the "practical reasons" that the Bennises owned another car and the forfeited car was of so little value that there would be "practically nothing" to divide. *Id.* at 1003 (Ginsburg, J., concurring). Justice Ginsburg's concurring opinion may indicate that she agreed with the disposition of this case based on its unique facts and the unique law being applied, but that under other circumstances she would find a due process violation in the forfeiture of property from an owner who lacks knowledge of wrongdoing. In that event, the Court would lack a majority for the contrary proposition.

erty is put even though the owner did not know that it was put to such use."¹¹² The Court dispensed with the Takings Clause claim by holding that the State had lawfully taken the property by governmental authority other than the power of eminent domain, and thus, was not required to compensate the owner.¹¹³

Of particular interest, the decision implies that an owner would likely have a valid due process defense against forfeiture of "property [that] is stolen . . . or otherwise taken from him without his privity or consent" and illegally used by a criminal.¹¹⁴ However, the due process claim of an owner who "had done all that reasonably could be expected to prevent the proscribed use of the property" is referred to as mere "obiter dictum."¹¹⁵ This aspect of the wife's defense was rejected on the basis that she had not made any showing beyond her lack of knowledge.¹¹⁶

Because it is unlikely that a prosecutor would seek to confiscate property that had been wrongfully taken from its owner and misused, the only constitutional defense in the ordinary forfeiture case that might be available to an owner is that he or she did all that reasonably could be expected to prevent the misuse. Accordingly, although the owners in *Calero-Toledo* and *Bennis* were "innocent" in the sense that they had not demonstrated any affirmative conduct that would indicate a culpable state of mind—they had no actual knowledge nor any reason to believe that those using the property would violate the law and they certainly had not procured or taken part in any illegality themselves¹¹⁷—they and owners like them could not prevail on a due process claim. The possibility exists that similarly situated owners

¹¹² *Id.* at 995.

¹¹³ *Id.* at 1001.

¹¹⁴ *Id.* at 999 n.5.

¹¹⁵ *Id.* at 999.

¹¹⁶ *Id.* The two dissenting opinions take the position that the forfeiture of property from an owner who is "truly innocent" violates the Due Process Clause. The Stevens dissent takes the position that case law supports the forfeiture of an innocent owner's property only when the "principal use" of the property is to facilitate the commission of a crime. *Id.* at 1005-07 (Stevens, J., dissenting). The opinion also apparently agrees with Justice Thomas's concurring opinion that property should not be forfeitable unless it is an instrumentality. *Id.* at 1002 (Stevens, J., dissenting). In this case, the *Bennis* car "bore no necessary connection to the offense committed by petitioner's husband" in the sense that the crime "might just as well have occurred in a multitude of other locations." *Id.* at 1006 (Stevens, J., dissenting). The forfeiture of the vehicle serves no remedial purpose, the dissent argues, but is entirely punitive. *Id.* at 1009 (Stevens, J., dissenting). Thus, punishment of Mrs. *Bennis*, who is "entirely without responsibility" and "in no way negligent in her use or entrustment of the family car," is fundamentally unfair. *Id.* at 1007 (Stevens, J., dissenting). Justice Kennedy, writing a separate dissenting opinion, agreed that the forfeiture violates due process because there was no showing of "negligent entrustment or criminal complicity" on her part. *Id.* at 1011 (Kennedy, J., dissenting).

¹¹⁷ Indeed, the dissent notes that Mrs. *Bennis* might be considered a victim of her husband's unlawful activity. *Id.* at 1009 (Stevens, J., dissenting).

could prevail if they could show that they had taken affirmative steps on their own initiative to prevent the illegal use of the property, but *Bennis* does not bode well for the viability of even this narrow claim.

2. The Statutory "Innocent Owner" Defense

At the same time Congress expanded the reach of forfeiture law to real property, it also provided a statutory defense for owners having no involvement with drug violations occurring on their property. The statutory defense excepts "innocent owners" from the forfeiture law. It states: "[N]o 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."¹¹⁸ An identical exception applies to the forfeiture of drug proceeds,¹¹⁹ and a similar exception applies to conveyances except that it does not cover owners who act with "willful blindness."¹²⁰ Because the three provisions read almost identically, the courts have viewed themselves as bound by precedent to apply the reasoning of forfeiture cases involving one type of asset, such as real property, in forfeiture cases involving other types of assets, such as conveyances and drug proceeds.¹²¹

A review of the "innocent owner" defense jurisprudence reveals a theoretical morass attributable to the procedural oddity of the civil *in rem* forfeiture action, the poor drafting of the forfeiture provisions, and the inherently slippery *mens rea* terms used to define innocent property owners. These factors have made the task of applying the forfeiture provisions extremely difficult. To further complicate the situation, the courts do not have any helpful legislative history to guide them.¹²²

¹¹⁸ Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1994)).

¹¹⁹ Psychotropic Substances Act of 1978, § 301(a), 21 U.S.C. § 881(a)(6) (1994).

¹²⁰ The "innocent owner" exception for conveyances reads: "[N]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." Comprehensive Drug Abuse Prevention & Control Act of 1970 § 511(a)(4)(B), 21 U.S.C. § 881(a)(4)(C) (1994).

¹²¹ See, e.g., *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 799-801 (3d Cir. 1994) (finding the reasoning in a real property case to be binding in a conveyance case) (citing *United States v. 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989)).

¹²² See, e.g., *One 1973 Rolls Royce*, 43 F.3d at 815 & n.20 (describing legislative history for forfeitures of real property and conveyances as "unhelpful"); Loomba, *supra* note 3, at 484 (stating that legislative history for forfeitures "provides no direct basis" for answering the question of "whether the phrase 'knowledge or consent' should be read disjunctively or conjunctively").

a. *The Procedural Oddity of Civil Asset Forfeiture*

The civil *in rem* asset forfeiture action differs procedurally from both the criminal action and the typical civil action. Ordinarily, the party “who generally seeks to change the present state of affairs . . . naturally should be expected to bear the risk of failure of proof or persuasion.”¹²³ In the “general run of issues in civil cases,” the plaintiff must produce evidence to prove its case “by a preponderance of the evidence.”¹²⁴ In civil forfeiture actions, however, the government, which “seeks to change the present state of affairs,” need only establish probable cause¹²⁵ to believe that the property is subject to forfeiture, *i.e.*, that someone has illegally used the property, be it the owner or another. The government may show probable cause by introducing otherwise inadmissible hearsay evidence.¹²⁶ The government is not required to prove the owner’s guilt.

¹²³ EDWIN W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 337, at 949 (3d ed. 1984). In a typical civil negligence case, the plaintiff bears the burdens of pleading, production, and persuasion. *Id.* at 948. In criminal cases, of course, the government bears the burden of proving the elements of the charge beyond a reasonable doubt. *See supra* note 91.

¹²⁴ CLEARY ET AL., *supra* note 123, § 339, at 956.

¹²⁵ “Probable cause” refers to “reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.” *United States v. \$4,255,000*, 762 F.2d 895, 903 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986) (citations omitted); *accord* 15603 85th Ave. North, 933 F.2d 976, 979 (11th Cir. 1991). For a thorough discussion of burden of proof issues in civil drug asset forfeitures, see Stahl, *supra* note 70, at 284-86, 291-93.

Some courts also have spoken of probable cause in asset forfeiture cases as requiring proof of “reasonable grounds to believe that a *substantial connection* exists between the property to be forfeited and the criminal activity. . . .” *United States v. 8848 S. Commercial St.*, 757 F. Supp. 871, 879 (N.D. Ill. 1990) (emphasis added). This requirement apparently derives from the legislative history of the innocent owner provision for drug proceeds, which states that “it is the intent of these provisions that the property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity.” Joint Explanatory Statement of Titles II and III, 124 CONG. REC. S17,647 (1978), *reprinted at* 1978 U.S.C.A.N. 9518, 9522 (1979); *see also* 6109 *Grubb Rd.*, 886 F.2d at 625 (quoting related legislative history).

Other courts have rejected the “substantial connection” test, requiring “only a nexus between” the property and the offense. *United States v. 163 Renwick St.*, 859 F. Supp. 93, 96 (S.D.N.Y. 1994) (citing *United States v. Daccarett*, 6 F.3d 37, 55-56 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294 (1994)); *see also* \$4,255,000, 762 F.2d at 902-03 (explicitly rejecting the substantial connection test).

¹²⁶ The rules of evidence, including, most significantly, the hearsay rules, do not apply during probable cause hearings. *See, e.g.*, *United States v. Lots 12, 13, 14 & 15, Keeton Heights*, 869 F.2d 942, 948 n.1 (6th Cir. 1989) (citing *United States v. One 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), *cert. denied sub nom.*, *Presto v. United States*, 461 U.S. 914 (1983)). Hearsay is a form of evidence generally excluded because of its perceived untrustworthiness. *See* FED. R. EVID. 802 (hearsay generally inadmissible).

The permissibility of considering hearsay at the probable cause stage of the process creates a dilemma in a jury trial, in which the duty to assess the innocent ownership defense, a question of fact, rests with the jury. *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1501 (11th Cir. 1992). Since a trial court may consider otherwise inadmissible hearsay evidence in a probable cause hearing, the question has arisen whether juries should be allowed to hear the inadmissible evidence that is presented to the court or

The property owners must introduce the issue of their innocence as an affirmative defense and then prove their innocence by a preponderance of the evidence.¹²⁷ The owners face the unenviable task of proving a negative: that they did *not* have knowledge of or did *not* consent to the illegal use.¹²⁸ An owner may have no better evidence available to prove that he or she did not know or consent to a drug offense than the otherwise unverifiable testimony, "I did not know or consent."¹²⁹ If the owner raises an "innocent owner" defense, the government then has the opportunity to disprove that claim.

b. *Poor Draftsmanship*

The Third Circuit has described the "innocent owner" defense as "[f]illed with negatives, its language is nearly impenetrable."¹³⁰ To demonstrate the "linguistic" difficulty, the court removed two of the negatives and the burden of proof language from the real property forfeiture provision, resulting in the following construction: "property shall be forfeited under [§ 881(a)(7)] to the extent of an interest of an owner, by reason of any act or omission . . . committed or omitted with[] the knowledge or consent of the owner."¹³¹ This revision, although grammatically improving the language, distorts the meaning of the provision. The negatives and burden of proof language, even with the "linguistic difficulty" they produce, more accurately commu-

whether the two phases of the process should be bifurcated, such that the probable cause hearing would be before the judge alone. *Id.* If the process is bifurcated, the jury would not hear the government's evidence concerning the forfeitability of the property. If, on the other hand, the process is not bifurcated, the jury would hear evidence that would be inadmissible at trial. In *1012 Germantown Rd.*, the trial court refused to bifurcate the trial, stating, "otherwise, the case [would not] make any sense at all to let the defendant go forward with proof, and disprove something not at issue." *Id.* at 1499 (citation omitted) (alteration in original). Indeed, the trial court allowed the jury to consider the inadmissible hearsay testimony as "background" and "contextual" evidence in evaluating the innocent ownership defense. *Id.* at 1502. The Eleventh Circuit reversed this decision, holding that forfeiture cases tried before a jury must be bifurcated if the government plans to introduce inadmissible evidence during the probable cause phase. *Id.* at 1501.

The practice of using inadmissible hearsay usually presents no difficulty since "forfeiture cases are typically tried as bench trials, making it relatively easy for the judge as factfinder to sort out the hearsay evidence from the admissible evidence." *Id.* And even if tried before a judge, "the improper use of hearsay evidence during the innocent owner portion of the trial is grounds for remand." *Id.* at 1501-02.

¹²⁷ See, e.g., *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1174 (8th Cir. 1992); *1012 Germantown Rd.*, 963 F.2d at 1501; *United States v. \$215,300*, 882 F.2d 417, 419 (9th Cir. 1989).

¹²⁸ The common law generally did not require anyone to prove a negative. See *Andrew Crispo Gallery v. Comm'r*, 16 F.3d 1336, 1342 (2d Cir. 1994); *163 Renwick St.*, 859 F. Supp. at 96 (citing *Elkins v. United States*, 364 U.S. 206, 218 (1960)).

¹²⁹ See, e.g., *8848 S. Commercial St.*, 757 F. Supp. at 876 (rejecting the government's argument that claimants' "simple denials" were insufficient and that claimants should affirmatively demonstrate their lack of knowledge to defeat a summary judgment motion).

¹³⁰ *United States v. One 1973-Rolls Royce*, 43 F.3d 794, 815 (3d Cir. 1994).

¹³¹ *Id.*

nicate the challenge the innocent owner defense poses to property owners. The Third Circuit's revision suggests that the government may not forfeit someone's property unless it can first show that the owner had knowledge of or had consented to the offense. However, this is not the case. The statute puts the onus on the owner to prove the negative, *i.e.*, to prove his or her lack of knowledge or consent: "[N]o 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*."¹³²

Of critical importance is the language in the statute that speaks of an act "committed . . . without the knowledge or consent of the owner." Courts have struggled to interpret this phrase. What did Congress mean by "knowledge or consent"? Knowledge is generally understood to require some conscious awareness of the facts at issue.¹³³ If consent is defined as "compliance or approval,"¹³⁴ then "[i]n order to comply or approve of something [done by another], it is only common sense that one must have knowledge of it."¹³⁵ In other words, one can have knowledge without giving consent, but one cannot consent without having knowledge. Proof of consent necessarily requires proof of knowledge. Most courts therefore interpret the statute to mean that in raising the innocent owner defense, an owner can establish his or her innocence by showing either a lack of knowledge or a lack of consent.¹³⁶

¹³² 21 U.S.C. § 881(a)(7) (1994) (emphasis added).

¹³³ The Model Penal Code defines "knowingly" as regards knowledge of circumstances as follows: "A person acts knowingly . . . when . . . he is aware . . . that such circumstances exist." MODEL PENAL CODE § 2.02(2)(b) (Proposed Official Draft 1962).

¹³⁴ *United States v. 141st St. Corp.*, 911 F.2d 870, 878 (2d Cir. 1990) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1971)), *cert. denied*, 498 U.S. 1109 (1991).

¹³⁵ *Id.*

¹³⁶ *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 (11th Cir. 1992); *141st St. Corp.*, 911 F.2d at 877-78; *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir.), *reh'g denied*, 890 F.2d 659 (3d Cir. 1989).

The Ninth Circuit, however, has put forth the odd requirement that an owner must prove both lack of knowledge and lack of consent in order to prevail. *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (*per curiam*). Such a requirement nullifies the lack of consent defense. If an owner did not have knowledge, then it follows that he or she did not consent; the lack-of-consent defense adds nothing. On the other hand, if the owner had knowledge, but did not consent, the owner nevertheless loses because the court requires that the owner prove both lack of knowledge and lack of consent. Because one cannot withhold consent unless one has knowledge, the lack-of-consent defense again adds nothing. *See 141st St. Corp.*, 911 F.2d at 878.

A district court in Hawaii, however, explains the Ninth Circuit's decision in *Lot 111-B* more sensibly. The court found it to require that the *government* prove both knowledge and consent to defeat an innocent owner claim—not that the *claimant* prove both lack of knowledge and lack of consent. Evidence of mere knowledge would thus be sufficient to defeat innocent owner defense, but only "if the claimant does not do all that reasonably

When an owner establishes his or her innocence by a preponderance of the evidence, the government must then refute this claim in order to prevail. It is at this point that the use of the disjunctive "or" between "knowledge" and "consent" has presented some difficulty for the courts.¹³⁷ The government clearly wins if it can show that the owner consented to (and thus implicitly had knowledge of) the drug offense. Can the government prevail, however, if it can establish only that the owner had knowledge, but did not consent? If knowledge alone is sufficient, then the question of consent becomes irrelevant, and courts usually avoid any reading of a statute that renders part of it irrelevant.¹³⁸ Nonetheless, the fact that the only sensible reading of the provision would provide a defense for owners who can prove *either* lack of knowledge or lack of consent, but would allow the government to prevail only if it can prove *both* knowledge and consent, has created a fair bit of confusion.¹³⁹

c. *Interpreting "Lack of Knowledge"*

To establish a person's criminal liability, the law ordinarily requires the party alleging a violation to establish that the other party acted with a culpable state of mind or *mens rea*.¹⁴⁰ The Model Penal Code, for example, provides that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense."¹⁴¹ Furthermore, the mental culpability must concur with the physical act, "in the sense that the former actuates the latter."¹⁴² The forfeiture rules, however, operate differently. In forfeiture cases, the law penalizes property owners for the criminal acts of others. Thus, one person may commit an offense, and another person may be penalized for knowing about it and letting it happen. Should an owner have a defense if he or she only learned of the offense committed by

could be expected to prevent the [offense]." *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1441 (D. Haw. 1990).

¹³⁷ See *United States v. 710 Main St.*, 744 F. Supp. 510, 522-23 (S.D.N.Y. 1990) and cases cited therein.

¹³⁸ *141st St. Corp.*, 911 F.2d at 878 (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *United States v. Berrios*, 869 F.2d 25, 28-29 (2d Cir. 1989)).

¹³⁹ See *supra* note 136.

¹⁴⁰ The mental element of criminal conduct has long been considered the bedrock justification for criminal punishment. *Mens rea* plays a less significant role in civil law. For a discussion of the comparative importance of mental culpability in criminal and civil law, see Mann, *supra* note 78, at 1805-06.

¹⁴¹ MODEL PENAL CODE § 2.02(1) (Proposed Official Draft 1962). The penal codes of at least 37 states underwent fundamental change to incorporate the *mens rea* concepts of the Model Penal Code. See PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* app. A, at A-3 (2d ed. 1986).

¹⁴² LAFAVE & SCOTT, *supra* note 30, at 194.

another on the owner's property after the fact, perhaps when police searched the premises?

The relevant provision provides, in part: "[N]o property shall be forfeited . . . by reason of any act . . . committed . . . without the knowledge . . . of that owner."¹⁴³ The courts have not, however, interpreted this provision to require knowledge of *the act upon which the forfeiture is predicated*. Rather, the courts have deemed owners to have had "knowledge" if they "knew" of *prior* offenses on the property.¹⁴⁴ Courts consider general knowledge on the part of a property owner of any past illegality that occurred on his or her property as effectively tainting the owner's mind from that point on, stripping the owner of his or her innocence. If owners cannot show a lack of general knowledge of past wrongdoing, they can attempt to show that although they had such knowledge, they did not consent to the offense in question.

¹⁴³ 21 U.S.C. § 881(a)(7) (1994).

¹⁴⁴ Moreover, notwithstanding judicial statements to the contrary, the government need not even prove "actual" knowledge. Courts may speak of requiring "actual" knowledge as opposed to "constructive" knowledge. *United States v. \$4,255,000*, 762 F.2d 895, 905-06 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *United States v. 8848 S. Commercial St.*, 757 F. Supp. 871, 882 (N.D. Ill. 1990). However, they then proceed to define actual knowledge in such a way that it is really only "willful blindness."

Willful blindness usually refers to "a mechanism for inference [of knowledge], not . . . a substitute for knowledge." *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1175 (8th Cir. 1992) (alterations in original) (quoting *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991)). The Model Penal Code, in addressing the willful blindness concept, states: "Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962).

To facilitate this slight of hand, courts typically invoke one of two metaphors. First, courts may speak of a person "deliberately clos[ing] his eyes to the existence of facts that would otherwise be obvious." *United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1175 (8th Cir. 1992). Second, they may assert that an owner could only be ignorant, in the face of substantial evidence of illegal activity, by "sticking his head in the sand." *8848 S. Commercial St.*, 757 F. Supp. at 883 (citations omitted). In *\$4,255,000*, the Eleventh Circuit stated that when "it is *reasonable to believe* that an owner of property is *aware* that the property is the proceeds of narcotics transactions. . . , that owner is not an innocent owner." 762 F.2d at 906 (emphasis added) (citation omitted); *see also 8848 S. Commercial St.*, 757 F. Supp. at 882-83. In other words, the evidence should support an "inference" of actual knowledge. *Id.*

Willful blindness, in addition to knowledge and consent, is explicitly mentioned in the forfeiture law for conveyances, but not in that for real property or drug proceeds. *See supra* notes 118-21 and accompanying text. Congress drafted the conveyances provision after it drafted those for real property and drug proceeds. The willful blindness language was added almost as an afterthought. *See One 1989 Jeep Wagoneer*, 976 F.2d at 1175. This omission is ultimately inconsequential because courts might invoke the willful blindness device to infer knowledge in any case.

d. *Interpreting "Lack of Consent": "All Reasonable Steps" To Prevent the Offense*

Although owners are deemed to have knowledge of unlawful activity if they merely knew about prior offenses unrelated to the specific illegality upon which a given forfeiture action is predicated, they will not be deemed to have consented to such activity unless they consented to the specific offense on which the forfeiture action is predicated. In most cases, the government will not have positive proof that an owner actually consented to the commission of the predicate illegal activity. In many cases, the property owner does not have actual knowledge that a specific offense will occur, but might have reason to believe (*i.e.*, "should have known") that the offense might occur based on knowledge of past instances of illegality. The "lack of consent" defense would thus always work for owners if they could simply demonstrate that they had not given their permission on that occasion. The government would very rarely have hard evidence that the owner granted such permission.

Rather than create this grand loophole for owners, most of the circuit courts that have considered the issue have interpreted the provision in a manner that is more consistent with Congress's intent: a property owner faced with a potential forfeiture must prove a lack of "implied" or "constructive" consent, *i.e.*, that he or she took "all reasonable steps" to prevent the illegal activity.¹⁴⁵ This definition incor-

¹⁴⁵ The Sixth Circuit rejects this approach and apparently requires property owners to produce evidence of their lack of knowledge or consent, giving those terms their ordinary meanings. *United States v. Lots 12, 13, 14, & 15*, 869 F.2d 942, 946-47 (6th Cir. 1989) (finding the "reasonable steps" requirement inapplicable due to (1) the absence of a constitutional question and (2) statutory language requiring only a lack of "knowledge or consent"). *See also United States v. 44133 Duchess Dr.*, 863 F. Supp. 492, 498-99 (E.D. Mich. 1994) (stating that the Sixth Circuit does not require a claimant to prove that he or she did everything necessary to prevent the illegal use of his or her property).

The Eighth Circuit rejected the applicability of the *Calero-Toledo* standard in construing willful blindness to infer knowledge in a conveyance forfeiture action. *One 1989 Jeep Wagoneer*, 976 F.2d at 1174. The court stated that "[the] statutory language, not the *Calero-Toledo* constitutional doctrine, is at issue in this case." *Id.* at 1175. The Eighth Circuit has not yet addressed the question in the context of construing consent.

Both the Second and Third Circuits have embraced the *Calero-Toledo* standard as appropriately applied to the statutory defense. *See United States v. 141st St. Corp.*, 911 F.2d 870, 879 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 623 (3d Cir. 1989). The Third Circuit, however, remanded for the district court to consider the applicability of the *Calero-Toledo* reasonable-steps standard. *Id.* at 625. In *United States v. 15603 85th Ave. N.*, 933 F.2d 976 (11th Cir. 1991), the Eleventh Circuit applied the *Calero-Toledo* standard to forfeitures of drug proceeds. The Eleventh Circuit applies the same standard to real property forfeitures as well, because both the drug proceeds and real property forfeiture provisions contain "identically worded innocent ownership exception[s]." *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1505 (11th Cir. 1992). The Ninth Circuit also implicitly adopted *Calero-Toledo* in rejecting an "innocent owner" defense where the claimant's testimony showed negligence, stating that "[f]ailure to exercise due care precludes reliance upon the innocent owner defense." *United States*

porates the narrow *Calero-Toledo* standard for a constitutionally-based innocent owner claim.¹⁴⁶

One might expect the law to penalize property owners who do not take reasonable measures to protect their property from illegal use, yet it is not obvious from the language of § 881 that Congress intended merely to codify the constitutional defense, thus adding nothing to the protection already accorded innocent owners. The dictionary definition of the word "consent," for example, suggests that an owner must have performed some positive act of approval.¹⁴⁷ Nonetheless, the courts find "consent" even where an owner expressed disapproval, but did not otherwise do enough to prevent the offense from occurring. Courts will find an owner who has knowledge of illegal conduct and who does nothing about it to have "consented" to that conduct as a matter of law. Indeed, even if an owner takes steps to eradicate the illegal activity, courts may still find consent if the owner does not take "all reasonable steps" to prevent a subsequent criminal offense.

III

CIVIL ASSET FORFEITURE CROSSES THE THRESHOLD

The civil asset forfeiture laws turn our *laissez faire* system of justice on its head. Ordinarily, citizens rely on the police to investigate crimes, conduct searches and make arrests, and the law imposes no duties on private individuals to perform the work of police officers.¹⁴⁸ The forfeiture laws, however, single out property owners and require them, under threat of punishment, to police their property for illegal use. The law subjects property owners' actions to heightened scrutiny and holds them responsible for the illegal acts of others if they fail to report the offenses or fail to take other steps to prevent illegal activity on the premises.

v. \$215,300, 882 F.2d 417, 420 (9th Cir. 1989), *cert. denied sub nom.*, *Arboleola v. United States*, 497 U.S. 1005 (1990). The court cited its decision in *United States v. One 1972 Chevrolet Blazer*, 563 F.2d 1386, 1389 (9th Cir. 1977), for this proposition; that case, however, addressed the constitutional, not the statutory, standard.

¹⁴⁶ The Second Circuit's decisions indicate an apparent shift from a somewhat lenient standard to the more exacting *Calero-Toledo* standard. In *United States v. 418 57th Street*, 922 F.2d 129 (2d Cir. 1990), the Second Circuit announced a more lenient rule: "[F]orfeiture is inappropriate where an owner can prove *reasonable efforts* were made, *under the circumstances*, to prevent illegal use of the property." *Id.* at 130 (emphasis added). The court did not require the property owner to make "all" reasonable efforts and permitted consideration of the peculiar circumstances of each case, rather than imposing a purely objective "reasonableness" test. In a later decision, *141st St. Corp.*, the Second Circuit explicitly applied the *Calero-Toledo* standard and required that an owner take "all reasonable steps" to prevent the wrongful use of his or her property. 911 F.2d at 879. *See also* *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 40 (2d Cir. 1994).

¹⁴⁷ *See supra* note 134 and accompanying text.

¹⁴⁸ *See supra* notes 31-48 and accompanying text.

In the family context, the forfeiture laws have the effect of transferring decisionmaking authority regarding family life from individual family members to the judiciary and the law enforcement establishment. Unlike other explicit attempts to regulate family life,¹⁴⁹ the asset forfeiture laws do not focus on family members per se; the effect on the family is incidental. Nevertheless, many federal courts have not trod lightly in this area; they have, to the contrary, brought the full force of federal confiscation power to bear on family members who have not fulfilled the perceived duties of citizenship imposed on them by the courts via the "reasonable steps" test.

The following sections address the duties courts have implicitly imposed on property-owning family members in articulating the "reasonable steps" expected of them in the civil drug asset forfeiture context. These sections focus on the two most common family scenarios: uninvolved wives with drug-dealing husbands and uninvolved parents with drug-dealing children. These scenarios raise troubling issues because they thrust courts squarely inside those complicated relationships and call on federal judges to rule on the propriety of a wife's behavior toward her husband or a parent's behavior toward a child.

A. "A Woman's Work is Never Done": The Duties of the Uninvolved Wife of a Drug Dealer

Without exception, drug forfeiture cases implicating spousal property involve a drug-dealing husband and a wife who has little or no knowledge of, or who may play only a minor role in, the illegal activity.¹⁵⁰ Of course, if a wife actively participates in the drug activity, a court will not view her as an innocent owner because she herself could be prosecuted for a drug offense.¹⁵¹ The interesting cases in-

¹⁴⁹ See *supra* notes 49-69 and accompanying text.

¹⁵⁰ See *United States v. 6109 Grubb Rd.*, 708 F. Supp. 698, 703 (W.D. Pa.), *vacated on other ground*, 886 F.2d 618 (3d Cir.), *reh'g denied*, 890 F.2d 659 (3d Cir. 1989); *United States v. Sixty Acres (Sixty Acres I)*, 727 F. Supp. 1414, 1415 (N.D. Ala. 1990), *rev'd*, 930 F.2d 857 (11th Cir. 1991); *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1437 (D. Haw. 1990); see also *United States v. 5.382 Acres*, 871 F. Supp. 880 (W.D. Va. 1994), *aff'd*, *United States v. Fisher*, 61 F.3d 901 (4th Cir. 1995); *United States v. 44133 Duchess Dr.*, 863 F. Supp. 492, 499 (E.D. Mich. 1994); *United States v. 281 Syosset Woodbury Rd.*, 862 F. Supp. 847 (E.D.N.Y. 1994), *aff'd*, 71 F.3d 1067 (2d Cir. 1995); *United States v. 1419 Mount Alto Rd.*, 830 F. Supp. 1476 (N.D. Ga. 1993); *United States v. 110 Collier Dr.*, 793 F. Supp. 1048 (N.D. Ala. 1992); *United States v. 9818 S.W. 94 Terrace*, 788 F. Supp. 561 (S.D. Fla. 1992), *aff'd*, 983 F.2d 1083 (11th Cir. 1993); *United States v. 5854 N. Kenmore*, 762 F. Supp. 204 (N.D. Ill. 1991); *United States v. 343 E. 12th Ave.*, 755 F. Supp. 823 (C.D. Ill. 1991); *United States v. 11885 S.W. 46 St.*, 715 F. Supp. 355 (S.D. Fla. 1990); *United States v. 19026 Oakmont S. Dr.*, 715 F. Supp. 233 (N.D. Ind. 1989); *United States v. 3201 Caughey Rd.*, 715 F. Supp. 131 (W.D. Pa. 1989), *aff'd* 945 F.2d 387 (3d Cir. 1991), *cert. denied*, 505 U.S. 1076 (1992); *United States v. 15621 S.W. 209th Ave.*, 699 F. Supp. 1531 (S.D. Fla. 1988), *aff'd*, 894 F.2d 511 (11th Cir. 1990).

¹⁵¹ See, e.g., *3201 Caughey Rd.*, 715 F. Supp. at 133 (wife used drugs and was present during illegal transactions).

volve wives who may have some knowledge of the illegal conduct but who do little or nothing to prevent it. The case law makes clear that courts will deem these wives to have consented to the illegal acts and will permit forfeiture of the wives' interests in their homes.¹⁵² For most other offenses, an innocent spouse's failure to take action to stop her husband's illegal acts would not result in her punishment.¹⁵³ In civil asset forfeiture cases, on the other hand, in conducting the "reasonable steps" analysis, courts have entered the realm of domestic married life and have begun to fashion a common law regarding the proper role of the wife/citizen.

In virtually every published case involving spouses, the wife either had no knowledge of, or took no steps to prevent, the illegal conduct. Thus, the courts have not had occasion to determine the reasonableness of a wife's conduct toward her husband, nor have they suggested steps that a wife could reasonably take. In spousal cases, unlike in parent-child cases, courts cannot recommend eviction of the spouse engaging in the illegal conduct because the property is jointly owned.¹⁵⁴ One district court, however, did suggest "[a]s pure speculation, [that] perhaps [the wife] was required to seek a divorce in order to divorce herself from this possible result."¹⁵⁵ In *United States v. 6109 Grubb Road*, the government took the position that Jane DiLoretto, the wife of a drug dealer and mother of five minor children, should have sought partition of the family home which she and her husband owned by tenancy in the entireties.¹⁵⁶ The Third Circuit disagreed, finding that such a suggestion "not only lacks legal substance but, in any event, defies marital reality."¹⁵⁷

The suggestions of partition and divorce are, practically speaking, one and the same. Partition usually requires a spouse to obtain a divorce, after which the spouse would be entitled to half of the couple's jointly-owned property. Some states also allow one spouse to partition

¹⁵² See, e.g., *9818 S.W. 94 Terrace*, 788 F. Supp. at 565 (property forfeited because wife knew of husband's drug dealings in home and took no action to stop it); *United States v. 717 Woodard St.*, 804 F. Supp. 716, 724 (E.D. Pa. 1992) (same); *Sixty Acres I*, 727 F. Supp. at 1420-21 (same); *19026 Oakmont So. Dr.*, 715 F. Supp. at 237 (same); *3201 Caughey Rd.*, 715 F. Supp. at 134-35 (same); cf. *United States v. 138 Colton St.*, 789 F. Supp. 74, 77-78 (D. Conn. 1991) (same, but forfeiture predicated on illegal gambling offense).

¹⁵³ Most forfeiture cases involve drug offenses, but other civil asset forfeiture laws apply to violations of other criminal laws. These forfeiture statutes involve the same "reasonable steps" analysis and thus impose the same duties on family members. See, e.g., *138 Colton St.*, 789 F. Supp. at 75 (forfeiture of family home because of husband's illegal gambling); see also *supra* notes 16-69 and accompanying text (addressing the American legal tradition that fails to impose legal duties on citizens to assist in police investigations).

¹⁵⁴ See *supra* notes 5-8 and *infra* notes 203-22 and accompanying text (discussing eviction in parent-child cases).

¹⁵⁵ *Sixty Acres I*, 727 F. Supp. at 1421.

¹⁵⁶ *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 627 (3d Cir. 1989).

¹⁵⁷ *Id.*

marital real property on account of misconduct by the other spouse. The spouse would, however, probably have to state a basis for the need to partition, requiring the spouse to reveal her husband's drug dealing to a court and thereby subjecting him to the risk of criminal prosecution.¹⁵⁸

Alternatively, a spouse could, as suggested in the parent-child context in *19 & 25 Castle Street*,¹⁵⁹ go directly to the police with information regarding her husband's criminal activities, which should suffice to avoid forfeiture of her interest in the property. Taking this step, however, would alert the police to bring a forfeiture action against her husband's interest in the home, again leaving the wife with only half of their jointly-owned property. Reporting her husband would also likely result in termination of their marriage. To suggest that the law expects wives to divorce their husbands to avoid legal punishment flies in the face of the policies underlying the spousal testimony privileges¹⁶⁰ and the general legal tradition that protects the integrity of the family and the home.¹⁶¹

In cases in which wives have knowledge of their husbands' wrongdoing, the question arises: What conduct should reasonably be expected of a wife who lives in fear of physical abuse by her husband? It should not be surprising that some wives of drug dealers have claimed that their husbands abused them.¹⁶² In one case, a woman testified that she had warned her husband that she would destroy his drugs the following day if he did not do so himself.¹⁶³ She would have taken this action, she stated, even if it would have resulted in her "get[ting] lick-

¹⁵⁸ In a few community property states, a spouse may seek separation of the community property if that spouse's interest in the property is threatened by the misconduct of the other spouse. See, e.g., LA. CIV. CODE ANN. art. 2374 (West 1985 & Supp. 1995); WIS. STAT. ANN. § 766.70(4)(a) (West 1993).

¹⁵⁹ See *supra* notes 5-8 and *infra* notes 191-217 and accompanying text.

¹⁶⁰ See *supra* notes 49-55 and accompanying text. Indeed, under a forfeiture regime that places the burden on the property owner to prove her innocence by disclaiming any knowledge of her husband's wrongdoing, a wife who goes forward with an innocent owner defense will be deemed to have waived her spousal communications privilege. Having placed her knowledge of her husband's wrongdoing in issue, the government will then have the opportunity to question her on any and all illegal activities her husband may have discussed with her, even if they occurred outside of the home. Thus, in drug cases involving family home forfeitures, wives have the unenviable choice of either not defending against the forfeiture, or taking the stand against their husbands concerning offenses that may have occurred outside of the home. See *United States v. 281 Syosset Woodbury Rd.*, 862 F. Supp. 847, 855 (E.D.N.Y. 1994) (raising an innocent owner defense "put [the claimant's] confidential communications with her husband at issue"), *aff'd*, 71 F.3d 1067 (2d Cir. 1995).

¹⁶¹ See *supra* notes 17-49 and accompanying text.

¹⁶² See, e.g., *United States v. Sixty Acres*, 930 F.2d 857, 860 (11th Cir. 1991); *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1437 (D. Haw. 1991).

¹⁶³ *Property Titled in the Names of Ponce*, 751 F. Supp. at 1437.

ings."¹⁶⁴ The court ignored this aspect of her claim, focusing instead on the question of whether, by giving her husband a day to destroy the drugs, she had unreasonably delayed taking action, thereby effectively consenting to his drug dealing.¹⁶⁵

In *United States v. Sixty Acres*, the government confiscated an Alabama farm and residence because of the husband's substantial marijuana dealings on the property.¹⁶⁶ The district court found the wife's testimony and other evidence of her fear of her husband to be credible.¹⁶⁷ Nonetheless, the court found that she consented to the illegal activity on her property because she had not taken all reasonable steps to prevent the offenses. The court wrote:

At some point the obligations of citizenship in a drug-ridden society must overcome spousal loyalty and even spousal intimidation. . . . Mrs. Ellis did not offer proof of the kind or character of duress or of control or of dominance which would have precluded her from exercising the degree of responsibility of citizenship which required her to take at least *some* overt action to deter her husband's course of action.¹⁶⁸

Thus, the court concluded that "'consent' can be implied [*sic*] to a wife, even a wife dominated by an overbearing and abusive husband, if that wife takes *no affirmative action whatsoever* to stop her husband's criminal activity . . . except perhaps to object verbally in a bland and ineffective way."¹⁶⁹

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1441-42. Because the court considered the wife's claim on a motion for summary judgment by the government, the court needed only to decide whether her claim raised a genuine issue of material fact. The court did not enter a final ruling regarding the adequacy of her conduct in establishing non-consent. *Id.* at 1442.

¹⁶⁶ *United States v. Sixty Acres (Sixty Acres 1)*, 727 F. Supp. 1414, 1416 (N.D. Ala. 1990), *rev'd*, 930 F.2d 857 (11th Cir. 1991).

¹⁶⁷ The court wrote:

When [the F.B.I. agent] interviewed Mrs. Ellis [after her husband's arrest], Mrs. Ellis denied any knowledge of her husband's current drug dealings but went on to say that she had lived in fear of bodily harm from him. On this point, this court believes that what Mrs. Ellis told Agent Rasner is true. In other words, if Mrs. Ellis had undertaken to squeal on her husband or to kick him out of the house as a means of avoiding . . . [forfeiture], she probably would have placed herself in personal jeopardy. The degree of her endangerment is unknown, and probably unknowable. She took no affirmative action to stop her criminally inclined husband from conducting his drug enterprise unless it was, perhaps, to nag him until he told her in no uncertain terms to mind her own business. In a sense, she watched and waited with a feeling of helplessness. . . .

Id. at 1416. The court also heard testimony regarding an interview with Mrs. Ellis's teenage daughter who said that she was scared of Mr. Ellis and "did not know what he would do to her mother, if she talked to [the police]." *Id.* (quoting narcotics officer's testimony).

¹⁶⁸ *Id.* at 1420.

¹⁶⁹ *Id.* at 1421.

However, the same district court later granted Mrs. Ellis a new trial to allow her to present additional evidence of her fear of her husband.¹⁷⁰ The court heard testimony that Mr. Ellis had served a prison term for beating his first wife to death and that Mrs. Ellis learned this shortly after marrying him.¹⁷¹ Furthermore, Mr. Ellis had previously choked Mrs. Ellis and threatened to kill her if she tried to leave him. A witness testified that Mr. Ellis would have killed his wife if she had reported him to the police. Mr. Ellis drank heavily and owned several guns, including a semi-automatic rifle. In general, he frightened his wife and other relatives and forced them to do his bidding. One government witness even described him as a "madman."¹⁷² The district court found the testimony to be credible, even accepting a characterization of Mrs. Ellis as her husband's "slave," and dismissed the government's forfeiture complaint with prejudice.¹⁷³

The Eleventh Circuit reversed, finding that Mrs. Ellis's "battered wife" claim did not satisfy the elements of a duress defense. The court stated:

Mrs. Ellis' *generalized* fear of persecution from her husband . . . does not allow her to escape the consequences, (in this case, forfeiture), for her consent to his illegal acts. We may not substitute, as the district court appeared to do, a vaguely-defined theory of "battered wife syndrome" for the showing of duress courts have always required to excuse otherwise criminal conduct.¹⁷⁴

Mrs. Ellis was not, however, charged with criminal conduct; she merely sought to avoid civil forfeiture. Nonetheless, her "generalized" fear did not excuse her from taking steps against her husband. The court imported the duress defense from criminal law, which requires proof of a "well-founded fear of impending death or serious bodily harm,"¹⁷⁵ into the civil forfeiture context. Unless her husband had threatened "*immediate* harm which the coerced party cannot reasonably escape,"¹⁷⁶ Mrs. Ellis could not prove duress.

In other cases, courts have found that wives did not have knowledge of their husbands' criminal activities, even in situations in which strong circumstantial evidence suggested that they did know.¹⁷⁷ Such

¹⁷⁰ United States v. Sixty Acres (Sixty Acres II), 736 F. Supp. 1579 (N.D. Ala. 1990).

¹⁷¹ *Id.* at 1582.

¹⁷² *Id.* at 1583.

¹⁷³ *Id.*

¹⁷⁴ United States v. Sixty Acres, 930 F.2d 857, 860 (11th Cir. 1991).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 861.

¹⁷⁷ See, e.g., United States v. 116 Emerson St., 942 F.2d 74, 80 (1st Cir. 1991) (district court found that wife had no knowledge of drugs found in microwave oven even though wife did all the cooking and cleaning for the household); United States v. 44133 Duchess Dr., 863 F. Supp. 492, 499 (E.D. Mich. 1994) (wife had knowledge of husband's drug dealing, but did not know it occurred in the home); United States v. 11885 S.W. 46 St., 751 F.

liberal applications of the "innocent owner" defense may indicate reluctance on the part of some judges to dispossess uninvolved wives and innocent children of their family homes, even if the wives are arguably not "innocent" under the law.

Even if a court finds a wife to be an innocent owner, such a ruling does not necessarily mean that she and her children (if she has any) may go on with their lives as usual. The "innocent owner" defense entitles a woman to retain ownership of only her share of the property that she and her husband jointly own. Assuming that her husband is found to be guilty, the court must then determine the wife's interest in the property under state marital property laws.¹⁷⁸ In a number of states, the marital property laws treat spousal ownership of real property as a tenancy by the entireties, granting each spouse an indivisible interest in the entire property, regardless of the circumstances.¹⁷⁹ Thus, if a woman establishes her "innocence," she would be entitled to keep the property in its entirety, and the government could not confiscate any part of it.¹⁸⁰ In other states, the entireties property becomes subject to partition upon forfeiture of one spouse's interest.¹⁸¹ The federal forfeiture laws thus apply differently depending on the state in which the property is located.

In those states requiring partition of entireties properties, a wife will receive one-half of the proceeds of the sale of her home. Obviously, this leaves her in a much worse position than before the forfeiture. She will have to find another place to live and will only have a fraction of her previous home's worth with which to acquire the new housing.¹⁸² Harming an innocent wife in this manner may be unconstitutional.¹⁸³ Affirming a lower court's ruling that Florida law requires that a wife retain the entire property after partition, the Eleventh Circuit stated in dictum that the conversion of a tenancy by the entireties to a tenancy in common (so that partition upon forfeiture of the husband's interest could occur) would violate the Takings Clause of the Fifth Amendment.¹⁸⁴

Supp. 355, 357 (S.D. Fla. 1990) (wife did not know about husband's drug dealing, which ultimately yielded him a 10-year prison sentence).

¹⁷⁸ See, e.g., *116 Emerson St.*, 942 F.2d at 79 n.3 (applying Rhode Island law); *United States v. 15621 S.W. 209th Ave.*, 894 F.2d 1513, 1514 (11th Cir. 1990) (applying Florida law); *44133 Duchess Dr.*, 863 F. Supp. at 500 (applying Michigan law); *United States v. 1419 Mount Alto Rd.*, 830 F. Supp. 1476, 1480 (N.D. Ga. 1993) (applying Georgia law).

¹⁷⁹ See *15621 S.W. 209th Ave.*, 894 F.2d at 1519 n.9 (listing 15 states).

¹⁸⁰ *Id.* at 1519.

¹⁸¹ See, e.g., *116 Emerson St.*, 942 F.2d at 77 (wife entitled to 50% share in property; other 50% forfeited to government).

¹⁸² If the government sells the home at public auction, it will probably not even fetch its fair market value because auctioned properties often sell at below market prices.

¹⁸³ *15621 S.W. 209th Ave.*, 894 F.2d at 1516.

¹⁸⁴ *Id.*

The couples involved in forfeiture cases often have young children. In *United States v. 6109 Grubb Road*, for example, five minor children claimed innocent ownership status.¹⁸⁵ They argued that as children of the owners and residents of the home, they had a possessory and future interest in the property at issue.¹⁸⁶ The district court, however, disagreed, finding that the children did not have any present ownership interest but only "a mere expectancy of inheritance" and, therefore, that the children lacked standing to assert a claim to the property.¹⁸⁷ This ruling is clearly correct under the law as written, but the effect is to punish innocent children for the "sins" of their parents. The district court acknowledged this effect, observing:

While we are not unmindful of the grave consequences arising from the forfeiture of a 'family home' where minor children are involved, we are constrained by the clear language of the statute. If some further exemption is to be carved out of § 881 for the benefit of minor children, it must be done by Congress.¹⁸⁸

B. Punishing the Parents for the Sins of the Children

In reading the parent-child forfeiture cases, one discovers common characteristics in the families' circumstances. Most cases involve an older, single mother who works full-time and owns a modest home. These mothers often live with their adult or minor children who frequently have young children of their own. The number of family members ranges from as few as five or six to as many as eighteen.¹⁸⁹ The older children may have keys to the home or a separate room or

¹⁸⁵ 708 F. Supp. 698, 704 (W.D. Pa.), *vacated in part on other grounds*, 886 F.2d 618 (3d Cir.), *reh'g denied*, 890 F.2d 659 (3d Cir. 1989).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* See also *United States v. 3201 Caughey Rd.*, 715 F. Supp. 131, 132 (W.D. Pa. 1989) (court had previously rejected claim brought by sons), *aff'd*, 945 F.2d 397 (3d Cir. 1991), *cert. denied*, 505 U.S. 1076 (1992).

¹⁸⁸ *6109 Grubb Rd.*, 708 F. Supp. at 704.

¹⁸⁹ See, e.g., *United States v. 3855 S. April St.*, 797 F. Supp. 933 (M.D. Ala. 1992) (single 69-year old mother with 6th grade education lived with two of her 10 children and two grandchildren); *United States v. 4.14 Acres*, 801 F. Supp. 737 (S.D. Ga. 1992) (single mother with fifth-grade education worked 9:00 a.m. to 4:00 p.m. and 11:00 p.m. to 4:00 a.m. six days a week and lived with three adult children and two grandchildren); *United States v. One Tract of Real Prop.*, 803 F. Supp. 1080 (E.D.N.C. 1992) (single mother lived with four adult children, ages 19-25, and three grandchildren); *United States v. 417 E. Grand Ave.*, 777 F. Supp. 1455 (W.D. Ark. 1991) (66-year-old widowed grandmother worked from 4:30 a.m. to 2:00 p.m. and lived with six grandchildren and four paid boarders); *United States v. 908 T St., N.W.*, 770 F. Supp. 697 (D.D.C. 1991) (single father of nine adult children and at least one adult grandchild, most of whom lived in his three-story house); *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991) (single, working mother with 17 children and grandchildren lived in three-bedroom apartment); *United States v. Rt. 1 Box 137 Randolph*, 743 F. Supp. 802 (M.D. Ala. 1990) (nephew lived with uncle and aunt in their mobile home).

apartment that they may share with siblings.¹⁹⁰ In each case, at least one of the children becomes involved in drug use and drug sales, usually as a small-time, street-level dealer.

Generally, as with spousal cases, the close quarters and the fact that the police may have made previous arrests of the children or conducted searches of the premises indicates that the parents have "knowledge" of past drug sales on the property.¹⁹¹ In *United States v. 19 & 25 Castle Street*, for example, the court found that the parents had "knowledge" of their children's criminal activity even though the evidence suggested that they believed that the drug activity had ceased. Although the couple had full knowledge of their children's past drug-related activities, the evidence showed that their four adult male children had attempted to conceal the fact that the drug use and sales continued:

[I]t appears that the children, despite the intervention of their parents, continued to use narcotics, hid the narcotics from Mr. and Mrs. Gonzalez and repeatedly lied to them regarding their narcotics-related activity.

....

[One son] kept his operations hidden from his parents by conducting sales from the residence only in their absence and moving sales down the street when they returned home from work.¹⁹²

The court nonetheless found that the parents had knowledge of the narcotics distribution on their property because they knew of past drug activity.¹⁹³ In other cases, however, the parents have avoided forfeiture by convincing a court that their children kept their drug activity hidden from them.¹⁹⁴

Parents who themselves become involved in the drug business¹⁹⁵ or who knowingly accept the proceeds of drug offenses,¹⁹⁶ are, of

¹⁹⁰ See, e.g., *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 37 (2d Cir. 1994) (a child lived in separate apartment on the premises); *908 T St., N.W.*, 770 F. Supp. at 701 (children had keys and their own rooms).

¹⁹¹ *19 & 25 Castle St.*, 31 F.3d at 39; *United States v. 4.14 Acres*, 801 F. Supp. 737, 741 (S.D. Ga. 1992); *United States v. 3855 S. April St.*, 797 F. Supp. 933, 936 (M.D. Ala. 1992).

¹⁹² *19 & 25 Castle St.*, 31 F.3d at 37-38.

¹⁹³ *Id.* at 39. But see *908 T St., N.W.*, 770 F. Supp. at 703 (father had knowledge of past offenses, but may not have known of further violations and, in any case, took all reasonable steps to prevent them).

¹⁹⁴ *United States v. 12110 S.W. 92nd St.*, 821 F. Supp. 666, 670 (S.D. Fla. 1993); *United States v. 750 E. Shore Dr.*, 800 F. Supp. 547, 550 (E.D. Mich. 1992); *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015, 1033 (E.D.N.Y. 1991).

¹⁹⁵ See, e.g., *United States v. 101 Kimberly Ave.*, 765 F. Supp. 39 (D. Conn. 1991) (mother involved in son's drug operation); *United States v. Route 2, Box 61-C*, 727 F. Supp. 1295 (W.D. Ark. 1990) (same).

¹⁹⁶ *United States v. 2511 E. Fairmount Ave.*, 737 F. Supp. 878 (D. Md. 1990) (parent knowingly accepted drug proceeds to purchase house); *United States v. 2511 E. Fairmount Ave.*, 722 F. Supp. 1273 (D. Md. 1989) (same).

course, not even remotely "innocent." But in most cases, the parents are hardworking individuals with no criminal history who do not approve of their children's unlawful behavior.¹⁹⁷ Such cases turn on the "consent" element of the "innocent owner" defense: did the parents take steps to stop their children's drug activities, and did these steps amount to "all that reasonably could be expected to prevent the illegal activity"?¹⁹⁸

Federal courts vary in their application of this test and in their criteria for determining what steps are "reasonably" to be expected of parents. In *United States v. 19 & 25 Castle Street*, for example, the parents had taken a number of measures to set their children straight:

[T]hey sought to help the children end their narcotics dependence. For example, they sent Benjamin, Renaldo and Doraida at different times to live in Florida to get away from the local narcotics environment. However, they all eventually returned to New Haven. Mrs. Gonzalez also sought to enroll Jose in a drug rehabilitation program, but was informed that, since Jose was an adult, he had to enter the program voluntarily.¹⁹⁹

They had also taken steps to end the drug activity in their neighborhood:

They [had] asked the drug dealers to move away and reported the narcotics activity [on Castle Street] to the police. The dealers retaliated against them by throwing a rock through a window and vandalizing their fruit trees. The attacks discouraged Mr. and Mrs. Gonzalez from seeking to prevent further narcotics activity.²⁰⁰

Despite these efforts, the Second Circuit affirmed the district court's ruling that the parents had not proven their innocence because they had not taken all reasonable steps to prevent the criminal activity.²⁰¹

The court indicated that to protect against forfeiture, Mr. and Mrs. Gonzalez should have conducted searches of the premises.²⁰² Presumably this means that the parents should have inspected the personal belongings of their adult children, presumably without giving them notice and notwithstanding their possible objections. No other court has suggested that parents take such measures. However, this seemed reasonable to the court in *19 & 25 Castle Street* inasmuch as the parents had allowed their children to live in the home they owned and had knowledge that the police had previously confiscated drugs there.

197 See *supra* note 189 (listing relevant cases).

198 *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 39 (2d Cir. 1994).

199 *Id.* at 37.

200 *Id.* at 38.

201 *Id.* at 40.

202 *Id.*

The only step certain to establish parents' innocence is the removal of the children from the home, either by reporting them to the police or by evicting them. The only single father to appear in these cases evicted his problem children and took steps to prevent them from re-entering the home.²⁰³ William Akers had a house full of children and grandchildren, and he knew that some of his children had conducted drug deals at and had brought weapons into the home.²⁰⁴ Mr. Akers's daughter testified that:

[H]er father put Kathy and Jeffrey out of the house and that her father took certain measures so that they would not "sneak back in." For example, he nailed up windows, put locks on the doors, "things like that." She further explained that [since the penultimate police raid of the home] there was no reason to believe that her father's home was being used for the facilitation of narcotics activities: Her addicted siblings "had been put out" of the house "to fend for themselves"; no one living permanently at 908 T Street, N.W. during that time used drugs; and Gregory, when he was released from prison in 1987 or early 1988, was living at a halfway house where he was monitored, was permitted to visit with his family every weekend, consistently tested negative for drugs, and attended a narcotics rehabilitation program.²⁰⁵

Without saying whether eviction was required, the court found the father's conduct sufficient to establish his innocence, based upon his demonstrated lack of consent to his children's criminal activities.²⁰⁶

In a similar case, Mrs. Gantt, a sixty-nine-year old widow with a sixth-grade education, had a serious problem with nonresidents dealing drugs in front of her home.²⁰⁷ The police had received many calls about the area and had made numerous arrests in front of the home.²⁰⁸ The suspects sometimes evaded arrest by running into Mrs. Gantt's home through the front door, which her young grandchildren often left unlocked.²⁰⁹

Mrs. Gantt took numerous steps to stop the drug activity on her property. She evicted her own drug-dealing children, and she and a son frequently reported the drug activity in front of the house to the police. Mrs. Gantt also attempted to call the investigating officer, Lieutenant Armstead, at the number he had left, but was unable to

²⁰³ United States v. 908 T St., N.W., 770 F. Supp. 697, 703 (D.D.C. 1991).

²⁰⁴ *Id.* at 699-701.

²⁰⁵ *Id.* at 701. The court found the testimony of his daughter, who "was working at the University of the District of Columbia and, in the evenings at a law office as an accountant," to be "exceedingly impressive and credible: She was poised, articulate, intelligent, and consistent." *Id.* at 701-04.

²⁰⁶ *Id.*

²⁰⁷ United States v. 3855 S. April St., 797 F. Supp. 933, 933-35 (M.D. Ala. 1992).

²⁰⁸ *Id.* at 935.

²⁰⁹ *Id.*

reach him. Her daughter posted a "No Trespassing" sign in the front yard. In addition, Mrs. Gantt attempted to keep her front door locked to prevent drug dealers from running into her house to evade the police.²¹⁰

Unsatisfied with her efforts, the government argued that she should have agreed to "swear out warrants for the arrest of any of the suspects; . . . to contact Armstead at the telephone number that he gave her; and . . . [should have kept] the deadbolt on the front door drawn at all times."²¹¹ Although the court agreed that Mrs. Gantt could have provided more assistance to the police, the court distinguished the requirement that an owner take all reasonable steps to prevent criminal activity from the requirement that they take all possible steps to do so: "[T]o require property owners to take all possible steps 'would result in the dangerous precedent of making property owners in drug-infested neighborhoods into substitute police forces.'"²¹² In assessing whether the steps Mrs. Gantt took sufficed, the court "view[ed] the facts in light of the particular claimant's individual situation and personal limitations."²¹³ Few other courts have explicitly interpreted the reasonable steps test to take into account an individual claimant's "situation and personal limitations."²¹⁴ The court concluded that Mrs. Gantt took all reasonable steps to prevent the drug activity on her property.²¹⁵

The four federal courts that have considered whether the reasonable steps analysis should require parents to either report their children to the police or evict them have split on the question. In *19 & 25 Castle Street*, the Second Circuit found it reasonable to impose this choice of duties on parents. Although the court understood the parents' reluctance to take further action against neighborhood drug dealers for fear of retaliation, the court nonetheless held that "it would not have been unreasonable for them to ask the police to take some action in regard to the narcotics activity at their dwelling."²¹⁶ The court also suggested that they should have issued an ultimatum to

²¹⁰ *Id.* at 938.

²¹¹ *Id.*

²¹² *Id.* at 938 n.9 (quoting *United States v. 710 Main St.*, 753 F. Supp. 121, 125 (S.D.N.Y. 1990)).

²¹³ *Id.* at 938.

²¹⁴ See, e.g., *United States v. 12110 S.W. 92nd St.*, 821 F. Supp. 666, 669-70 (S.D. Fla. 1993) (applying reasonableness analysis, taking into account the claimant's age, the fact that she worked long hours five days a week and that she had "expressed antipathy to drugs," and her demonstrated "dedication to maintaining and preserving the family").

²¹⁵ *3855 S. April St.*, 797 F. Supp. at 939 (citing *United States v. 908 T St.*, N.W., 770 F. Supp. 697 (D.D.C. 1991), as representative of the steps a homeowner should take to avoid forfeiture).

²¹⁶ *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 40 (2d Cir. 1994).

their children: "Comply with the law or move out."²¹⁷ (Of course, if the parents honestly believed that the drug activity had ended, there would have been no need for them to issue this ultimatum.) In the end, the parents lost their home for failing to take all the steps the court believed were reasonably expected.

The District Court for the Southern District of Georgia similarly approved the forfeiture of the home of a hard-working, single mother with a fifth-grade education because she had failed to report or evict her drug-dealing and drug-addicted daughters:

In the case at bar, Easter Mae Jenkins "fussed" at her daughter Jennifer for using drugs and told her daughters that she did not want any drugs in the house. Despite her belief that her pleas would be sufficient, she should have called the police department or the Drug Enforcement Agency for help with her children. . . . She did not throw her daughters out of the house because she was concerned about providing shelter for their young children. Although Ms. Jenkins' maternal love and concern for her grandchildren are certainly commendable, her actions do not constitute reasonable efforts to prevent the use of her property in drug transactions.²¹⁸

The court felt constrained to follow precedent and it, like the court in *3855 South April Street*, also cited *United States v. 908 T Street, N.W.* as a model of what courts expect of homeowners.²¹⁹ The court ordered forfeiture "with great regret," describing the punishment as "unduly harsh"²²⁰ and explaining:

Although loss of the family dwelling will somewhat punish Sharon, the perpetrator of the Title 21 offenses, Easter Mae Jenkins will bear the full effect of the forfeiture. She loses the home that she prudently purchased with proceeds from her husband's wrongful death settlement because she continued to provide for her daughters through hard work even when their treatment of her was reprehensible and their respect for her minimal. Unfortunately, the law requires this result.²²¹

Two other district courts have taken the contrary position, finding it unreasonable to require parents to evict their children. In *United States v. 1105 W. 92nd Street*, for example, the court observed that "it would not have been reasonable for an elderly woman to evict

²¹⁷ *Id.*

²¹⁸ *United States v. 4.14 Acres*, 801 F. Supp. 737, 742-43 (S.D. Ga. 1992) (citation omitted).

²¹⁹ *Id.* at 743.

²²⁰ *Id.*

²²¹ *Id.*

her son and his entire family from her home, especially in light of her apparent dedication to maintaining and preserving the family."²²²

IV

THOUGHTS AND SUGGESTIONS FOR A MORE HUMANE APPROACH TO CIVIL ASSET FORFEITURE IN FAMILY SETTINGS

The practice of visiting the sins of one family member on another sacrifices the interests of the uninvolved person for the societal good of deterring wrongdoing. It threatens the special bond of love and loyalty that exists between family members. The failure to make an exception for family situations in the application of civil forfeiture laws ignores those important emotional and psychological bonds. It also ignores the moral, cultural, and religious beliefs that may require family members to give shelter and protection to each other in the face of government pressure to betray them.

In a family setting, the forfeiture rules can have a detrimental impact on family relationships and on the long-term development of individuals within the family. The spousal property cases demonstrate a callous indifference to gender-related issues of power and authority. The Eleventh Circuit's decision in *Sixty Acres*²²³ epitomizes the cruelty of the forfeiture regime, dispossessing an uninvolved wife because she had failed to report her husband to the police, even though she reasonably believed that had she done so, her husband would have retaliated against her, inflicting serious bodily harm or even killing her. In the words of the Third Circuit, the forfeiture cases "defy marital reality" by expecting wives, who may be responsible for young children and financially dependent on their husbands for support,²²⁴ to either report their spouses to the police or file for divorce.

The parent-child cases likewise disregard the reality of family life by encouraging the parents of teenage or young adult children via the "reasonable steps" test to (1) search their children's possessions; (2) report their children's illegal activity to the police; or (3) evict their children from the home. Parents may oppose random searches be-

²²² *United States v. 12110 S.W. 92nd St.*, 821 F. Supp. 660, 670 (S.D. Fla. 1993); *see also United States v. 417 E. Grand Ave.*, 777 F. Supp. 1455, 1457 (W.D. Ark. 1991) ("The claimant cannot reasonably be expected to turn her own grandson out into the street.")

²²³ *United States v. Sixty Acres*, 930 F.2d 857 (11th Cir. 1991); *see supra* text accompanying notes 166-76.

²²⁴ This is not to suggest that these women live off the proceeds of drug selling; the cases indicate that these families instead rely on legitimate income for their primary support. This author reviewed only two cases in which the property owners knowingly used drug proceeds to pay for their property. *See United States v. 2511 E. Fairmount Ave.*, 722 F. Supp. 1273, 1281 (D. Md. 1989); *United States v. 19026 Oakmont S. Dr.*, 715 F. Supp. 233, 237 (N.D. Ind. 1989).

cause they may reasonably believe in the need to respect their older children's privacy. They may, in other words, view establishing and maintaining trust between themselves and their children as the key to effective parenting.

Parents may also oppose the second and third options, preferring, when they discover illegal activity in the home, to take measures that fall short of reporting their children to the authorities or evicting them. Parents may believe that through stern, caring discussions, intrafamily discipline, and demonstrated faith in the ability of their children to improve, the family stands a better chance at rehabilitating the errant children.

Some parents may, in fact, choose to call the police only as a last resort when and if their children's behavior reaches the point at which it threatens the health and peace of the entire family. In certain situations, parents may, depending on their assessment of their children in relation to the family unit, determine police intervention to be necessary. They may even believe that spending a short time in jail would have a certain "shock" value to their children, helping to steer them in the right direction. Parents make such choices with the best long-term interests of their children and the entire family in mind.

It is a question of conflicting goals: The asset forfeiture law seeks to enforce the anti-drug laws and calls on property owners to make valiant efforts toward that end. Parents, on the other hand, seek to achieve the long-term goal of guiding family members away from drugs and encouraging productive, law-abiding behavior. Most parents will attempt to spare their children the potentially devastating impact of criminal conviction and incarceration. Parents may also reasonably believe that policing their children in the manner required by the courts will destroy the parent-child relationship.

The third option—requiring parents to throw their children out of the house—poses another set of problems. First, for working class parents, the suggestion that they evict their children may mean literally putting their children out on the street. If they fear loss of the home to forfeiture, they cannot in good conscience send their children to live with other relatives or friends because doing so would simply transfer the risk of forfeiture to them.

Second, many of the children in forfeiture cases have drug addiction problems.²²⁵ Although institutionalization in a residential treatment facility would be an ideal solution for the family at risk of forfeiture, this form of treatment may be prohibitively expensive for

²²⁵ See *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 37 (2d Cir. 1994); *4.14 Acres*, 801 F. Supp. at 742; *United States v. 908 T St.*, N.W., 770 F. Supp. 697, 703 (D.D.C. 1991).

working class families, who may not have medical insurance coverage for this service or the funds to pay for it outright. In addition, they may not have access to public rehabilitation programs because of unavailability or because they may not meet the indigency requirements for such programs.

The eviction option thus presents a cruel irony of the forfeiture rules as applied to families. Hard working, working-class people who do well enough to buy a home for their family, but who are not wealthy, cannot afford to send their children away for residential treatment like a wealthy person can and even a poor person might. Working-class parents thus occupy the most vulnerable position when faced with forfeiture of the family home. If a wealthy person's home is forfeited, he or she will simply buy another. If a poor person who rents an apartment or house is evicted, he or she can usually rent another.²²⁶ Those in between these two extremes—usually single mothers who may have struggled for years to stay above the poverty line—lose everything they have invested in their homes and cannot likely afford comparable housing.

What, then can lawmakers do to eliminate the unfairness of civil asset forfeiture laws? Congress will not likely abolish the facilitation provision for real property forfeitures any time soon,²²⁷ but a number of less drastic amendments would protect innocent family members from the loss of their homes. Congress could, for example, enact an exception for the primary residences of family members who are not themselves guilty of any drug offense. At a minimum, lawmakers could give standing to innocent minor children whose homes become subject to forfeiture.

To protect innocent spouses, Congress should amend the forfeiture laws to prohibit the partition of marital real property so that uninvolved spouses are not penalized for the wrongdoing of their husbands or wives. Such a rule would not protect the ill-gotten gains of drug dealers since the cases suggest that the homes confiscated under the civil asset forfeiture laws are not purchased with drug proceeds. Nor would guilty spouses avoid punishment; they would be subject to criminal prosecution for their offenses.

Even absent legislative change, however, the courts could re-examine precedent on what steps are "reasonable," when one or more

²²⁶ Alternative housing for low-income people may not, of course, always exist. See, e.g., *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015, 1018 (E.D.N.Y. 1991) (acute shortage of low-priced housing may bring about homelessness for person evicted from apartment); *Richmond Tenants Org. Inc. v. Kemp*, 753 F. Supp. 607, 608-09 (E.D. Va. 1990) (addressing eviction of public housing tenants whose apartments were used for drug offenses).

²²⁷ See *supra* notes 82-83 and accompanying text (discussing forfeitures of real properties that facilitate drug offenses).

family members become involved in the drug trade. The case law demonstrates a lack of awareness of important gender and class issues created by the forfeiture rules. Courts should emulate those cases that have contextualized the "reasonableness" analysis, considering factors such as educational background, work schedule, and total number of dependents, which may affect a parent's ability to supervise the use of his or her property. Furthermore, courts should recognize the value of preserving the family, and of showing maternal concern for young children, as legitimate factors in evaluating the reasonableness of a parent's response to drug offenses on his or her property. In spousal property cases, the courts should similarly recognize the reality of married life and the importance of maintaining marital bonds. No woman should be required by law to either report her husband to the police, or divorce him, because he has violated drug laws. In cases of violent oppression by an abusive husband, the courts should not expect a woman to take any measures that would endanger her or her family. No woman should have to sacrifice her safety or that of her children to further the government's war on drugs.

CONCLUSION

To the extent that forfeitures of drug-related assets remove drug proceeds from drug offenders, they may further the goal of crippling large-scale drug operations. But the forfeiture of homes used to "facilitate" drug offenses does not further this goal. The Supreme Court observed that such forfeitures of real property serve primarily to punish, not to divest a person of ill-gotten gains.²²⁸ Forfeitures of family homes used as the site of a drug transaction therefore punish uninvolved property owners as well as other uninvolved residents of the home. In most cases, the innocent victims of family home forfeitures are working-class, single mothers raising two generations of children, or the wives and young children of men involved in the drug trade. None of the cases have involved rich drug "kingpins."

We have lived with the present law long enough to see its unfortunate results. Drug law enforcement has been pursued at the expense of another essential goal: the preservation of the family. In weighing the costs and benefits of the current system, it seems clear that the time has come to put the family first. As the Supreme Court once wrote:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a

²²⁸ Austin v. United States, 113 S. Ct. 2801, 2810-12 (1993).

substantial measure of sanctuary from unjustified interference by the State. . . .

The personal affiliations . . . entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage; the raising and education of children; and cohabitation with one's relatives.²²⁹

²²⁹ *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (citations omitted).