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CIVIL FORFEITURE VS. CIVIL LIBERTIES

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I. INTRODUCTION

The current law of civil forfeiture violates many of the fundamental tenets upon which this society was founded: the right to be innocent until proven guilty,[1] the right not to be punished until guilt is proven beyond a reasonable doubt,[2] the right to be free from unreasonable searches and seizures,[3] the right not to be deprived of property without due process of law,[4] the right to equal protection of the laws,[5] and the right to be free from unwarranted or disproportionate punishment.[6]

Civil forfeiture allows police full discretion to confiscate any and all cash and property based upon mere police or informant suspicion of wrongdoing. Owners of such money and property are afforded no legal protection, unjust procedural barriers often bar recovery, evidence of racial targeting abounds, and even the uncharged and completely innocent are presumed guilty in court. The upshot is that the police agency keeps the money and the property it seizes, giving a share to both its informants and to the U.S. Department of Justice.

While hailed by law enforcement officials as a dream way to seize the assets of drug traffickers, civil forfeiture has become a virtual nightmare for thousands of ordinary people who have minor brushes with the law or who are completely innocent of wrongdoing. Civil forfeiture has been hailed as a "tactical nuclear weapon" in the war on drugs.[7] Yet, with the

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1. *See In re* Winship, 397 U.S. 358, 363 (1970) ("The [reasonable-doubt] standard provides concrete substance for the presumption of innocence—the bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law.'") (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

2. *See id.* at 361.

3. U.S. CONST. amend. IV.

4. U.S. CONST. amend. V.

5. U.S. CONST. amends. V, XIV, § 1.

6. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

7. Michael deCourcy Hinds, *States Seek Tougher Drug Forfeit Laws*, N.Y. TIMES, July 16, 1990, at A11 (quoting Richard M. Wintory, Director of the National Drug Prosecution Center).

increased use of forfeiture, swarms of horror stories about its misuse, replete with catastrophic results have also increased.[8] Cash, cars, homes, and businesses have been seized based upon mere probable cause that such property has any type of nexus to the drug trade. Probable cause, however, is not objectively defined—an informant's tip, a drug dog's bark, a black man carrying a large amount of cash, or a Hispanic woman cruising along I-95—are all routinely used as reasonable suspicion to seize property.

This article highlights some of the civil liberties abuses foisted on the public under the name of civil forfeiture. It describes forfeiture's pedigree, its constitutional and policy infirmities, its less than honorable police practices, and the efforts to reform this morally and legally scandalous system.

A. *Historical Roots*

The history of civil forfeiture hearkens back to medieval England, where kings seized the property of nobles who had committed treason.[9] In America, civil forfeiture dates back to provisions enacted against foreign threats from the sea; forfeiture actions were taken against ships used by pirates[10] and against ships engaged in trade with the enemy.[11]

Because most of the owners of pirate ships were not American citizens, the courts allowed the government to seize the vessels, rather than attempt to track down the foreign owners for prosecution.[12] The offenses for which these ships were held were criminal rather than civil.[13] But because the owners were difficult to prosecute, the courts allowed the government to claim a civil, rather than a criminal, remedy.[14] This point is essential because it allowed the government to punish an owner for a crime without any of the constitutional protections provided a criminal defendant.[15] The courts allowed this under the legal pretense that it was seeking a remedy for an injury done to the

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8. *See infra* notes 38-69 and accompanying text.

9. *See* Tamara Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 928-35 (1991).

10. *See, e.g.*, United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844).

11. *See, e.g.*, The Friendschaft, 17 U.S. (4 Wheat.) 105 (1819); The Langdon Cheves, 17 U.S. (4 Wheat.) 103 (1819); The Caledonian, 17 U.S. (4 Wheat.) 98 (1819).

12. *See* Piety, *supra* note 9, at 940-41.

13. *See id.* at 935-42.

14. *See id.*

15. *See supra* notes 1-6 and accompanying text.

government by these ships.[16] The government claimed that because these ships were engaged in crimes which threatened the ability of the government to collect taxes and tariffs or which threatened the security of the nation during wartime, the government was entitled to financial compensation by the forfeiture of the ships.[17]

By claiming that the action was one for compensation of lost revenue rather than for criminal punishment, the government did not have to convict anyone of actually committing an act of piracy.[18] Instead, a legal fiction was invented, whereby the ship would be named as a defendant. This legal fiction endowed the ship with a culpable personality capable of being indicted for the commission of a crime. But while human defendants enjoy a presumption of innocence and the state must prove their guilt beyond a reasonable doubt,[19] inanimate defendants in forfeiture actions are presumed guilty based upon probable cause that they have been used in the commission of a crime.[20] Thus, by this legal sleight of hand, the government was able to seize ships based upon a minimal amount of evidence and without proving that the owner knew of, or had anything to do with the criminal action.[21]

B. *Current Practice*

Unfortunately, eighteenth-century maritime laws are being applied to twentieth-century drug laws and the repercussions are horrendous. The case of James Hoyle's seventy-two-year-old mother is illustrative:

> My name is James Hoyle. My mother's home was seized by the FBI in conjunction with the District of Columbia Metropolitan Police. On July 29, 1992, at 2:00 a.m. there was a knock at my mother's door. My nephew Mark Hoyle, who was visiting overnight, answered the door. 15-20 FBI agents . . . armed with what appeared to be automatic weapons entered. Immediately they placed Mark under arrest, along with one of his friends. They were the targets of the search, due to their alleged selling of narcotics. The FBI ran through the house and woke up other

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16. *See* Piety, *supra* note 9, at 939.

17. *See id.*

18. *See id.* (citing The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (holding that a conviction under the piracy law was not a necessary prerequisite to the forfeiture of a vessel used to commit the act of piracy)).

19. *See In re* Winship, 397 U.S. 358 (1970).

20. *See, e.g.*, 21 U.S.C. § 881(b)(4) (1988 & Supp. V 1993).

21. *See* Piety, *supra* note 9, at 935-42.

> family members. They went into my mother's room while she was sleeping. She is 72 years old. They stuck a gun in her face and made her get on her knees and handcuffed her with her hands behind her back. . . . She had no idea what was going on. . . .
>
> The FBI searched the house and found nothing. Then they took all the TVs, VCRs, tapes, and papers we had: all the family photos, all the bills, all the personal papers. Then they took one automobile and the registration to it. They took one of the children's computer sets. They took a 40-inch TV in-wall unit out of the wall. It took 12 cops to get it out of the house, and they tore down the back gate taking it through. They brought several trucks and cars to haul away the belongings. . . . One of the cops was overheard saying: "How do you like your new house?"
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> I came on the scene because my niece told me that a strange person was answering the phone. . . . The head agent explained that the house was being seized. . . . There is no reason why this house should have been seized. My nephew Mark Hoyle is charged with drug dealing, and whatever he may have done, or been accused of doing, my 72 year-old mother had nothing to do with it. . . . In the seizure warrant, some informant claims to have made a drug deal with Mark Hoyle on the front porch some time in 1990. If that is so, my mother certainly did not know of it or condone it. My mother is a pillar of the community.[22]

Civil forfeiture has been especially attractive to law enforcement agencies because success demands very little in the way of proof or connection to actual wrongdoing. Authorities must simply satisfy a requirement of probable cause that the property was used in an illicit activity or was purchased with funds from illicit activity in order to subject the property to forfeiture.[23] No criminal arrest or conviction is

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22. Statement of James Hoyle, submitted to the House Committee on Government Operations, Legislation and National Security Subcommittee, Re: The Federal Asset Forfeiture Program, September 30, 1992 (on file with the *New York Law School Law Review*).

23. *See, e.g.*, 21 U.S.C. § 881(b)(4) (1988 & Supp. V 1993) (stating that, in drug-related forfeitures, authorities may seize without process when "the Attorney General has probable cause to believe the property" facilitated, or is proceeds from, illicit drug activity); *see also* United States v. 1973 Rolls Royce, 43 F.3d 794, 799 (3d Cir. 1994) ("Section 881 has become attractive to prosecutors because it permits them to seize property involved in drug trafficking merely upon a showing of probable cause that the property was used to help facilitate a drug transaction.").

necessary to subject property to forfeiture.[24] Once property has been seized, a rebuttable presumption exists in favor of the seizing agency.[25] An owner can overcome this presumption only by proving that he or she had no knowledge of the illicit activity or did not consent to that activity. This burden of proof is most often impossible to satisfy. Because civil forfeiture requires such a low level of proof, it is frequently used by authorities to penalize people when the state cannot sustain a criminal conviction. Ofttimes, the amounts of the forfeitures well exceed the criminal fines that would be assessed if a criminal proceeding were initiated.

Despite the seeming unfairness of civil forfeiture, the Supreme Court has declared the practice constitutional.[26] In 1971, two Puerto Rican citizens leased a pleasure yacht from Pearson Yacht Leasing Co.[27] The following year, Puerto Rican authorities discovered marijuana on board the yacht.[28] Pursuant to Puerto Rico's civil forfeiture statute, the authorities seized the yacht and notified the two Puerto Rican lessees that unless they filed suit contesting the seizure, the yacht would be forfeited to the government.[29] The lessees did not respond and automatically forfeited the yacht to the authorities.[30] When Pearson attempted to track down the lessees for nonpayment of rent, it discovered that the yacht had

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24. *See, e.g.*, United States v. $228,536, 895 F.2d 908 (2d Cir. 1990) (holding that a court is not required to warn a defendant that his or her property may be subject to civil forfeiture as a result of a plea in a criminal case).

> The reason that an acquittal does not bar a forfeiture action is twofold. First, forfeiture is a civil, remedial measure brought against offending property rather than a criminal penalty against the person acquitted. . . .
>
> Second, even if the government is unable to prove a criminal charge against a defendant "beyond a reasonable doubt," there may be sufficient evidence to support civil forfeiture.

Id. at 916 (citations omitted).

25. *See, e.g.*, *1973 Rolls Royce*, 43 F.3d at 804. The court stated:

> As with all the forfeiture provisions of § 881, § 881(a)(4) places upon the government the initial burden to show probable cause for forfeiture. Probable cause exists if facts show reasonable grounds to believe that the property was used to facilitate a drug transaction. Once the government shows probable cause, the burden shifts to the claimant to show that he or she has a defense to the forfeiture.

Id. (citation omitted).

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

27. *Id.* at 665.

28. *Id.*

29. *Id.* at 667-68.

30. *Id.* at 668.

been forfeited.[31] Pearson immediately challenged the forfeiture, claiming that it had been denied notice of the seizure and an opportunity to be heard.[32] Pearson also claimed that it had absolutely no knowledge of the lessees' activities.[33]

The Court rejected Pearson's due process argument, finding that (1) the seizure served a significant governmental purpose of preventing drug trafficking, (2) pre-seizure notice and hearing might frustrate the interests of the statute in preventing such activity because they would give claimants a chance to move the property out of the jurisdiction of the courts, and (3) seizures in forfeiture cases are not initiated by self-interested parties, but instead are initiated and settled by law enforcement officials.[34] The Court further reasoned that because forfeiture has existed in American law since the writing of the Constitution, and because such a law encourages property owners to diligently monitor the use of their property, forfeiture was not unconstitutional.[35]

Some ten years after the Puerto Rican officials seized the yacht which gave rise to the *Calero-Toledo* decision, the General Accounting Office released a report criticizing the reluctance of the Department of Justice to aggressively use civil forfeiture.[36] According to the report, civil forfeiture was an under-used, but potentially devastating weapon, perfectly suited for the war on drugs.[37]

II. ABUSES

A. *Legalized Extortion*

There exists an unbelievable number of cases in which civil forfeiture is abused or overzealously pursued. For example, in some states and localities, after the police seize property, prosecutors allow them to "negotiate settlements" with the property owners for the return of their

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31. *Id.*

32. *Id.*

33. *See id.*

34. *Id.* at 679.

35. *Id.* at 680-88.

36. COMPTROLLER GENERAL OF THE U.S., U.S. GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING (1981) (stating that "the Federal Government's record in taking the profit out of crime is not good" and that "[t]he government has simply not exercised the kind of leadership and management necessary to make asset forfeiture a widely used law enforcement technique").

37. *Id.*

property.[38] This practice has resulted in widespread misuse that some have compared to "legalized extortion."[39]

The St. Louis Post-Dispatch conducted a series of investigative reports into such police practices in St. Louis County, Missouri. St. Louis County police were found to routinely seize property from owners and then demand that the owners pay various amounts to retrieve their belongings.[40] For instance, a postal worker's home was searched in response to a peace disturbance call during a party at the worker's home. The police found a bag of marijuana, which a guest had thrown under a bed, and seized the postal worker's home computer, stereo and record collection. They then demanded that the postal worker pay $600 for the return of his property. No charges were ever filed against him or any of his guests. The postal worker refused to pay and only got his property back months later.[41]

In another example, a seventeen-year-old boy was stopped for drunk driving. The police seized the car, belonging to his mother, when they found an empty marijuana pipe in the car's ashtray. The police demanded that the mother pay $200 for the return of her car and their promise not to prosecute her son.[42]

Elmore Waller's son was stopped for speeding in his father's car. The police found a marijuana cigarette butt in the back seat. They seized the car and called Waller, demanding $1200 plus $84 in towing and storage. The police did not bother to tell Waller that, as an innocent owner who was unaware of his son's drug use, he was entitled to the return of his car without cost. Waller signed a release form issued by the State of Missouri, paid the fee, and got his car back. When a local newspaper called the prosecutor's office regarding the Waller case, it found that the prosecutor's office was not notified about the seizure or the agreement until after the fee was paid.[43]

Herbert Wyrsch was arrested for drunk driving after an accident in 1988. The police found the remnants of a marijuana cigarette in the ashtray of his truck. The police chief, George "Skip" Cobb, demanded that Wyrsch pay $1200 for the return of his badly damaged truck. Wyrsch claimed that the police said they would go easy on him for the

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38. *See generally* Tim Poor & Louis J. Rose, *Police Make Suspects Pay Fees*, ST. LOUIS POST-DISPATCH, Apr. 28, 1991, at 1.

39. *Id.*

40. *See id.*

41. *Id.*

42. *Id.* at 1, 6.

43. Tim Poor & Louis J. Rose, *Calverton Park Acknowledges Problem*, ST. LOUIS POST-DISPATCH, Apr. 29, 1991, at 1A, 4A.

marijuana and the charges of driving while intoxicated if he paid their fee. Wyrsch refused to pay and eventually lost his truck.[44]

In describing the extortionist-type tactics of police "negotiating settlements," Police Chief Benjamin Branch of neighboring Frontenac County stated, "you can just wheel and deal."[45] Indeed, Police Chief Cobb aggressively sought seizures to the dismay of most everyone except the municipal officials who watched as the village treasury was filled with forfeited cash. Even Cobb's second in command stated: "[W]e weren't happy about it, [but] there [was] nothing you could do. You couldn't tell the chief, 'No I don't want to do it'—if you want your job."[46]

Few of the people from whom property was seized were even charged with crimes. And fewer of those who were charged were ever convicted. Statistics reveal that ninety percent of those who lost property in St. Louis County were not convicted of any criminal activity.[47] Nor do court records exist for any of the reported settlements, indicating that the police acted without any judicial oversight, selling property back to those who could pay.

Thomas Moses, who bought his car back for $200 after the police found a marijuana cigarette in it while his son was driving, remarked: "[T]hey've got you and they know it" because in most cases the cars are not worth fighting for in court.[48] And while many seizures would not stand up in court, the police know that most people cannot pay the legal fees necessary to get their cars and other property back after seizure.

Even those charged, tried and acquitted often have no recourse. Delmar Puryear was a sixty-three-year-old Army veteran who retired because of a muscular disease which left him disabled. In 1986, the government found 500 wild marijuana plants scattered over his family farm. They accused Puryear of cultivating marijuana for sale. Puryear was acquitted by a jury in a criminal trial when he explained that, because of his disability, he was physically unable to farm the plants or even tour his property. Despite his acquittal, the government sought a forfeiture of his farm. And while Puryear enjoyed a presumption of innocence in his criminal trial, the law required him to prove his innocence in the forfeiture trial. Physically and mentally exhausted by the ordeal, Puryear finally agreed to pay the government not to take his property, rather than face the

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44. Tim Poor & Louis J. Rose, *Aggressive Ex-Chief Cited in Forfeitures*, ST. LOUIS POST-DISPATCH, Apr. 29, 1991, at 1A, 4A.

45. Poor & Rose, *supra* note 43, at 4A.

46. Poor & Rose, *supra* note 44, at 4A.

47. Poor & Rose, *supra* note 43, at 4A.

48. *Id.* at 4A.

prospect of the rigors of another trial where he would have to prove his innocence.[49]

B. *Racial Targeting for Highway Robbery*

In 1993, the National Association for the Advancement of Colored People (NAACP) sued the Volusia County, Florida, Sheriff's Office. Citing illegal search and seizure and equal protection violations, the suit alleged that the Volusia County Sheriff's Office used race as a basis to unlawfully target and stop African-American and Hispanic motorists travelling on Interstate 95 on the pretext of either non-existent or minor traffic violations in order to search the vehicles and confiscate the motorists' cash and other valuable property.[50]

Since the inception of Volusia County's property seizure practices in 1989, police have seized approximately $8 million from motorists.[51] In more than 1000 traffic stops made along I-95, the Sheriff's Office issued citations to less than one percent of the motorists.[52] Of 262 property seizure cases over three months, only sixty-three resulted in criminal charges.[53] Of the 199 seizures in which there was no evidence of criminal wrongdoing, ninety percent were from African-American or Hispanic motorists.[54] An investigative series by *The Orlando Sentinel* chronicles these and other statistics.[55]

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49. Deborah Yetter, *Even Those Acquitted Are Sometimes Penalized*, COURIER-J. (Louisville, Ky.), Oct. 6, 1991, at 1, 16.

50. *See* Washington v. Vogel, 156 F.R.D. 676, 678 (M.D. Fla. 1994) (denying injunctive relief to the individual plaintiffs, denying class certification, and dismissing the NAACP as a party).

51. Steve Berry & Jeff Brazil, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL, June 14, 1992, at A-1.

52. Steve Berry & Jeff Brazil, *Forfeiture Law Under Pressure: Changes Are Needed to End Abuses, Say Outside Experts and Members of a Panel Appointed by Chiles*, ORLANDO SENTINEL, Aug. 24, 1992, at A-1 (referring to the comments of panel member and Duval County Sheriff Jim McMillan, who said that his officers wrote 3000 tickets on I-95 between 1990 and 1992).

53. *See* Berry & Brazil, *supra* note 51, at A-1.

54. Steve Berry & Jeff Brazil, *Blacks, Hispanics Big Losers in Cash Seizures: A Review of Volusia Sheriff's Records Shows That Minorities Are The Targets in 90% of Cash Seizures Without Arrests*, ORLANDO SENTINEL, June 15, 1992 at A-1, A-6. Records show that less than 5% of the no-arrest cases involved white suspects. In the remaining 5% of cases, the officers failed to mention the race of the suspect in their reports. *Id.*

55. For an in-depth analysis of the forfeiture activities of Sheriff Vogel, see Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994).

Florida State Representative, Elvin L. Martinez, in citing the "particularly nasty reputation" of the Volusia County Sheriff's Office, which has victimized motorists based on race, explained that despite no "hint of wrongdoing," once stopped, these motorists are intimidated, harassed, and denied any semblance of procedural safeguards.[56]

> The high cost of contesting seizures, and the time constraints involved (a significant number of these persons reside in other states and do not have the resources to do battle with these uniformed highwaymen), result in citizens being coerced into accepting lopsided settlements which result in financial windfalls to law enforcement agencies at the expense of persons whose only crime is traveling on the nation's highways. Moreover, the procedures for securing the return of seized property are unduly burdensome, and often result in waste to non-monetary assets.[57]

Representative Martinez described several examples:

> In one case, an Hispanic man was headed to Miami with $19,000 in cash to look at antique cars. Deputies decided his money was drug money. He had no criminal past and there was nothing to suggest the commission of a crime. More importantly, he produced bank documents for the loan he had made.[58]

Deputies returned only part of the money confiscated.[59]

In another instance, despite the fact that an African-American male informed the Sheriff's Deputy that he had no weapons, drugs, or contraband, and would not consent to a search of his car, the Sheriff's Department nevertheless searched the car and its contents with the aid of a drug sniffing dog. "No drugs, weapons, or contraband were found. The only thing which resulted from this stop was the severe inconvenience to and unnecessary and unwarranted harassment of the motorist."[60]

In other examples, authorities seized $38,923 from a Miami lawn-care business owner. They returned $28,923 and kept $10,000. They seized

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56. *See Department of Justice Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 12-13 (1992) [hereinafter *House Forfeiture Hearings*] (back-up information for the testimony of Florida State Rep. Elvin L. Martinez).

57. *Id.* at 13.

58. *Id.* at 12.

59. *Id.*

60. *Id.* at 13.

$31,000 from a Virginia car salesman, returning $27,250 and keeping $3750.[61]

Representative Martinez explained that this same scenario is duplicated in other Florida counties whose Sheriff's Departments have been trained by the Volusia County Sheriff's Office in the use of these tactics.[62] A decision by the Circuit Court of Alachua County, Florida, is evidence of the spread of this unlawful conduct.[63] On March 5, 1993, Circuit Judge Chester B. Chance ruled that:

> The traffic stop technique employed by Deputy Troiano is in fact used by him and other deputies at the Alachua County Sheriff's Office in a patently pretextual pattern, designed to further the Petitioner's forfeiture efforts; the Alachua County Sheriff's Office uses the race or ethnicity of motorists as a profile factor in conducting the pattern of stops, searches and seizures exemplified by this case.[64]

The court found that not only were the claimant's constitutional rights to property, privacy, equal protection, due process and freedom from unreasonable search and seizure violated, but it also found "a lack of good faith and an abuse of the Alachua County Sheriff's Office's discretion under the Florida Contraband Forfeiture Act."[65]

The Pittsburgh Press also conducted an extensive investigation of stops involving drug courier profiles and forfeitures. In an examination of 121 stops in which money was seized yet no drugs discovered or arrests made, the *Press* found that seventy-seven percent of the cases involved African-American, Hispanic and Asian motorists.[66]

Highway motorists are not the only persons targeted by law enforcement. The nation's airports, train stations and bus terminals have likewise had their share of racially motivated seizures. Landscaper Willie Jones had $9600 in cash seized in a Nashville airport because he purchased a roundtrip airline ticket with cash, some of which he had

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61. *See* Berry & Brazil, *supra* note 51. The settlement took seven months and the claimant's attorney received approximately 25% of the recovery. *Id.*

62. *See House Forfeiture Hearings*, *supra* note 56, at 13 (back-up information for the testimony of Florida State Rep. Elvin L. Martinez).

63. *See In re* Forfeiture of $44,645, No. 92-2477-CA (Fla. Cir. Ct. Mar. 5, 1993) (amended order granting claimant's motion for tax costs and attorneys fees).

64. *Id.* at 4.

65. *Id.*

66. *See* Andrew Schneider & Mary P. Flaherty, *Drug Agents Far More Likely to Stop Minorities*, PITT. PRESS, Aug. 12, 1991, at A1.

planned to use to buy shrubbery for his nursery. A ticket agent alerted the authorities because this behavior corresponded to a profile of drug courier activity—that is, he was an African-American carrying a large sum of cash.[67]

In Memphis, Tennessee, drug agents testified that about seventy-five percent of the people stopped in the Memphis airport in 1989 were African-American; the latest figures from the Air Transport Association reveal that only four percent of the flying public is African-American.[68]

In yet another case, a dark-skinned Dominican woman was stopped by drug agents who wanted to search her luggage when she got off a bus in Buffalo. Although no drugs were found, DEA agents discovered $4750 in cash in her purse. They seized the money, despite her explanation that it was to pay legal fees or bail for her husband and the fact that she had receipts showing that the money was obtained legally.[69]

C. *Tainted Cash as Reasonable Suspicion*

Police often support a "reasonable suspicion" that property, particularly cash, is involved in drug trafficking with assertions that a trained dog scratched at luggage or barked at a person. On many occasions, people have lost large amounts of money, simply because a drug dog sniffed the cash and reacted to trace quantities of drugs remaining on the bills.[70] Scientists, however, report that an average of ninety-six percent of American money has been contaminated with drugs, and continues to be so, well after the money has left the hands of drug traffickers or users.[71]

For example, Ethyl Hylton had $39,000 in cash seized from her at a Houston airport. After she disembarked, she was told by a DEA agent that she was under arrest because a drug dog had scratched at her luggage. There was no dog present and when she requested to see the dog, the agents refused. No contraband was found among her possessions, although her bags were searched and she was strip-searched. The money, a settlement from an insurance claim, was found in her purse. The police

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67. *Id.* at A6. Many airport employees double as paid informers for the police and the DEA usually pays them 10% of any money seized. *Id.*; *see also 60 Minutes: You're Under Arrest* (CBS television broadcast, Apr. 5, 1992).

68. Schneider & Flaherty, *supra* note 66, at A1.

69. *Id.* at A6.

70. Andrew Schneider & Mary P. Flaherty, *Drugs Contaminate Nearly All the Money in America*, PITT. PRESS, Aug. 12, 1991 at A6.

71. *Id.*

confiscated all but $10, alleging a drug connection. She was never charged with a crime.[72]

A recent federal district court decision discussed the results of a DEA study of U.S. currency for contamination by cocaine:

> [Plaintiff] offered into evidence a copy of an internal DEA memorandum, from Sanford A. Angelos, Forensic Chemist, to Benjamin Perillo, Laboratory Chief of the DEA's North Central Laboratory, reporting the results of chemical trace analyses on batches of United States currency, and similar tests performed on belts used in currency sorting machines in use at Federal Reserve Banks. The report found that "[o]ne-third [contamination] of a randomly selected sample is a significant argument that the general currency in circulation is contaminated with traces of cocaine. The amount of the cocaine detected ranged from 2.4 to 12.3 nanograms per bill." In addition, the belts from the sorting apparatus were contaminated with an estimated 200 nanograms detected. Mr. Angelos concluded: . . . "These results indicate the termination of the project as all aspects show that forensic usefulness of trace analysis is at best limited."[73]

D. *Police Pocketing of Proceeds*

All monies and property seized by state and federal agencies are deposited back into the budgets of the seizing agencies.[74] And, while this was originally seen as some form of "poetic justice," where criminals would be paying for their own apprehension, it has become clear that the incentive for local, state, and federal officials to seize property is greater than a desire for simple justice. The police are making millions of dollars in forfeited assets and, in some cases, losing interest in ever actually pursuing convictions. In Calverton Park, Missouri, only four of thirty-

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72. *See id.*

73. Jones v. United States Drug Enforcement Admin., 819 F. Supp. 698, 707 (M.D. Tenn. 1993) (citation omitted) (holding that the government did not meet its burden of demonstrating probable cause for seizure of $9000 in cash from an airline passenger, where the seizing police officers' suspicions were aroused by a ticket agent who alerted them that the passenger paid for his ticket in cash).

74. *See, e.g.*, 19 U.S.C. § 1613b (1988 & Supp. V 1993) (establishing the Customs Forfeiture Fund); 21 U.S.C. § 1509 (1988 & Supp. V 1993) (establishing the National Drug Control Policy's Special Forfeiture Fund); 28 U.S.C. § 524(c) (Supp. V 1993) (establishing the U.S. Department of Justice Assets Forfeiture Fund); MO. REV. STAT. § 195.140 (1993); 42 PA. CONS. STAT. ANN. § 6801(b) (Supp. 1994).

nine suspects from whom property was seized were charged and convicted.[75]

The forfeiture provisions of the Comprehensive Crime Control Act of 1984 limit the use of money from seizures to "law enforcement purposes."[76] This restriction, however, often includes dubious luxuries for police officers or prosecutors.

In Pennsylvania, $4.5 million was disbursed to local police departments in return for a promise to use that money for "law enforcement purposes."[77] In Philadelphia, "law enforcement purposes" included a new air conditioning system; in Warren County, New Jersey, it included the use of a new yellow Corvette for the chief assistant prosecutor.[78]

Similarly, in Suffolk County, New York, as has been widely reported, "District Attorney James M. Catterson Jr. [drove] a BMW 735i seized from a drug dealer. He spent $3412 from his office's forfeiture fund to repair the car; $300 on a watch for a retiring secretary, and $3999 on chairs."[79]

Little Compton, Rhode Island received $3.8 million from a hashish arrest and purchased $1700 in video cameras and body detection devices for their police force of seven, despite social service programs which could have benefitted from such funds.[80] The Lakewood, Colorado Police Department "lavished their $1.3 million on Christmas parties, amusement park tickets and a $12,000 banquet to honor officers."[81]

Michael F. Zeldin, former director of the Justice Department's asset forfeiture office, has acknowledged that forfeiture has encouraged law enforcement to pursue seizure of property over other legitimate goals: "'We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws.'"[82]

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75. *See* Poor & Rose, *supra* note 43, at 4A.

76. Pub. L. No. 98-473, § 310, 98 Stat. 1837, 2052 (codified at 28 U.S.C. 524(c)(1) (Supp. V 1993)).

77. Andrew Schneider & Mary P. Flaherty, *Government Seizures Victimize Innocent*, PITT. PRESS, Aug. 11, 1991, at A1, A8.

78. *See id.*

79. Richard Miniter, *Ill-Gotten Gains: Police and Prosecutors Have Their Own Reasons to Oppose Forfeiture-Law Reform*, REASON, Aug./Sept. 1993, at 34.

80. *See House Forfeiture Hearings*, *supra* note 56, at 4 (opening statement of John Conyers, Jr., Chairman, Subcommittee on Legislation and National Security, Committee on Government Operations).

81. *Id.* at 7.

82. *See* Miniter, *supra* note 79, at 34.

In *United States v. All Assets of Statewide Auto Parts, Inc.*,[83] Circuit Judge George C. Pratt stated: "We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."[84] He urged federal district courts to stay asset seizures until after the owner is convicted of a crime, arguing that "[t]hrough such courageous and sensitive application of their discretionary powers the district courts can then ensure that 'due process' remains a reality and is not reduced to a mere encomium."[85]

Since the passage of the Comprehensive Crime Control Act, federal forfeitures have increased from $499.6 million in 1987 to just under $1.9 billion in 1993.[86] Forfeiture also has flourished at the state and local levels. In 1986, the Department of Justice shared $22.5 million in cash and property with local officials.[87] In 1993, this figure rose to $215 million.[88] As evidenced from the above figures, there is no question that civil forfeiture has become a lucrative field for law enforcement officials.

The Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*[89] based its decision partially on the notion that law enforcement officials are not self-interested when it comes to forfeiture.[90] But it stands to reason that while the authorities may not enjoy the spoils of the drug war as individual owners, the thrill of driving a seized speed boat or Porsche 911S is just as great while on the job as off duty.

In fact, the incentive to pursue cash and property through forfeiture has hampered efforts to actually apprehend those who abuse the law. The National Association of Attorneys General recently released a report stating that the "financial incentive to law enforcement agencies has created competition among local law enforcement agencies for forfeited resources. This competition weakens statewide drug enforcement efforts. As a result of this competition, many law enforcement agencies refuse to

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83. 971 F.2d 896 (2d Cir. 1992).

84. *Id.* at 905.

85. *Id.*

86. EXECUTIVE OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM: FISCAL YEAR 1993, at 20 (1994).

87. *Id.* at 19.

88. *Id.* This amount does not include the value of cash and property seized by state and local officials without federal help. State and local officials received this $215 million in addition to any amounts they were able to seize on their own. *Id.*

89. 416 U.S. 663 (1974).

90. *Id.* at 679.

share information with other law enforcement agencies, thereby hampering overall law enforcement efforts."[91]

E. *State Laws, Equitable Sharing, Adoptive Forfeitures*

At times, federal forfeiture law serves to subvert states' autonomy. Each of the fifty states has a civil forfeiture provision which allows state and local police to seize and keep property involved in criminal activity.[92] Equitable sharing allows the Department of Justice to share

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91. Mike Moore & Jim Hood, *The Challenge to States Posed by Federal Adoptive Forfeitures*, NATIONAL ASS'N OF ATT'YS GEN., CIVIL REMEDIES IN DRUG ENFORCEMENT REP., June-July 1992, at 2.

92. Many of these provisions are similar to the federal civil forfeiture provisions. However, they vary slightly according to the legal history of each state. States with chronic drug problems often have well developed statutes and case law. Other states have older, less explicit provisions in which the procedures are more vague.

See ALA. CODE § 20-2-93 (1990); ALASKA STAT. § 17.30.110 (1993); ARIZ. REV. STAT. ANN. § 13-3413 (1989); ARK. CODE ANN. § 5-64-505 (Michie 1993); CAL. HEALTH & SAFETY CODE § 11470 (West 1994); COLO. REV. STAT. § 16-13-501 (1986 & Supp. 1994); CONN. GEN. STAT. § 21a-246(d) (West 1985); DEL. CODE ANN. tit. 16, § 4784 (1983 & Supp. 1992); FLA. STAT. ANN. § 893.12 (West 1976 & Supp. 1994); GA. CODE ANN. § 16-13-49 (1992 & Supp. 1994); HAW. REV. STAT. § 329-55 (1985 & Supp. 1992); IDAHO CODE §§ 37-2744-37-2744A (1994); ILL. ANN. STAT. ch. 725, paras. 150/1-150/14 (Smith-Hurd 1992); IND. CODE ANN. § 34-4-30.1-1 (Burns 1986 & Supp. 1994); IOWA CODE ANN. §§ 809.1-809.21 (West 1994); KAN. STAT. ANN. § 65-4135 (1992 & Supp. 1993); KY. REV. STAT. ANN. § 218A.410 (Michie/Bobbs-Merrill 1991 & Supp. 1992); LA. REV. STAT. ANN. § 32:1550 (West 1989 & Supp. 1994); ME. REV. STAT. ANN. tit. 15 § 5821 (West Supp. 1993); MD. ANN. CODE art. 27 § 297 (1987 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 94c § 47 (1984 & Supp. 1994); MICH. STAT. ANN. § 14.15(7521) (Callaghan 1988 & Supp. 1994); MINN. STAT. ANN. § 609.531 (1987 & Supp. 1994); MISS. CODE ANN. § 41-29-153 (1993); MO. REV. STAT. § 195.140 (1993); MONT. CODE ANN. § 44-12-102 (1993); NEB. REV. STAT. § 28-431 (1989); NEV. REV. STAT. §§ 453.301-453.311 (1991); N.H. REV. STAT. ANN. § 318-B:17-b (1984 & Supp. 1993); N.J. STAT. ANN. § 2C:64-1 (1982 & Supp. 1994); N.M. STAT. ANN. § 30-31-34 (Michie 1989); N.Y. PUB. HEALTH LAW §§ 3387-3388 (McKinney 1993); N.Y. CIV. PRAC. L. & R. §§ 1310-1352 (McKinney 1993); N.C. GEN. STAT. § 90-112 (1993); N.D. CENT. CODE § 19-03.1-36 (1991 & Supp. 1993); OHIO REV. CODE ANN. §§ 2925.13, 2933.41-2933.43 (Anderson 1992); OKLA. STAT. ANN. tit. 63 § 2-503 (West 1984 & Supp. 1994); OR. REV. STAT. § 167.247 (1993); 42 PA. CONS. STAT. ANN. § 6801 (Supp. 1994); R.I. GEN. LAWS §§ 21-28-5.04 to 21-28-5.07; S.C. CODE ANN. § 44-53-5520 (Law. Co-op. 1985 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 34-20B-70 (1994); TENN. CODE ANN. § 53-11-451 to 53-11-452 (1991); TEX. CODE CRIM. PROC. ANN. arts. 59.01-59.10 (West Supp. 1994); UTAH CODE ANN. § 58-37-13 (1994); VT. STAT. ANN. tit. 18, § 4241 (Supp. 1993); VA. CODE ANN. § 18.2-249 (Michie 1988 & Supp. 1994); WASH. REV. CODE ANN. § 69.50.505 (West 1985); W. VA. CODE § 60A-7-703 (1992); WIS. STAT. ANN. § 161.55 (West 1989);

forfeited property and funds with local law enforcement agencies which have assisted in federal prosecutions. And while this policy has gained widespread acclaim in law enforcement circles, it has often been detrimental to the integrity of the state laws governing forfeiture.

Frequently, state authorities will call in federal authorities when they wish to circumvent state laws which place restrictions on the use of seized proceeds.[93] In some instances, when the state has directed that forfeited funds be deposited into the general state treasury or to the education budget, local authorities have asked federal officials to "adopt" their cases in exchange for a percentage of the seizure proceeds.[94] The federal government has gone so far as to state that unless state authorities allow local law enforcement agencies to keep the proceeds from adoptive forfeiture, they will withhold entirely any proceeds pursued in conjunction with federal officials.[95] This policy has effectively abolished any state control over funds being poured into local law enforcement budgets.

Several states have approached civil forfeiture differently than the federal government. For example, the California statute sets forth specific threshold amounts of controlled substances which must be involved in the alleged offense in order to subject any property to forfeiture.[96] This protects people from forfeiture in a few circumstances where very small quantities of drugs are involved. California also exempts from forfeiture family homes which are owned by two or more people, one of whom had no knowledge of its unlawful use,[97] and vehicles in which there is a community property interest of a person other than the defendant and the vehicle is the sole vehicle available to the defendant's immediate family.[98]

Whereas under the federal law, real property can be seized when it is used "in any manner" to facilitate drug trade or possession,[99] Arkansas demands instead that real property be used "substantially" to assist in the alleged offense for seizure to be permitted.[100] This provision helps to

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WYO. STAT. § 35-7-1049 (1994).

93. *See* Charles Doyle, *Equitable and Adoptive Forfeitures*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, Nov. 5, 1990, 90-538 A, at 6.

94. DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 7.02, at 7-7 to 7-9 (1994).

95. *See id.*

96. CAL. HEALTH & SAFETY CODE § 11470 (West 1994).

97. *Id.* § 11470(g).

98. *Id.* § 11470(e).

99. 21 U.S.C. § 881(a)(7) (1988).

100. ARK. CODE § 5-64-505(a)(7) (Michie 1993).

protect homeowners from losing the family home because a small drug transaction occurred in the driveway.

In Texas, forfeiture is invoked only in cases involving felonies and a single misdemeanor involving certain types of pollution.[101] This provision is similar to the California provision in that it requires that a higher level of offense be involved than is required by the federal law.

Alabama requires that the state bear the burden of proving that the owner knew of, or consented to, the illicit use of his or her real property.[102] Georgia has a minimum threshold amount of controlled substances similar to the one in California.[103] In addition, a lien can be filed on the property in lieu of seizure.[104] This provision often does not help owners of cars and other vehicles whose property is deemed mobile and, therefore, presents a risk that it may be removed from the jurisdiction if it is not confiscated. It is, however, advantageous to homeowners.

The Florida Supreme Court has ruled that the government may not take an individual's property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property was used in the commission of a crime.[105] This ruling is a significant breakthrough because it raises the level of proof closer to that required for a criminal conviction.

Hawaii is among the many states that adhere to the National Commission of Uniform State Laws (NCUSL) standards for civil forfeiture. Presently, Hawaii lacks a provision for the forfeiture of real property.[106] This exclusion protects homeowners from the forfeiture of their houses and land.

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101. TEX. CODE CRIM. PROC. ANN. art. 59.01(2) (West Supp. 1994).

102. ALA. CODE § 20-2-93(h) (1990) ("An owner's or bona fide lienholder's interest in real property or fixtures shall not be forfeited under this section for any act or omission unless the state proves that that act or omission was committed or omitted with the knowledge or consent of that owner or lienholder.").

103. GA. CODE ANN. § 16-13-49(e) (1992 & Supp. 1994). The statute states:

> A property interest shall not be subject to forfeiture under this Code section for a violation involving one gram of cocaine or less or four ounces of marijuana or less unless said property was used to facilitate a transaction in or a purchase of or sale of a controlled substance or marijuana.

Id.

104. *Id.* § 16-13-49(j).

105. Department of Law Enforcement v. Real Property, 588 So. 2d 957, 968 (Fla. 1991).

106. HAW. REV. STAT. § 329-55 (1985 & Supp. 1992).

III. REMEDIES

A. *The Supreme Court to the Rescue?*

Recently, several Supreme Court cases have addressed various aspects of forfeiture laws. The first case, *United States v. 92 Buena Vista Ave.*,[107] involved the innocent-owner defense to governmental seizure. In 1978, Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970 to authorize seizure and forfeiture of the proceeds of illegal drug transactions.[108] Because this was a vast expansion of governmental power, Congress built an "innocent-owner defense" into it.[109] If the owner could prove lack of knowledge about the related criminal activities, a court must void the governmental seizure.

Despite the enactment by Congress of selective innocent-owner defenses to forfeiture to provide owners of certain types of assets with an exemption, the Department of Justice has argued in federal courts and before the Supreme Court against allowing innocent property owners the opportunity to exempt their property from forfeiture.[110] In supporting its view, the Justice Department has invoked the common law principle called the "relation-back" doctrine.[111] Pursuant to this doctrine, the government's title to the property vests at the time the property was used unlawfully, and the government's title is superior to that of any subsequent purchaser, transferee, or owner of the property.[112] For example, because of the relation-back doctrine, property that is tainted by unlawful acts in 1986 remains forfeitable today, even against someone who purchased it in 1990. The impact of the relation-back doctrine is evident. Using it, the government can invalidate numerous asset transfers, however legitimate, by linking the history of an asset to some unlawful act in the past which occurred while the asset was in the custody of an earlier owner or user.

In opposing the government's position, business and mortgage groups cautioned that legitimate businesses and mortgage lenders might find themselves caught up in a forfeiture proceeding because forfeiture affects the certainty and predictability of the laws governing real estate titles, thus threatening to upset the legitimate expectations of real property owners

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107. 113 S. Ct. 1126 (1993).

108. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301, 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)).

109. *Id.*

110. *See 92 Buena Vista Ave.*, 113 S. Ct. at 1135.

111. *Id.*.

112. *Id.*

and mortgage lenders who have no involvement in the illegal activity giving rise to the forfeiture.[113] Unless innocent real property owners are adequately protected in forfeiture proceedings, forfeiture will have a significant adverse impact on innocent homeowners, mortgage lenders, and real estate investors.

The *92 Buena Vista Avenue* case involved a New Jersey woman, Beth Ann Goodwin, who challenged the forfeiture of a home she had purchased with money that her boyfriend had given her.[114] The Supreme Court, in offering some protection to innocent property owners, ruled that although the relation-back doctrine might be valid in its general outline, it was not self-executing, and that the innocent owner defense entitled Goodwin to offer evidence that she did not know the money came from illegal activity.[115]

The next Supreme Court forfeiture case, *Alexander v. United States*,[116] was a First Amendment challenge to the Government's authority under the federal racketeering statute to require forfeiture of an entire chain of adult bookstores and movie houses after finding several obscene items for sale.[117] Although the Court determined that the First Amendment was not violated by the government's seizure, it held that forfeiture of a business under federal racketeering law was nevertheless subject to the Eighth Amendment's excessive fines prohibition.[118]

The third case, *Austin v. United States*,[119] posed the related question of whether the Constitution imposes a requirement of proportionality between the severity of the offense and the value of the property to be forfeited. In *Austin*, a North Dakota man lost his car repair business and his mobile home after selling two grams of cocaine to an undercover agent.[120] The Supreme Court ruled that civil forfeiture was punitive, and thus regulated by the Excessive Fines Clause of the Eighth Amendment.[121]

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113. *See* Brief for the American Land Title and the Mortgage Bankers Association as Amicus Curiae, United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (No. 91-781); Brief for American Bankers Association as Amicus Curiae, United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (No. 91-781); Brief for the Federal Home Loan Mortgage Corp. as Amicus Curiae, United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (No. 91-781).

114. *92 Buena Vista Ave.*, 113 S. Ct. at 1130.

115. *Id.* at 1137.

116. 113 S. Ct. 2766 (1993).

117. *Id.* at 2769.

118. *Id.* at 2776.

119. 113 S. Ct. 2801 (1993).

120. *Id.* at 2803.

121. *Id.* at 2812.

In *United States v. James Daniel Good Real Property*,[122] the Supreme Court ruled that, absent exigent circumstances, the government cannot seize any real property that it believes may have been used in a drug-related crime without first providing the property owner with notice and a hearing.[123] The Supreme Court held that seizure of real property on the basis of a search warrant, without any pre-seizure hearing, would be appropriate only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[124]

B. *Congress to the Rescue?*

Both Democratic and Republican members of Congress disapprove of civil forfeiture practices, and two legislative proposals were considered in the 103d Congress. Representative Henry Hyde, an Illinois Republican, on June 15, 1993 introduced the Civil Asset Forfeiture Reform Act,[125] and Representative John Conyers, a Michigan Democrat, introduced the Asset Forfeiture Justice Act on October 22, 1993.[126] These bills represent a bipartisan response to the need for reform of civil forfeiture laws. Although Representative Conyers' bill is much more comprehensive in scope, both proposals share some common features.

1. Current Law

Under current law, after the government meets its low burden of proof—probable cause that the property is subject to forfeiture—the burden shifts to the property owner to prove either the "property's innocence," or that the owner did not know and did not consent to the property's illegal use.[127]

These burdens, easy on the government, hard on the property owner, often result in the seizure of property owned by one against whom the

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122. 114 S. Ct. 492 (1993).

123. *Id.* at 505.

124. *Id.* at 501.

125. H.R. 2417, 103d Cong., 1st Sess. (1993). Congressman Hyde recently authored a comprehensive book on civil forfeiture. *See* HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995).

126. H.R. 3347, 103d Cong., 1st Sess. (1993).

127. *See* United States v. Property Currently Recorded in Name of Neff, 960 F.2d 561, 563 (5th Cir. 1992).

government cannot support a criminal charge.[128] Both the Hyde and Conyers bills raise the government's standard of proof to a showing of clear and convincing evidence that the property is subject to forfeiture.[129]

Although federal courts have largely accepted, without scrutiny, the probable cause standard for civil forfeitures, the Florida Supreme Court has unanimously held that under the Florida Constitution, the state must prove its civil forfeiture cases by clear and convincing evidence.[130] If the property owner is truly involved in criminal activity to an extent that would justify forfeiture of the property, the government should be able to prove the criminal culpability beyond a reasonable doubt or, at a minimum, by the clear and convincing standard upheld by Florida and incorporated into the Hyde and Conyers bills.

The current law's onerous burden of proof requirement is exacerbated by certain procedural aspects. An owner of seized property has only twenty days to contest a seizure,[131] notice of which is often given through publication;[132] if he or she misses the deadline, many courts will allow forfeiture. An attorney is not provided for the indigent, and property subject to forfeiture can not be used to pay attorney costs. The owner of seized property must pay ten percent of the value of the property—a cost bond up to $5000—in order to contest the seizure.[133] If the owner is successful and recovers the property, he or she will not get reimbursement for damages caused while the property was in government storage.[134]

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128. *See* Schneider & Flaherty, *supra* note 77, at A1, A4 (noting that 80% of the people who lost property to the federal government were never charged with a crime).

129. H.R. 2417 § 4; H.R. 3347 § 4.

130. *See* Department of Law Enforcement v. Real Property, 588 So. 2d 957, 968 (Fla. 1991).

131. 19 U.S.C. § 1608 (1988).

132. 19 U.S.C. § 1607(a) (1988).

133. 19 U.S.C. § 1608 (1988).

134. *See* Andrew Schneider & Mary P. Flaherty, *Jet Seized, Trashed, Offered Back for $66,000*, PITT. PRESS, Aug. 15, 1991, at A6 (citing as an example the DEA's causing over $50,000 damage to a confiscated, then returned-for-a-fee, airplane used in a legitimate charter business in Las Vegas).

2. The Conyers and Hyde Bills

Both the Conyers and Hyde bills extend the deadline to contest a government forfeiture from twenty to sixty days;[135] provide free counsel to those who cannot otherwise afford one;[136] and eliminate the need for an owner to pay the cost bond.[137] The Conyers bill also establishes a right to a trial by jury,[138] and further exempts from forfeiture property used or pledged to an attorney for fees.[139] Both bills also allow recovery against the government if the property was negligently damaged while in the government's custody,[140] although the Conyers bill allows recovery for non-negligent damage as well.[141]

The Hyde bill allows for the release of seized property pending final disposition of a case, if continued possession by the government would cause the claimant substantial hardship.[142] The Conyers bill requires the return of all property seized if forfeiture proceedings have not been initiated within one year from the date of seizure;[143] requires the payment of interest of any seized coins, currency or negotiable instruments;[144] and allows a claim to be filed under the Tort Claims Act for destruction, injury or loss of property due to harm incurred while the property is in the custody of a law enforcement officer.[145]

Representative Conyers' Asset Forfeiture Justice Act's most notable departure from current law requires a person's conviction before the government may seize the property involved.[146] Because much of the property confiscated pursuant to civil forfeiture is taken from uncharged or innocent people, requiring a criminal conviction would eliminate this deplorable aspect of civil forfeiture.

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135. H.R. 2417 § 5; H.R. 3347 § 6.
136. H.R. 2417 § 5; H.R. 3347 § 6.
137. H.R. 2417 § 5; H.R. 3347 § 6.
138. H.R. 3347 § 7.
139. *Id.* § 8.
140. H.R. 2417 § 2; H.R. 3347 § 19.
141. H.R. 3347 § 19.
142. H.R. 2417 § 6.
143. H.R. 3347 § 19.
144. *Id.*
145. *Id.* § 23.
146. *Id.* § 2.

Representative Hyde's bill clarifies the "innocent owner" defense,[147] which has been interpreted by a number of federal courts to mean that the owner must have had no knowledge of and have not consented to illegal use of his property.[148] The Hyde bill makes it clear that the lack of either knowledge or consent to illegal activity is a valid defense to forfeiture.[149]

Civil forfeiture has not been viewed as punitive by the federal government,[150] and thus very expensive property and entire businesses have been seized based on minuscule illegalities.[151] The Conyers bill mandates the proportional forfeiture of property involved in criminal activity: forfeited property must be equal to or less than the value of the crime.[152] Further, the bill allows forfeiture only of property that primarily facilitated the crime; not allowing, for example, the seizure of a car merely because .226 grams of marijuana was found crushed in the floormats.[153]

Current law allows police total discretion to seize property based upon mere probable cause to believe that the property is subject to forfeiture. As discussed earlier, there have been charges that police, especially during highway and airport stops, use racially biased drug courier profiles to establish probable cause.[154] The Conyers bill requires a preliminary adversarial hearing, except in exigent circumstances, before the government may seize property to be forfeited.[155]

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147. *See* 21 U.S.C. § 881(a)(7) (1988). Property used to commit or to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of that owner." *Id.*

148. *See, e.g.*, United States v. Lot 111-B, 902 F.2d 1443 (9th Cir. 1990) (concluding that if the claimant either knew or consented to the illegal activities, the innocent owner defense is unavailable).

149. H.R. 2417 § 8.

150. Brief for the United States at 32, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073) (arguing that the deposit of forfeiture assessments into a fund to defray expenses is "a strong indicator of the pervasively civil and compensatory thrust of the statutory scheme").

151. *See, e.g.*, United States v. 1976 Porsche 911S, 670 F.2d 810 (9th Cir. 1979) (rejecting the notion that forfeiture was unconscionable where the government confiscated an entire car after finding .226 grams of marijuana crushed in the floormats).

152. H.R. 3347 § 11.

153. *1976 Porsche 911S*, 670 F.2d at 812.

154. *See supra* Part II.B.

155. H.R. 3347 § 5.

The Conyers bill eliminates the relation-back doctrine in civil forfeiture,[156] which gives the government title to property at the time it was first used criminally,[157] superseding the title of even third-party bona fide purchasers.

In the disposition of seized money and property, local police are often allowed to keep a large percentage, with shares going to informants,[158] and to the Department of Justice. The Conyers bill outlaws adoptive seizure, and mandates that all funds gained through forfeitures be turned over to the general state treasury.[159] The bill also mandates that fifty percent of the proceeds gained from forfeitures be used for drug treatment, prevention and education programs.[160] It limits the total amount paid to individual informants to $250,000 a year.[161] Further, the proposed legislation requires the U.S. Attorney General to offer for sale, at a nominal price, low-value forfeited property to tax-exempt organizations.[162]

While the Hyde bill represents a welcome beginning in the reform of civil asset forfeiture laws, the Conyers bill is much more extensive, and better ameliorates the civil liberties abuses currently being practiced under the banner of fighting crime. Much of the Conyers bill has been incorporated into the Crime Prevention and Criminal Justice Act of 1993[163] introduced by Congressman Craig Washington, a Democrat of Texas, and endorsed by the Congressional Black Caucus.

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156. *Id.* § 12.

157. The federal government has argued that the relation-back doctrine gives the United States immediate, unqualified, and irrevocable title to property involved in criminality, even after purchase by an innocent buyer. Brief for the United States at 17, United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1992) (No. 91-781).

158. Drug informants make huge amounts of money giving police often unreliable tips. *See* Andrew Schneider & Mary P. Flaherty, *35 Arrested Despite Bumbling Ways of Informant*, PITT. PRESS, Aug. 14, 1991, at A8; *see also* Andrew Schneider & Mary P. Flaherty, *Crime Pays Big for Informants in Forfeiture Drug Cases*, PITT. PRESS, Aug. 14, 1991, at A1.

One informant made $780,000 in 1990; several earned over $500,000 in 1990 or 1991; and 65 made more than $100,000 in 1991. The DEA paid informants $28.6 million in 1991. *See* Dennis Cauchon, *Informant's Drug War Rewards Top $100,000*, USA TODAY, Aug. 3, 1992, at 1A.

159. H.R. 3347 § 17.

160. *Id.* § 15.

161. *Id.* § 16.

162. *Id.* § 22.

163. H.R. 3315, 103d Cong., 1st Sess. (1993).

IV. CONCLUSION

Civil forfeiture constitutes a dangerous, collateral weapon for law enforcement agencies where criminal convictions are more difficult to achieve. While civil forfeiture is sustained as constitutional because it is characterized as civil rather than criminal, its effects are clearly penal, yet it lacks the safeguards governing criminal proceedings. Until the practice of civil forfeiture is abolished or, at the least, radically reformed, it will continue to be a thorn in the side of civil liberties.