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I. INTRODUCTION

During the 1980s, law enforcement turned with increasing frequency to forfeiture as a means of enhancing existing methods of criminal law enforcement. State and federal legislators have fostered this expansion by broadening existing forfeiture laws in order to increase their usefulness to law enforcement. This expansion of prosecutorial power, however, has come under fire in the press and in the courts. Federal courts in particular have become increasingly skeptical of the expansive use of the forfeiture laws, and they have turned to the Constitution as a means of injecting fairness and balance into a statutory forfeiture scheme that often lacks both. This article addresses the growing constitutional limitations on civil forfeiture.

Forfeiture laws date back to the beginning of the republic and before. In fact, the forfeiture prosecution of John Hancock's ship, the schooner *Liberty*, and the spirited defense of Hancock by the Boston criminal defense lawyer John Adams would provide one of the sparks that led to the American Revolution.[1] Notwithstanding some early hostility to the forfeiture practices of the Crown, forfeiture has been a widely accepted federal enforcement tool since the first Congress. In recent years, however, some states have enacted forfeiture laws so broad, that they represent a significant departure from the last 200 years of forfeiture jurisprudence.

Driven largely by legislators' understandable desire to eradicate drug traffic, legislative expansions of forfeiture law sometimes have ignored the historical purposes and limitations on the scope of forfeiture law. In particular, some states have enacted forfeiture statutes which are nominally labelled "civil" forfeitures but purport to impose broad forfeitures, which have previously only been imposed upon convicted defendants as punitive sanctions for criminal conduct after observance of the heightened

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1. *See generally* John Adams, *Argument and Report, in* 2 LEGAL PAPERS OF JOHN ADAMS 172-210 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). The celebrated trial of John Hancock helped to unify the colonies in opposition to the practices of the British Customs Commissioners and "to produce the single impulse against the courts which increased steadily until its manifestation in the Declaration of Independence." *Id.* at 185.

procedural protections of the criminal process. This article considers what, if any, limitations the federal Constitution may place on the ability of any government, state or federal, to seize a citizen's legitimate assets in such a manner.

As one might expect with any set of laws that have been in existence since 1790, federal courts have periodically addressed the limitations that the Constitution places upon government efforts to subject assets to forfeiture. Moreover, since 1790, the protections that the Constitution generally affords those suspected of criminal activity have also evolved considerably. Accordingly, identifying what current limitations the Constitution might impose upon the use of forfeiture laws requires a historical analysis of both forfeiture law and the evolving balance between the government's interests in law enforcement and citizens' rights.

This article first briefly discusses the historical and doctrinal origins of forfeiture law in the United States.[2] Then it discusses the constitutional balance that the Supreme Court has reached over the years between the government's interest in using forfeiture laws to further enforcement objectives and the rights of citizens to be free from unconstitutional seizures and deprivations of property.[3] After concluding that a constitutionally significant difference exists between civil and criminal forfeitures, the article addresses the Supreme Court's effort to draw a constitutional dividing line between civil and criminal sanctions generally and assesses its application to forfeiture law.[4] Finally, the article considers whether, in light of the constitutional differences between civil and criminal sanctions generally, and civil and criminal forfeitures specifically, the Constitution places any limits upon the government's ability to subject legitimate assets to forfeiture in civil, as opposed to criminal, proceedings.[5]

II. CRIMINAL VERSUS CIVIL FORFEITURE: ORIGINS, RATIONALES, AND JUSTIFICATIONS

Federal forfeiture legislation in the United States can be traced back to the first session of Congress.[6] Until 1970, however, all federal

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2. *See infra* notes 6-10 and accompanying text.

3. *See infra* notes 11-62 and accompanying text.

4. *See infra* notes 63-140 and accompanying text.

5. *See infra* notes 141-64 and accompanying text.

6. *See* Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 29, 41, 47; Act of Aug. 4, 1790, ch. 35, §§ 27, 46, 67, 1 Stat. 145, 163, 169, 176.

forfeitures were civil forfeitures;[7] that is, they were *in rem* proceedings premised on the legal fiction that the forfeited property was guilty of an offense and thereby became subject to seizure and forfeiture to the government.[8] The civil label attached to such procedures offered several advantages for the government in its prosecution of such claims. Civil forfeitures frequently have been characterized as remedial,[9] thereby justifying a reduced burden of proof. Judicial acceptance of these diminished procedural protections no doubt was facilitated by the legal fiction that a piece of property, and not a citizen, was the subject of government prosecution. In 1970, Congress enacted the first federal criminal forfeiture law, the Racketeer Influenced and Corrupt Organizations (RICO) statute.[10] Unlike civil forfeiture, criminal forfeiture was justified as a criminal punishment imposed in a criminal *in personam* proceeding directly against an individual offender for his misconduct, not to an inanimate object through legal fiction. The fundamental distinctions between these two forms of forfeiture—criminal and civil—have both practical and legal significance for the government's ability to impose forfeiture and the procedures by which such a forfeiture action can be accomplished.

A. *Civil Forfeiture: The Taint Theory and the Limits of Its Logic*

Because most of the federal revenue during the early days of the republic originated from duties and tariffs,[11] duties and tariffs were the first subjects of civil forfeiture legislation.[12] Civil forfeitures have been justified on a variety of grounds, but the earliest, and most practical,

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7. *See Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 407 (1969) [hereinafter *Senate Hearings*] (testimony of Deputy Attorney General Kleindienst); *see also* S. REP. NO. 225, 98th Cong., 1st Sess. 82 (1983); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993). For a general overview of the history of civil forfeiture law, see generally Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C. L. REV. 57, 59-69 (1983).

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

9. *See, e.g.*, Glup v. United States, 523 F.2d 557, 561 (8th Cir. 1975) (discussing 18 U.S.C. § 924(d) forfeiture proceedings).

10. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 941 (codified as amended as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)).

11. During the early 1800s, customs duties provided approximately 70% to 80% of federal revenue. *See* H.R. DOC. NO. 33, 86th Cong., 1st Sess. 712 (1960).

12. *See* Act of July 31, 1789, ch. 5, §§ 12, 29, 36, 1 Stat. 29, 39, 47.

rationale was that they were needed "to guard the revenue laws from abuse."[13] Central to this early use of "civil" forfeiture as a customs enforcement weapon was the limited scope of the resulting forfeiture. Patterned largely after the earlier British Navigation Acts, which mandated that goods be transported upon British ships with British crews, early federal civil forfeiture statutes limited the scope of forfeiture to either the unlawful cargo or the ship that transported it.[14] Similarly, under the Navigation Act's imposition of severe, but circumscribed, liability, "the ship was not only the source, but the limit, of liability."[15]

The most persistent rationale for civil forfeiture laws, however, has been the personification theory, under which inanimate objects are imbued with a personality which is then held accountable for the violation of applicable federal laws.[16] The classic formulation of the distinction between civil and criminal forfeitures remains that of Justice Story, one of the Supreme Court's most prolific early expositors of civil forfeiture law. He observed:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or, at least, a consequence, of the judgment of conviction. It is plain, from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offense; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right, by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognisable on the revenue side of the exchequer. *The thing is here primarily considered as the offender, or rather the offence is attached primarily to the*

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13. United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 406 (1814) (Story, J., dissenting).

14. *See* Reed & Gill, *supra* note 7, at 65-66; James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 774 (1977).

15. OLIVER W. HOLMES, JR., THE COMMON LAW 7 (Little, Brown & Co. 1923) (1881).

16. *See* United States v. United States Coin & Currency, 401 U.S. 715, 719-20 (1971); The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827); HOLMES, *supra* note 15, at 26-29.

thing; and this, whether the offence be malum prohibitum, or malum in se.[17]

The personification fiction, as originally described in Justice Story's opinion, has guided the Supreme Court's constitutional analysis of forfeiture law since then, although the vitality of this fiction has been eroded by the Court.[18] As a result of this fiction, courts have regarded the owner's innocence as irrelevant because the forfeiture action was deemed as an action against the res, not its owner.[19] Historically, then, civil forfeitures were justified under a theory of taint. That is, the forfeitable object had become tainted by its unlawful use. As described by Justice Story, when property held in a forfeiture proceeding is found to have not been used in violation of the law, "the taint of forfeiture is completely removed, and cannot be re-annexed to it."[20]

After the Civil War, the Supreme Court confronted the distinction between civil and criminal forfeitures in *Miller v. United States*.[21] At issue in the *Miller* case was the constitutionality of *in rem* legislation, commonly known as the Confiscation Acts, passed by Congress during the Civil War, which authorized the forfeiture of property owned by Confederate soldiers and supporters.[22] Miller, the plaintiff and property owner, objected to this forfeiture on the grounds that the purpose of the Act was to punish the criminal offense of treason, but the civil *in rem* proceedings failed to afford the owner the constitutional protections of indictment and due process guaranteed by the Constitution.[23] The Supreme Court noted that if the legislation constituted "municipal regulations only, there would be force in the objection that Congress has

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17. *The Palmyra*, 25 U.S. at 15 (emphasis added). Courts generally overlook the fact that Justice Story reached the opposite conclusion in his earlier dissent in *1960 Bags of Coffee*, 12 U.S. at 405-16. As to innocent purchasers of forfeitable goods without notice of their tainted character, Justice Story had found the argument for forfeiture "monstrous." *Id.* at 416. Further, he could "foresee that great embarrassments will arise to the commercial interests of the country; and no man, whatever may be his caution or diligence, can guard himself from injury and perhaps ruin." *Id.* at 406.

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

19. *Id.* at 685 (relying on the rationale that the thing is primarily considered as the offender to sustain the statutory forfeiture of a vessel found to have been engaged in piracy, even though the innocence of owner had been fully established).

20. Gelston v. Hoyt, 16 U.S. (3 Wheat.) 245, 318 (1818); *see also 1960 Bags of Coffee*, 12 U.S. at 406 (Story, J., dissenting) (describing "the secret taint of forfeiture" attaching to goods used in violation of customs laws).

21. 78 U.S. (11 Wall.) 268 (1870).

22. Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590.

23. *Miller*, 78 U.S. at 304.

disregarded the restrictions of the fifth and sixth amendments of the Constitution."[24] The Court upheld the legislation, however, by concluding that the statutes "were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States,"[25] but rather pursuant to the legitimate exercise of Congress's war power authority.[26] In a memorable dissent, Justice Field took issue with the majority's characterization of the Confiscation Acts as falling within Congress's broad war powers.[27] Justice Field argued that the legislative history of the Acts revealed that their real purpose was to punish those guilty of treason.[28] So construed, the Acts were unconstitutional because they purported to impose punishment upon the owner for treason without observing the constitutional requirements incident to a criminal prosecution.[29] In so concluding, Justice Field quoted Court precedent stating that confiscations of property "are punitive" and do not punish "an offending thing, but are inflicted for the personal delinquency of the owner . . . and punishment should be inflicted only upon due conviction of personal guilt."[30]

Justice Field went on to make two observations that have lasting relevance to forfeiture law. First, he described the critical doctrinal limitation of civil forfeiture to property that can itself be characterized as an offender:

> [If] proceedings *in rem* for the confiscation of property could be sustained, without any reference to the uses to which the property is applied, or the condition in which it is found, but whilst, so to speak, it is innocent and passive, and removed at a distance from the owner and the sphere of his action, on the ground of the personal guilt of the owner, all the safeguards provided by the Constitution for the protection of the citizen against punishment, without previous trial and conviction, and after being confronted by the witnesses against him, would be broken down and swept away.[31]

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24. *Id.*

25. *Id.*

26. *Id.* at 305.

27. *Id.* at 319 (Field, J., dissenting).

28. *Id.* at 321 (Field, J., dissenting).

29. *Id.* at 322 (Field, J., dissenting).

30. *Id.* (Field, J., dissenting) (quoting The Amy Warwick, 1 F. Cas. 808 (D. Mass. 1862) (No. 343)).

31. *Id.* at 322-23 (Field, J., dissenting).

In short, Justice Field identified the tainted character of property—its guilt, that is, its direct use in criminal activity—as a constitutional limitation on the scope of civil, *in rem* forfeiture. Additionally, he went on to describe the radical consequences of failure to adhere to this important distinction:

> [I]t would sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman, or the murderer, were authorized, not as a consequence of their conviction upon regular criminal proceedings, but without such conviction, upon *ex parte* proof of their guilt, or upon the assumption of their guilt from the failure to appear to a citation, published in the vicinage of the property, or posted upon the doors of the adjoining court-house, and which they may never have seen. It seems to me that the reasoning, which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone, or that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offence be inflicted.[32]

For present-day purposes, the significance of *Miller* lies in the point of apparent agreement between the majority opinion and Justice Field's dissent. Both the majority and Justice Field agreed that the Constitution forbids the enactment of forfeiture legislation aimed at imposing punishment for a property owner's offense without affording the due process protections secured by the Constitution for criminal prosecutions.[33] That a majority of the Court would, during the Reconstruction Era, strain to uphold the Confiscation Acts as a permissible exercise of Congress's war powers should not be surprising. That the Court felt constrained to do so is a testament to the strength of the constitutional arguments mustered by Justice Field.

At the end of the nineteenth century, the Court again attempted to reconcile the requirements of the Bill of Rights with accepted practice under the federal civil forfeiture statutes. In *Boyd v. United States*,[34] the Supreme Court held that a customs forfeiture statute, authorizing the

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32. *Id.* at 323 (Field, J., dissenting).

33. For the majority's discussion, see *id.* at 304-05. For Justice Field's discussion, see *id.* at 323 (Field, J., dissenting).

34. 116 U.S. 616 (1886).

seizure of evidence in support of a forfeiture claim, abridged the constitutional protections of the Fourth and Fifth Amendments.[35] More important, the Court rejected the argument that such civil forfeitures were civil proceedings not within the reach of the safeguards of either amendment for criminal proceedings.[36] According to the Court in *Boyd*, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."[37] The Court concluded that "suits for penalties and forfeitures, incurred by the commission of offences against the law, are of this quasi-criminal nature," and, therefore, were subject to the Fourth Amendment's protection against unreasonable seizures and the Fifth Amendment's protection against compelled self-incrimination.[38]

The *Boyd* opinion created a new niche for nominally "civil" forfeiture laws: they would not be considered wholly civil or criminal, but rather would occupy the middle ground of "quasi-criminal." After *Boyd*, the government could no longer contend that the personification fiction eliminated all constitutional protections. Instead, courts began the task of selectively identifying which constitutional rights applicable to criminal proceedings would apply equally to civil forfeiture actions.

This process of selective incorporation continues to this day. For example, federal courts grappled for years with the question of whether the Eighth Amendment applies to civil forfeiture actions[39] until the Supreme Court decided this issue in the affirmative in *Austin v. United States*.[40] Of course, *Boyd* and its progeny did not address which constitutional protections would apply to a truly criminal forfeiture, that is, one imposed as a direct result of an owner's criminal deed. Criminal

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35. *Id.* at 634. The statute at issue was Act of June 22, 1874, § 12, 18 Stat. 186.

36. *Id.* at 633-34.

37. *Id.* at 634.

38. *Id.*

39. *See, e.g.*, United States v. 107.9 Acre Parcel of Land, 898 F.2d 396, 401 (3d Cir. 1990) (holding the Eighth Amendment inapplicable to a forfeiture under 21 U.S.C. § 881(a)(7) because the statute was intended to be a civil remedy, not a criminal punishment); United States v. Santoro, 866 F.2d 1538, 1543 (4th Cir. 1989) (same); United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988) (holding the proportionality requirement of the Eight Amendment inapplicable to *in rem* civil forfeiture proceedings under 21 U.S.C. § 881(a)(4), (7)); *cert. denied*, 493 U.S. 954 (1989). *But see* United States v. 3639 2d St., N.E., 869 F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring) ("We are not today foreclosing the possibility that a given use of the forfeiture statutes may violate the excessive fines clause of the Eighth Amendment.").

40. 113 S. Ct. 2801 (1993).

forfeiture would not appear on the federal statutes until much later, in 1970.[41]

Though it is an unusual legal doctrine, the taint rationale for civil forfeitures has survived to this day. The Supreme Court has repeatedly, if begrudgingly, upheld civil forfeitures over facial constitutional challenges. For example, in *J.W. Goldsmith, Jr.-Grant Co. v. United States*,[42] the Supreme Court observed:

> If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the [forfeiture] section with the accepted tests of human conduct. Its words taken literally forfeit property though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of due process of law required by the Constitution. . . . And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.
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> Regarded in this abstraction the argument is formidable, but there are other and militating considerations.[43]

The Court in *Goldsmith-Grant* went on to justify such an anomalous and counter-intuitive result by reference to the need to protect federal revenue, to common law deodand doctrine, and to the Bible.[44] Finally, the Court relied on nineteenth-century precedent, including Justice Story's opinion in *The Palmyra*, which upheld such forfeitures against innocent owners because "the thing is primarily considered the offender."[45]

In the past, the taint theory often was used as a justification for upholding civil forfeiture laws. Today, however, its logic may actually place some limits on the scope of civil forfeiture, which largely went unexamined until the recent spate of legislative and law enforcement

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41. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 941 (codified as amended as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)).

42. 254 U.S. 505 (1921).

43. *Id.* at 510.

44. *Id.* at 510-11.

45. *Id.* at 511 (citing The Palmyra, 25 U.S. (12 Wheat.) 1, 7 (1827)).

efforts to expand the reach of civil forfeiture law beyond a taint justification.[46]

B. *Criminal Forfeiture and Its Origins: The Abandonment of Taint as a Limitation Upon Forfeiture*

In 1970, Congress enacted what it believed to be the first federal "criminal" forfeiture law when it passed the RICO Act[47] and the Continuing Criminal Enterprise drug statute.[48] Unlike civil forfeitures, criminal forfeitures are considered to be part of a criminal prosecution,[49] are punitive,[50] and can only be imposed after a conviction.[51] Criminal

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46. Federal courts have rejected government efforts to expand civil forfeiture beyond tainted property. In United States v. 1980 Rolls Royce, 905 F.2d 89 (5th Cir. 1990), for example, the Fifth Circuit rejected a claim by the government for the forfeiture of a tract of real estate and an automobile. The government had brought a civil forfeiture action seeking forfeiture of these items as the "proceeds" of drug violations under the now ubiquitous "proceeds" forfeiture provisions of 21 U.S.C. § 881(a)(6). The government argued that "if one dollar of drug money was used to purchase an asset, the entire asset is forfeitable." *Id.* at 90. The court rejected this argument and held that the government was entitled to forfeit only those portions of the two properties that reflected the invested, tainted proceeds of drug violations or derivative profits, but not the portions derived from legitimate sources. *Id.* In *Rolls Royce*, the Fifth Circuit quoted with approval language from the First Circuit's opinion in United States v. Pole No. 3172, 852 F.2d 636 (1st Cir. 1988), which rejected the argument that "forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment." *Id.* at 639-40.

47. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 941-48 (codified as amended as the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)); *see Senate Hearings*, *supra* note 7, at 407 (testimony of Deputy Attorney General Kleindienst); S. REP. NO. 225, 98th Cong., 1st Sess. 82 (1983) ("From [1790] until 1970 there was no criminal forfeiture provision in the United States Code."). *See generally* Reed & Gill, *supra* note 7, at 59-69.

48. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1236, 1265 (codified as amended at 21 U.S.C. §§ 848, 853 (1988 & Supp. V 1993)).

49. *See* FED. R. CRIM. P. 31 advisory committee's note to 1972 amendment.

50. *See Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Judiciary Comm.*, 91st Cong., 2d Sess. 107 (1969) (statement of sponsor Sen. McClellan); United States v. Lizza Indus., 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); United States v. Rubin, 559 F.2d 975, 992 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978). *But cf.* Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (suggesting that criminal forfeiture may also serve restitutionary goals). *Cf.* Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 703-04 (1990) (rebutting suggestion of restitutionary

forfeitures have a long lineage[52] and can be traced to feudal practices in England,[53] but they had been disfavored in colonial America.[54]

In contrast to civil forfeiture laws, which are premised on a taint theory, criminal forfeitures are premised on a punitive theory, whereby forfeiture serves the important penal interests associated with the criminal process.[55] As the Fifth Circuit observed in upholding a substantial criminal forfeiture: "property forfeited under RICO need not be guilty."[56] Rather, the scope of criminal forfeiture is measured by the penal objectives of the legislature.[57] With RICO, for example, Congress authorized the forfeiture of assets, either legitimately or illegitimately acquired, which afford a defendant a source of influence over a business.[58] Accordingly, courts have readily applied RICO's broad forfeiture language to encompass legitimately acquired assets to further Congress's goal of eliminating the economic influence of racketeers over legitimate businesses.[59] Thus, in many respects, criminal forfeiture is broader in scope than civil forfeiture because law enforcement can reach assets that were legitimately acquired or lawfully used. Courts have entertained Eighth Amendment challenges to such broad criminal forfeitures,[60] and some have observed that Eighth Amendment concerns are most acute when the government seeks to forfeit such untainted assets

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goal for criminal forfeiture).

51. *See, e.g.*, United States v. Cauble, 706 F.2d 1322, 1348, *reh'g denied*, 714 F.2d 137 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

52. *See generally* Reed & Gill, *supra* note 7, at 60.

53. *See* 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 466 (2d ed. 1968); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1300, at 178-80 (Fred B. Rothman & Co. 1991) (1st ed. 1833). *See generally* Terrance G. Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 748 n.9 (1985).

54. *See* 1 STORY, *supra* note 53, §§ 163-65, at 186-97; Reed & Gill, *supra* note 7, at 61.

55. *See* Reed & Gill, *supra* note 7, at 61; *see also* United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

56. *Cauble*, 706 F.2d at 1350; *accord* United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987) (holding that RICO "forfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity").

57. *See Cauble*, 706 F.2d at 1346.

58. *See* 18 U.S.C. § 1963(a)(2) (1988 & Supp. V 1993).

59. *See Busher*, 817 F.2d at 1413; *Cauble*, 706 F.2d at 1350; United States v. Marubeni Corp., 611 F.2d 763, 769 n.12 (9th Cir. 1980).

60. *See, e.g.*, Alexander v. United States, 113 S. Ct. 2766 (1993); United States v. McKeithen, 822 F.2d 310, 314-15 (2d Cir. 1987); *Busher*, 817 F.2d at 1413.

under a purgative rationale such as that found in RICO.[61] One respected commentator even has urged that the criminal forfeiture of untainted property violates the Eighth Amendment.[62] The focus of this article, however, is not whether the government can obtain the forfeiture of untainted assets through criminal procedures with their manifold safeguards, but whether the government can subject to forfeiture untainted assets through civil procedures and especially through that peculiar variation of civil procedures common to many civil forfeiture statutes.

C. *A Brief Comparison of Civil and Criminal Forfeiture Procedures*

Just as civil and criminal forfeitures have distinct legal ancestries and purposes, the procedures used to perfect each type of forfeiture are dramatically different. The most obvious difference, of course, is that criminal forfeitures are considered a part of a criminal prosecution and thus are subject to criminal procedural rules, whereas civil forfeitures are prosecuted in independent civil actions directly against offending property.[63]

Civil forfeitures are considered *in rem* proceedings, and a court must take possession of property through an act of seizure by the government before it can assert *in rem* jurisdiction.[64] The typical civil forfeiture action begins with a seizure of property and is followed by the filing of a forfeiture complaint and the prosecution of the government's claim. In many senses, the *raison d'etre* of civil forfeitures lies in their reduction of the government's burden for a successful prosecution.[65] Federal courts have further reduced the government's burden by, in effect, shifting the burden of proof from the government/plaintiff to the claimant/defendant

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61. *See* United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), *cert. denied*, 498 U.S. 1034 (1989); United States v. Regan, 726 F. Supp. 447, 457 (S.D.N.Y. 1989), *aff'd in part, vacated in part*, 937 F.2d 823, *decision amended*, 946 F.2d 188 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2273 (1992).

62. *See* William W. Taylor III, *The Problem of Proportionality in RICO Forfeitures*, 65 NOTRE DAME L. REV. 885, 894 (1990).

63. *See generally* United States v. Seifuddin, 820 F.2d 1074, 1076-77 (9th Cir. 1987).

64. *See, e.g.*, United States v. James Daniel Good Real Property, 114 S. Ct. 492, 503 (1993) (citing cases). Civil forfeitures are *in rem* proceedings initiated by seizure of the res, either actual or constructive, which confers *in rem* jurisdiction upon the court. *See* Miller v. United States, 78 U.S. (11 Wall.) 268, 294 (1870); The Brig Ann, 13 U.S. (9 Cranch) 289 (1815) (Story, J.); United States v. $84,740, 900 F.2d 1402, 1404 (9th Cir. 1990); United States v. $10,000, 860 F.2d 1511, 1513 (9th Cir. 1988); *see also* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 9.01[2] (1994).

65. *See generally* Reed & Gill, *supra* note 7, at 65-66.

for a wide variety of federal civil forfeitures.[66] Moreover, federal courts have held that federal prosecutors need not comply with evidentiary rules in furnishing evidence to support a civil forfeiture; for example, a forfeiture judgment can be obtained through hearsay.[67]

Criminal forfeitures, on the other hand, are *in personam* actions against a criminal defendant, and thus the only prerequisite to court jurisdiction is obtaining jurisdiction over the person of the defendant. The burden of proof in a criminal forfeiture case is, however, allocated to the government. As previously mentioned, a criminal conviction is a necessary predicate for any criminal forfeiture.[68] Moreover, as in all criminal cases, the government's burden of persuasion is proof beyond a reasonable doubt.[69] Some federal courts have held that the government's burden of proof as to the forfeitability of assets in some types of criminal forfeiture prosecution, as opposed to the burden of proving a defendant's guilt, is only a preponderance of the evidence.[70] The better rule, however, and the only one endorsed by Congress, is that the government must shoulder the more stringent burden of proof beyond a reasonable doubt.[71]

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66. *See, e.g.*, United States v. $250,000, 808 F.2d 895, 900 (1st Cir. 1987); SMITH, *supra* note 64, ¶ 11.03.

67. United States v. 56-Foot Motor Yacht Named the Tahuna, 702 F.2d 1276, 1283-84 (9th Cir. 1983); United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 728, *reh'g denied*, 696 F.2d 996 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); United States v. 1974 Porsche 911-S, 682 F.2d 283, 286 (1st Cir. 1982).

68. *See* 18 U.S.C. § 1963(e) (1988).

69. *See* United States v. Pelullo, 14 F.3d 881, 904-06 (3d Cir. 1994) (holding that under RICO, the government must prove, beyond a reasonable doubt, that there is a nexus between the criminal conduct and the property to be forfeited); United States v. Pryba, 674 F. Supp. 1518, 1521 (E.D. Va. 1987), *aff'd*, 900 F.2d 748 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990).

70. United States v. Elgersma, 971 F.2d 690, 694-97 (11th Cir. 1992) (forfeiture under 21 U.S.C. § 853); United States v. Smith, 966 F.2d 1045, 1050-53 (6th Cir. 1992) (same).

71. *See, e.g.*, 18 U.S.C. § 1467(e)(1) (1988) (requiring the government to meet the beyond-a-reasonable-doubt burden for criminal forfeitures in federal obscenity prosecutions); *see also* H.R. REP. NO. 845, 98th Cong., 2d Sess. 18, 38 (1984) (adopting the Justice Department's request for language that criminal forfeiture must be established by proof beyond a reasonable doubt); U.S. DEP'T OF JUSTICE, ASSET FORFEITURE OFFICE, FORFEITURE: VOLUME I; INTRODUCTION TO CIVIL STATUTES 36 (1984) (observing that criminal, unlike civil, forfeitures must be proven beyond a reasonable doubt); SMITH, *supra* note 64, ¶ 14.03.

Compare United States v. Sandini, 816 F.2d 869 (3d Cir. 1987) (preponderance sufficient) *with* United States v. Pace, 898 F.2d 1218, 1235 n.5 (7th Cir.) (applying beyond-reasonable-doubt standard), *cert. denied*, 497 U.S. 1030 (1990); *Pryba*, 674 F.

In any event, the federal rules of criminal procedure and evidence apply to criminal forfeiture prosecutions, and they provide specific procedural protections, such as the requirement that the allegedly forfeitable assets be identified in the indictment and in a special verdict from the jury.[72] Moreover, although Congress has enacted statutory provisions authorizing the issuance of pretrial restraining orders in appropriate cases prior to conviction, the government is generally not entitled to seize allegedly forfeitable assets in a criminal forfeiture action prior to a judgment.[73] In addition, Congress in 1984 significantly modified criminal forfeiture procedures by providing for specific post-trial procedures to permit third parties to exempt their property from a criminal forfeiture verdict.[74]

In sum, the procedural protections afforded by statute to property owners in federal criminal forfeiture actions are much greater than those available to property owners in civil forfeiture actions. The potential scope of forfeiture is much greater in a federal criminal forfeiture prosecution, however, than that permitted in a federal civil forfeiture proceeding. The principal limitation that distinguishes the scope of federal civil forfeitures from that of federal criminal forfeitures is the taint doctrine: civil forfeitures are traditionally limited to property actually used to violate the law, whereas criminal forfeitures can include lawfully acquired and used property. Accordingly, Congress's provision of greater procedural protections for federal criminal forfeiture actions is consistent not only with the "criminal" label attached to such proceedings, but also with the general purpose of such proceedings: to impose punishment even if it means confiscating wholly legitimate property.

Supp. 1504 (same). *Sandini* can be construed as applicable only to forfeiture prosecutions under 21 U.S.C. § 853(d), which authorizes the government to prove forfeiture under a rebuttable presumption of forfeiture. The Advisory Committee notes to Rule 31(e) of the Federal Rules of Criminal Procedure state that the assumption is that criminal forfeiture is an "element of the offense to be alleged and proved." FED. R. CRIM. P. 31 advisory committee's note to 1972 amendment. *Contra* United States v. Hernandez-Escarsega, 886 F.2d 1560, 1577-78 (9th Cir. 1989).

72. *See, e.g.*, FED. R. CRIM. P. 7(e)(2), 31(e), 32(b)(2); *see also* United States v. Seifuddin, 820 F.2d 1074, 1078 (9th Cir. 1987).

73. *See, e.g.*, 18 U.S.C. § 1963(b) (1988); *see* United States v. Ripinsky, 20 F.3d 359, 362-65 (9th Cir. 1994) (holding that criminal forfeiture statutes do not allow pretrial restraint of substitute assets).

74. *See* 18 U.S.C. § 1963(*l*)(2) (1988). *See generally* Reed, *supra* note 53, at 769-76.

D. *Civil Forfeiture Today*

During the 1980s and early 1990s, federal and state law enforcement officials embraced forfeiture as a valuable tool in their battle with crime. In fiscal year 1993 alone, for example, the federal government seized approximately $1.9 billion in assets for forfeiture.[75] The dramatic increases in the number and size of forfeitures, however, largely has not been accompanied by significant improvements in the procedures or protections available to prevent erroneous or unfair forfeitures. To the contrary, during the 1980s and early 1990s, the Department of Justice has taken an active role in opposing procedural or substantive reform of the civil forfeiture laws. This intransigence on the part of the Department of Justice led to a string of Supreme Court opinions in the early 1990s that, in the process of rejecting Department of Justice positions, also have narrowed the forfeiture laws.

The first such opinion, *United States v. 92 Buena Vista Avenue*,[76] was a statutory construction case, but one that had obvious constitutional overtones. The Department of Justice sought review by the Supreme Court to sustain its contention that the relation back doctrine, a legal fiction which posits that the government obtains title to forfeitable property at the time the property is used unlawfully, took precedence over Congress's enactment of an innocent owner exemption from forfeiture.[77] According to the Department of Justice, the relation-back doctrine, as codified in the federal drug civil forfeiture statute,[78] operated to vest title to forfeitable property in the government at the time of the alleged offense, such that any person who subsequently purchased or was given title to the property did not, in fact, obtain good title.[79] In short, the Department of Justice contended that even wholly innocent owners can lose their property to forfeiture if, at some distant time in the past, the

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75. 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).

76. 113 S. Ct. 1126 (1993).

77. *See id.* at 1134; 21 U.S.C. § 881(a)(6) (1988) (authorizing forfeiture of proceeds of illegal drug transactions except "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").

78. 21 U.S.C. § 881(h) (1988) (providing that "[a]ll right title and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section").

79. *See 92 Buena Vista Ave.*, 113 S. Ct. at 1134-35.

property had become forfeitable because of acts of another, thereby giving the government superior title to the property.[80]

The Supreme Court disagreed and construed the relation-back doctrine as not coming into effect until after a forfeiture judgment was entered,[81] thereby granting standing to all property transferees who seek to establish their entitlement to an innocent owner exemption. The Court's ruling, unlike the department's position, made sense and was consistent with the expressed congressional intent to protect innocent property owners.[82]

In *92 Buena Vista Avenue*, the Department of Justice basically asked the Court to recognize that the department had the authority to forfeit the property of innocent owners. To make matters worse, the department sought to belittle the impact of such a harsh ruling by contending that it would use this power sparingly because it could always decide to remit or mitigate forfeitures. If, however, the Supreme Court accepted this argument, the Court would have left open the troubling question of how the Department of Justice would decide which "innocent owners" deserved forfeiture, and which did not. The department's advocacy of doctrinal purity, bottomed on anachronistic forfeiture dogma, undoubtedly cost the department points with the Court.

On the heels of *92 Buena Vista Avenue*, the Court issued the *Austin* opinion, in which the Court recognized that civil forfeitures can constitute punishment within the meaning of the Constitution, and that excessive forfeitures can constitute punishment that violates the Eighth Amendment.[83] Once again, the Justice Department took the hard line and based its argument on old forfeiture doctrine. The department contended that because drug forfeitures are "civil" in name they are not subject to the protections of the Eighth Amendment against excessive fines.[84] The bottom line for the Department of Justice was that civil forfeitures can never be so large as to trigger constitutional protection against disproportionate punishment.[85] The Court disagreed.[86]

In *Austin*, the Supreme Court found that civil forfeiture statutes generally, and the drug forfeiture statute specifically at issue,[87] were historically considered punitive.[88] The Court then applied to the drug

80. *See id.*

81. *Id.* at 1136.

82. *See id.* at 1136-37.

83. Austin v. United States, 113 S. Ct. 2801, 2812 (1993).

84. *Id.* at 2804.

85. *See id.*

86. *See id.* at 2804-05.

87. 21 U.S.C. § 881 (1988 & Supp. V 1993).

88. *Austin*, 113 S. Ct. at 2808-11.

forfeiture statute the constitutional standard it had crafted four years earlier in *United States v. Halper*[89] for determining whether imposition of a civil sanction after a criminal conviction was sufficient to trigger the Double Jeopardy Clause of the Fifth Amendment.[90] Thus, the "'civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.'"[91] Applying this standard, the *Austin* Court concluded that the drug civil forfeiture statute was "punitive" for purposes of triggering the Eighth Amendment's prohibition on excessive fines, notwithstanding its potential remedial purposes.[92]

The *Austin* opinion acknowledged that the Court had, in the past, selectively applied constitutional protections to civil forfeitures, incorporating some protections of the Bill of Rights which are equally applicable to criminal prosecutions, while not incorporating others.[93] The Court expressly rejected the government's contention that a civil sanction must be "so punitive that it must be considered criminal" before constitutional protections would apply.[94] Implicitly, therefore, the Court in *Austin* placed the drug civil forfeiture statute at issue into the same middle-tier "quasi-criminal" category that was previously created for civil forfeitures a century earlier in *Boyd v. United States*.[95] Nonetheless, the Court observed that "even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal."[96]

In addition, the *Austin* Court gave notice that the power of the "guilty property" personification fiction to eliminate the relevance of a property owner's innocence in a civil forfeiture proceeding was now a debatable issue.[97] In stating that the Court had previously reserved ruling on this question,[98] the Court in *Austin* ignored other arguably dispositive

89. 490 U.S. 435 (1989).

90. *See Austin*, 113 S. Ct. at 2806.

91. *Id.* (quoting *Halper*, 490 U.S. at 448) (emphasis added).

92. *See id.* at 2811-12.

93. *Id.* at 2804 n.4.

94. *Id.* at 2804 (referring to Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)).

95. 116 U.S. 616 (1886); *see supra* notes 34-38 and accompanying text.

96. *Austin*, 113 S. Ct. at 2804 n.4.

97. *See id.* at 2808.

98. *Id.* at 2809.

precedent from the nineteenth and twentieth centuries[99] and narrowly construed its past precedent as merely "rejecting the 'innocence' of the owner as a common-law defense to forfeiture."[100] Instead, the Court signaled its departure from historical forfeiture rationale by simply noting that "the more recent cases have expressly reserved the question" whether civil forfeiture can be imposed upon the "truly innocent owner."[101]

Subsequently, in *United States v. James Daniel Good Real Property*,[102] the Court held that the Due Process Clause of the Fifth Amendment requires the government to provide notice and an adversarial judicial hearing to realty owners before they can be dispossessed by a seizure for purposes of initiating civil forfeiture proceedings.[103] Again, in *Good*, the Supreme Court sought to place some distance between current forfeiture analysis and historical justifications for forfeiture practices. The Court concluded that "[j]ust as the urgencies that justified summary seizure of property in the 19th Century had dissipated by the time of *Phillips*, neither is there a plausible claim of urgency today to justify the summary seizure of real property under § 881(a)(7)."[104]

In the wake of *92 Buena Vista Avenue*, *Austin*, and *Good*, it seems clear that the government's continued reliance upon historical, if not anachronistic, forfeiture rationales will not provide it with a firm basis upon which to defend its forfeiture practices. Rather, these opinions reflect a growing judicial awareness that the plethora of legal fictions and convenient procedures that have made civil forfeiture so attractive to law enforcement must ultimately be reconciled with the evolving protections of the Constitution. In short, the days of the pirates and customs smugglers are over. If law enforcement wishes to take advantage of the benefits of forfeiture in the ordinary chores of daily law enforcement, it

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99. The Court did not address cases where the Court sustained civil forfeitures of property even though claimants had made showings that they were bona fide purchasers for value of the property. *See, e.g.*, United States v. Commercial Credit Co., 286 U.S. 63 (1932); United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814).

100. *Austin*, 113 S. Ct. at 2808.

101. *Id.* at 2809 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974) and J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 512 (1921)).

102. 114 S. Ct. 492 (1993).

103. *Id.* at 505; *see* United States v. $8850, 461 U.S. 555, 562 n.12 (1983); Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950).

104. *Good*, 114 S. Ct. at 505 (referring to Phillips v. Commissioner, 283 U.S. 589 (1931) (holding that IRS administrative preseizure procedures were adequate to allow for seizure of property without a judicial hearing)).

must assume the task of conforming nineteenth-century practices to modern day constitutional and practical realities.

III. RECENT EFFORTS TO ABANDON TAINT PRINCIPLES AS A LIMITATION ON CIVIL FORFEITURES

To some degree, the proper scope of civil forfeiture is a matter properly committed to the discretion of legislative bodies, because they enact laws that describe the specie of property that is subject to civil forfeiture by reason of its relationship, or "nexus," to specified unlawful activity.[105] Common statutory nexus provisions include property that "facilitates"[106] certain offenses, or property that is used "in furtherance of" unlawful activity,[107] or other similar limiting language. Hence, resolving whether certain assets are subject to civil forfeiture will often involve a factual inquiry into whether the asset's alleged use falls within the "nexus" language chosen by the legislature.[108]

At some point, however, the nexus between property and criminal conduct is so attenuated that it is simply not tainted by unlawful conduct.[109] As is explained below, some states purport to authorize the civil forfeiture of property not tainted by any direct connection to unlawful conduct.[110] The purpose of such forfeitures is apparent; they attempt to impose a sanction not on property but on a property owner for his criminal conduct. It is here, at the edges of civil forfeiture law, that current jurisprudence offers little guidance, largely because law enforcement officials never before have attempted to stake a claim to civil forfeiture authority in these outer reaches of forfeiture law. Old and time-honored, if not particularly compelling, civil forfeiture rationales such as a property's "guilt in the wrong,"[111] offer no support for extending the scope of civil forfeiture beyond property either directly or indirectly used in criminal conduct and thereby tainted.

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105. *See generally* SMITH, *supra* note 64, ¶ 3.03.

106. *See, e.g.*, 21 U.S.C. § 881(a)(4) (1988).

107. *See, e.g.*, N.J. STAT. ANN. § 2C:64-1a(2) (West 1982 & Supp. 1994).

108. *See* SMITH, *supra* note 64, ¶ 3.03, at 3-13.

109. *See id.* ¶ 3.03, at 3-15, 3-20 (citing United States v. 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 427 (2d Cir. 1977)) ("The line [between property and criminal conduct] must be drawn situation by situation."); *see also* United States v. 1972 Chevrolet Corvette, 625 F.2d 1026 (1st Cir. 1980) (holding that the intended use of car to transport proceeds of illicit sale did not by itself subject vehicle to forfeiture).

110. *See infra* notes 113-18 and accompanying text (discussing the merits of Arizona's forfeiture law).

111. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510 (1921).

The forfeiture of untainted property in a civil forfeiture action is not aimed at guilty property but rather at guilty owners. In the words of Justice Field, such a forfeiture seeks confiscation of property

> without any reference to the uses to which the property is applied, or the condition in which it is found, but whilst, so to speak, it is innocent and passive, and removed at a distance from the owner and the sphere of his action, on the ground of the personal guilt of the owner . . . .[112]

Here, also, the oft-invoked contention that "civil" forfeiture is merely remedial is least persuasive while the punitive mission of such a forfeiture is as transparent today as it was to Justice Field in 1870.

A. *Arizona's Expansion of Civil Forfeiture to Reach Untainted Assets*

Several states recently have broadened the statutory forfeiture authority available to state law enforcement officials. Some states track federal law in recognizing a distinction between criminal forfeiture actions, with their potentially broader scope, and civil forfeitures.[113] Other states, most notably Arizona,[114] have abandoned the traditional distinction between criminal and civil forfeitures. These states purport to allow the imposition of civil forfeitures, with their reduced procedural protections, on wholly untainted property. In short, these states authorize the imposition of forfeitures of legitimate assets through civil forfeiture proceedings rather than requiring compliance with the constitutional protections applicable to criminal forfeitures under federal law.[115]

Initially, the failure of some states to adopt the long-held distinction in federal law between civil and criminal forfeitures should not be surprising. Given that states never have exercised customs responsibilities, states had no need to develop civil forfeiture as an enforcement tool in the nineteenth century. Instead, states typically have used civil forfeitures—in accordance with their modern day rationale—as an adjunct to criminal law enforcement.[116]

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112. Miller v. United States, 78 U.S. (11 Wall.) 268, 323 (1870) (Field, J., dissenting).

113. *Compare* N.J. STAT. ANN. § 2C:64-1 (West 1982 & Supp. 1994) (criminal forfeiture) *with* N.J. STAT. ANN. § 2C:64-3 (West 1982 & Supp. 1994) (civil forfeiture).

114. *See* ARIZ. REV. STAT. ANN. §§ 1-253, 13-2314(N), 13-4301 to 13-4315 (1989 & Supp. 1994-95).

115. *E.g.*, ARIZ. REV. STAT. ANN. § 13-2314(D).

116. *See* SMITH, *supra* note 64, ¶ 3.03, at 3-15.

The Arizona statute purports to be a logical extension of this trend, and its advocates have described it as "a stride in the evolution of a 'civil justice system' to complement the criminal justice system through judicial intervention in antisocial behavior."[117] Furthermore, the proponents of Arizona's statute allege that broad civil asset forfeiture statutes represent "the leading edge of civil remedies for economic injustices."[118] Arizona's statute is attractive to state law enforcement because broadening the scope of forfeiture while narrowing available procedural protections will undoubtedly strengthen law enforcement. Absent a constitutional barrier to this practice, its future seems bright.

In 1970, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted forfeiture provisions for the Uniform Controlled Substances Act (UCSA), which were patterned after federal forfeiture laws. Accordingly, the UCSA forfeiture provision authorized only limited civil forfeitures.[119] During the late 1980s, however, the NCCUSL considered, and ultimately enacted in 1990, a major comprehensive revision to the UCSA.[120] During this process, advocates of the Arizona forfeiture model urged that it form the basis for all state forfeiture law. This effort failed, but prosecution advocates renamed their work product as the Model Asset Forfeiture Act (MASFA).[121] The MASFA purports to authorize the civil forfeiture of untainted assets.[122] Specifically, it proposes to incorporate two aspects of federal criminal forfeiture law—substitute assets forfeiture and enterprise forfeiture—into the permissible scope of civil forfeiture. The proposed inclusion of these broad criminal forfeiture features into civil forfeiture law would herald a new expansion in the scope of civil forfeiture into areas unsupported by a taint rationale. In addition to lacking a foundation in civil forfeiture doctrine, these expansions would have the effect of authorizing the imposition of punitive sanctions without the numerous procedural safeguards of the criminal process.

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117. Cameron H. Holmes, *History and Purpose of Arizona Forfeiture Under A.R.S. § 13-4301 et seq.* (1986), *reprinted by* ABA National Institute on Forfeitures and Asset Freezes (materials provided for ABA conference, Forfeitures and Asset Freezes: A Comprehensive Survey of Asset Forfeiture, Restraints and Third-Party Rights, Wash., D.C., Dec. 3-4, 1990).

118. *Id.*

119. *See* SMITH, *supra* note 64, ¶ 3.03, at 3-14 n.4.

120. *See* STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE app. J-3 (1993 & Supp. 1994).

121. MODEL ASSET FORFEITURE ACT (1991).

122. *Id.*

1. Substitute Asset Forfeiture

The proposed application of substitute asset forfeiture, a feature of federal criminal forfeiture law, to state civil forfeiture law serves to highlight the incongruity between forfeiture doctrine and the proposed expansion. Substitute asset forfeiture is a form of forfeiture whereby the government is authorized to seize legitimate untainted assets in lieu of forfeitable assets.[123] First proposed by the Justice Department for inclusion in the Comprehensive Forfeiture Act of 1984,[124] substitute asset forfeiture was viewed as a means of preventing a criminal defendant from frustrating criminal forfeitures by the device of transferring or dissipating assets prior to the entrance of a forfeiture judgment.[125] Substitute asset forfeiture was considered, in conjunction with the adoption of the relation-back doctrine for criminal forfeitures, to be an important means to strengthen the effectiveness of criminal forfeiture.[126] Congress, however, eliminated the proposed substitute asset language from the Comprehensive Crime Control Act of 1984 in conference committee because of perceived constitutional problems, and opted to adopt an alternative fine provision authorizing a fine of up to twice the amount of criminal gain.[127]

In 1986, however, Congress enacted substitute asset forfeiture provisions, but restricted their application to situations in which the unavailability of forfeit assets at final judgment was caused by the acts or omissions of the criminal defendant.[128] Thus, substitute asset forfeiture—the forfeiture of untainted assets—was triggered only by the improper conduct of a criminal defendant. Moreover, the need for substitute asset forfeiture initially was predicated on the desire to preserve the punitive impact of criminal forfeiture by denying a criminal defendant the ability to thwart forfeiture prior to judgment.

The MASFA, however, enacts substitute asset forfeiture as a type of civil forfeiture.[129] Unlike its federal counterpart, under the proposed uniform state substitute asset forfeiture, liability is not conditioned on

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123. *See, e.g.*, 18 U.S.C. § 1963(m) (1988).

124. Pub. L. No. 98-473, 98 Stat. 2040.

125. *See* S. REP. No. 225, 98th Cong., 1st Sess. 201 (1983).

126. *Id.*

127. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 2301, 98 Stat. 1976, 2192.

128. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153(a), 100 Stat. 3207, 3207-13 (codified as amended as part of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963(m) (1988)).

129. *See* MASFA § 517.

some intentional or negligent conduct by a claimant or defendant that places property out of reach.[130] Rather, the claimant or defendant is liable for unavailable property, regardless of fault, including liability for any diminution in value. As a practical matter, the procedural differences between civil and criminal forfeitures render the objective of substitute asset forfeiture inapplicable to civil forfeitures. Civil forfeitures begin with the seizure of the offending res, thus eliminating the opportunity for it to be transferred by a claimant. Accordingly, there is no risk that the res will be unavailable for any subsequent civil forfeiture judgment. The problem of disappearing or dissipating assets occurs only in the context of criminal forfeitures, where the government must first obtain a criminal conviction before it is entitled to seize assets.[131]

Moreover, the implementation of substitute asset forfeiture in a civil forfeiture context underscores its lack of doctrinal foundation. The res in a civil forfeiture action serves not only to demarcate the court's jurisdiction but also to limit the liability of any affected potential parties. By contrast, with substitute asset forfeiture, potential claimants are created beyond that identified in the litigation by the substitution of wholly licit property for forfeiture purposes. Even from the perspective of the legal fiction guiding civil forfeiture law, if civil forfeiture is justified as a prosecution of an offending res, then it makes no sense to permit satisfaction of such a claim against a non-guilty or untainted res.

In summary, applying substitute asset forfeiture to civil forfeitures cannot be justified under a taint theory. Indeed, civil forfeitures are premised on the principle that the guilt or innocence of property owners is irrelevant to the prosecution of an independent civil forfeiture action.[132] In short, lurking behind the articulated desire to impose substitute asset forfeiture in civil *in rem* actions is the motivating impulse to impose forfeiture *in personam* upon a guilty property owner, not upon "guilty" property.

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130. *Compare id. with* 21 U.S.C. § 881(a)(7) (1988).

131. *See, e.g.*, 18 U.S.C. § 1963(e) (1988). Of course, the federal government can and does seek pretrial restraining orders in criminal forfeiture cases. *See generally* Reed, *supra* note 53, at 760-68.

132. *See, e.g.*, The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) ("[T]he proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceedings *in personam*.").

2. Enterprise Forfeiture

Enterprise forfeiture is a term coined from the lexicon of the federal RICO and Continuing Criminal Enterprise statutes.[133] Under these criminal statutes, a convicted defendant can be forced to forfeit not only the profits of his crime, but also any assets that afford a defendant a source of influence over the alleged "racketeer influenced and corrupt organization" or drug enterprise.[134] Enterprise forfeiture is aimed at purging the defendant from the enterprise and thus, in RICO cases, eliminating the influence of organized crime from legitimate businesses.[135] Enterprise forfeiture, however, is not predicated on a taint theory, because it reaches wholly legitimate assets that are forfeited in order to punish their owner.[136] Thus, enterprise forfeiture is the quintessential type of criminal, *in personam*, forfeiture, because its justifications lie in the guilt of the owner, not of the property.

Nonetheless, the MASFA language includes enterprise forfeiture within the substantive scope of civil forfeiture.[137] Again, all forfeiture is characterized as civil, both in name and in procedure, in the MASFA.[138] Accordingly, the forfeiture of untainted assets via enterprise forfeiture would be accomplished through civil forfeiture procedures. Moreover, enterprise forfeiture, when pressed in federal criminal prosecutions, has elicited widely-expressed concern from courts about its potential to infringe on the Eighth Amendment rights of defendants.[139] This has prompted a disavowal by the Justice Department of any intent to seek any disproportionate criminal forfeiture.[140] Of

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133. *See* 18 U.S.C. § 1961(4) (1988) (RICO statute defining "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity").

134. *See* 18 U.S.C. § 1963(a)(2) (1988 & Supp. V 1993); United States v. Porcelli, 865 F.2d 1352, 1363 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989).

135. *See Porcelli*, 865 F.2d at 1362-63; *see also* Gerard E. Lynch, *RICO: The Crime of Being Criminal, Parts I & II*, 87 COLUM L. REV. 661, 709 (1987).

136. United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987); United States v. Washington, 797 F.2d 1461, 1477 (9th Cir. 1986); United States v. Cauble, 706 F.2d 1322, 1349-50, *reh'g denied*, 714 F.2d 137 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

137. MASFA § 4(e).

138. *See, e.g., id.* §§ 6, 11-13.

139. *See, e.g., Porcelli*, 865 F.2d at 1364-66; *Busher*, 817 F.2d at 1414-15.

140. *See* EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATT'Y'S MANUAL § 9-110.414 (1992). The section reads, in pertinent part:

course, if the civil label attached to enterprise forfeiture under the MASFA was given effect, federal precedent would suggest that the Eighth Amendment poses no obstacle to civil forfeiture regardless of its magnitude. Such a broad scope of forfeiture, however, could not possibly be justified under a taint rationale, because enterprise forfeiture is not premised on taint.

IV. CRIMINAL VS. CIVIL SANCTIONS

Implicit in the contention that all forfeitures can be characterized as "civil" is the assumption that the confiscation of an owner's property for his criminal conduct is fairly described as a remedial and nonpunitive sanction. The Arizona forfeiture statute makes this assumption explicit, declaring that a forfeiture action "is remedial and not punitive."[141] As applied to the forfeiture of untainted assets, such a contention is contradicted by approximately two centuries of federal forfeiture precedent.[142] Accordingly, if federal forfeiture principles and their common law ancestors, govern the issue, the punitive label would attach to such a sanction, thereby triggering the multiple constitutional protections that attend the imposition of such a sanction.

Wholly apart from federal forfeiture law and its peculiar history, however, the same punitive classification is obtained when the forfeiture of untainted assets is analyzed as a question of the proper constitutional characterization of such a government sanction. The dividing line between criminal and civil prosecutions by the government has never been especially bright. The Supreme Court has attempted to provide general lines of demarcation, but its views have been unclear, and at times, inconsistent. Nonetheless, the Court has offered some general guidance.

The traditional test to determine whether federal legislation is penal in character was set forth in *Kennedy v. Mendoza-Martinez*.[143] The Court outlined the following criteria:

> Whether the sanction [1] involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only upon a finding

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> In deciding whether forfeiture . . . is appropriate, the [Organized Crime and Racketeering] Section will consider the nature and severity of the offense; the government's policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime.

Id.

141. *See* ARIZ. REV. STAT. ANN. § 2314(N) (1989 & Supp. 1994-95).

142. *See supra* Part II.

143. 372 U.S. 144 (1963).

> of *scienter,* [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .[144]

These seven factors are not exhaustive[145] and "may often point in differing directions."[146] Nonetheless, the *Mendoza-Martinez* factors constitute the definitive test for characterizing a statute as either penal or civil. Again, as the scope of "civil" forfeiture legislation moves beyond tainted assets to encompass legitimate assets, either under substitute asset forfeiture or enterprise forfeiture, the case for a criminal label is strengthened under the *Mendoza-Martinez* factors. Moreover, as the *Austin* opinion makes clear, once a forfeiture becomes so punitive as to satisfy the *Mendoza-Martinez* factors, "protections associated with criminal cases may apply to a civil forfeiture proceeding."[147]

For example, the forfeiture of legitimately acquired or maintained assets certainly qualifies as an affirmative disability. In the *Mendoza-Martinez* opinion, the Supreme Court offered as examples of such affirmative disabilities legislation which had excluded alleged subversives from government employment[148] and the exclusion of former Confederates from federal court practice.[149] Deprivation of lawfully obtained property is similar enough to qualify as an affirmative disability. Also, because the forfeiture of untainted property has historically been regarded as punishment, dating back as far as feudal times, the second *Mendoza-Martinez* factor points to a punitive label. Accordingly, the first two *Mendoza-Martinez* factors weigh in favor of a punitive classification for the forfeiture of legitimate assets.

The need for a finding of scienter, the third *Mendoza-Martinez* factor,[150] is difficult to apply in this context. Traditionally, the

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144. *Id.* at 168-69 (footnotes omitted).

145. *See* United States v. Ward, 448 U.S. 242, 250 (1980).

146. *Mendoza-Martinez*, 372 U.S. at 169.

147. Austin v. United States, 113 S. Ct. 2801, 2804 n.4 (1993).

148. *See Mendoza-Martinez*, 372 U.S. at 168 n.22 (citing United States v. Lovett, 328 U.S. 303, 316 (1946) (invalidating § 304 of The Urgent Deficiency Appropriation Act of 1943, Pub. L. No. 132, 57 Stat. 431, 450, which prohibited payment of salaries of government employees designated subversive by the House Committee on Un-American Activities)).

149. *See Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

150. *Mendoza-Martinez*, 372 U.S. at 168.

forfeiture of untainted property has required a finding of scienter—criminal *mens rea*; however, here the government eludes such a burden by simply eliminating intent as a relevant issue in their civil forfeiture case-in-chief. The loss of the property to forfeiture, absent proof of a statutory claim of "innocence," certainly injects the issue of scienter into a civil forfeiture proceeding. That is, the stigma inherent in a finding of scienter is clearly present.[151]

Most certainly, given that the avowed purposes of this expansion of forfeiture law are to further the objectives of criminal enforcement, its "operation will promote the traditional aims of punishment, retribution and deterrence."[152] In addition, there can be no doubt that "the behavior to which it applies is already a crime," thus pointing to a punitive characterization under the fifth *Mendoza-Martinez* factor.[153]

The sixth *Mendoza-Martinez* factor, whether an alternative purpose can rationally be assigned to the sanction of forfeiture of legitimate assets, is not as easily answered. Advocates of such civil forfeiture contend that it furthers criminal enforcement objectives; however, they offer no "alternative purpose" justifying a nonpunitive assessment. Proponents of civil forfeiture of legitimate assets, on the other hand, urge that it does have an alternative purpose. For example, according to a representative of the Arizona Attorney General's office, the "fundamental purpose [of the Arizona statute] is 'social engineering' accomplished through government intercession in commercial activity harmful to the economy as a whole."[154] With such a broad charter, it is hard to imagine any sanction that could not be so justified.

Stripped to its essentials, however, the civil forfeiture of legitimate assets still depends for its *raison d'etre* on the need to deter or punish criminal conduct of the property owner. Nor can the societal need to deter negligence by property owners, a historic rationale for some civil forfeitures,[155] be ascribed as a purpose justifying civil forfeiture of legitimate assets; if assets have no nexus to criminal activity, then their owner has not been negligent in their supervision.

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151. *Id.* (citing Helwig v. United States, 188 U.S. 605, 610-12 (1903)).

152. *Id.*

153. *See id.*

154. *See* Holmes, *supra* note 117.

155. Under English common law, the law of deodand mandated forfeiture of property that caused the death of another. *See* Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodand, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 180-81 (1973). The purpose of deodand was to deter negligence by property owners. Deodand was abolished in England in 1846. *Id.* at 170-74. *See also* 77 J. HANSARD, PARLIAMENTARY DEBATES 1031 (1845).

A tabulation of the *Mendoza-Martinez* factors, therefore, strongly suggests that the "civil" forfeiture of legitimate assets falls on the criminal side of the constitutional scales. This conclusion is further buttressed by recent forays of the Supreme Court in its evolving attempt to distinguish between criminal and civil sanctions.[156]

Finally, language from both the majority and concurring opinions in *Austin v. United States* offers support for the contention that untainted assets are not subject to civil forfeiture.[157] The majority in *Austin* rejected the government's argument that by removing property that is not contraband, but nonetheless constitutes the "instruments" of drug crimes, civil forfeiture serves a "remedial" purpose.[158] The *Austin* majority held that the forfeitures sought in that case—real property, which had allegedly "facilitated" a drug offense—were no more the "instruments" of crime than was the automobile used to convey illegal liquor in *One 1958 Plymouth Sedan v. Pennsylvania*.[159] In other words, the *Austin* majority found no remedial purpose served by the forfeiture of property which was not contraband. This, of course, does not mean that the forfeiture of facilitation property is impermissible or unconstitutional. It does mean, however, that when one moves one step further from crime—from forfeiting facilitation property to forfeiting wholly legitimate property unrelated to crime—the claim for a characterization of the government's forfeiture as "remedial" is virtually untenable.

By far the most compelling argument against the civil forfeiture of substitute assets lies in the concurring opinion of Justice Scalia in *Austin*.[160] Justice Scalia agreed with the majority that the civil forfeiture of noncontraband property must be deemed punitive for Eighth Amendment purposes.[161] He suggested, however, that "an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur."[162] Instrumentalities are properly

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156. *See supra* Part II.

157. *See* Austin v. United States, 113 S. Ct. 2801, 2809 (1993) (Blackmun, J., delivering the opinion of the Court); *id.* at 2814 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2816 (Kennedy, J., concurring in part and concurring in the judgment).

158. *Id.* at 2811.

159. 380 U.S. 693 (1965).

160. *Austin*, 113 S. Ct. at 2812 (Scalia, J., concurring in part and concurring in the judgment).

161. *Id.* at 2814-15 (Scalia, J., concurring in part and concurring in the judgment).

162. *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment).

forfeited, however, regardless of their value, if the "confiscated property has a close enough relationship to the offense."[163] In other words, Justice Scalia would sustain a large forfeiture from an Eighth Amendment challenge for excessiveness if the relationship between the property and the offense was sufficiently close to make the property tainted or "guilty" under traditional standards. According to Justice Scalia, "our cases suggest a similar instrumentality inquiry when considering the permissible scope of a statutory forfeiture."[164]

Justice Scalia's concurring opinion in *Austin* embodies a reaffirmation of the taint doctrine of, and justification for, civil forfeiture. Under his reasoning, the civil forfeiture of wholly legitimate assets—which by definition have no connection to criminal activities—would appear to constitute an Eighth Amendment violation per se. As this article suggests, limiting civil forfeitures to tainted property, or the "instrumentalities" of crime, is also consistent with traditional forfeiture precedent. Of course, if the Eighth Amendment precludes the civil forfeiture of lawful property unrelated to crime, then state and federal legislators are prohibited from authorizing such a practice.

V. CONCLUSION

Historically, forfeiture has been an effective law enforcement weapon, beginning with customs laws and extending to criminal laws. In many ways, civil forfeiture, with its diminished procedural protections, is a peculiar legal doctrine formed out of a desire to further enforcement objectives at the expense of the wide-ranging constitutional protections of our criminal jurisprudence. Recognizing this tension, the Supreme Court long ago gave such civil forfeitures of tainted assets the special status of "quasi-criminal," thereby justifying imposition of some, but not all, of the constitutional safeguards incident to criminal prosecutions.[165]

Today, motivated by a desire for enhanced enforcement, some states have attempted to push civil forfeitures beyond their historical and legal limits by imposing broad forfeitures on untainted assets by means of civil procedures. Such an effort runs counter to two centuries of forfeiture precedent and to the evolving distinction between civil and criminal sanctions drawn by the Supreme Court. Accordingly, the Constitution will not tolerate the civil forfeiture of untainted legitimate assets, however well-intentioned the effort.

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163. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

164. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

165. *See supra* notes 34-40 and accompanying text.