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Deborah Duseau

David Schoenbrod

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OVERBROAD CIVIL FORFEITURE STATUTES ARE UNCONSTITUTIONALLY VAGUE*

DEBORAH DUSEAU** & DAVID SCHOENBROD***

I. INTRODUCTION

Eager to lock up Dan the drug dealer, the police tell his neighbor, Sarah, to spy on him. Sarah has taken no part in Dan's criminal activity. In fact, she has told her fifteen-year-old son, who hangs out on the front steps of her home, that he should not even speak to Dan. Dan slips the lad a few bucks now and then for calling out when a police cruiser is about to roll by during drug deals. When Sarah refuses to do the police's bidding, the prosecutor seizes her home under a statute that authorizes forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter."¹

Sarah may bring an action to get her home back, but will succeed only if she can show that her property does not meet this broad description or that the crime was "committed . . . without [her] knowledge or consent" ² She would likely lose. A crime was committed, her front steps were a lookout, she knew of the crime and might have done more to stop it. Moreover, under some state civil forfeiture statutes, even less protection is afforded owners, and Sarah could lose her home even if she had no knowledge that any crime was being committed.³

Prosecutors defend civil forfeitures by pointing out that, typically, they are less outrageous than that of Sarah's home.⁴ This is insufficient

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** J.D., 1994, New York Law School

*** Professor of Law, New York Law School.

1. 21 U.S.C. § 881(a)(7) (1988).

2. *Id.*

3. *See, e.g.*, P.R. LAWS ANN., tit. 24, § 2512(a)(4), (b) (1979) (lacking an express innocent-owner defense).

4. *See, e.g.*, *United States v. Boeing 707 Aircraft*, 750 F.2d 1280 (5th Cir.), *cert. denied*, 471 U.S. 1055 (1985) (permitting forfeiture of weapons and one Boeing 707 which were directly involved in an illegal attempt to export arms without a proper license); *United States v. 5.935 Acres of Land*, 752 F. Supp. 359 (D. Haw. 1990) (finding that forfeiture of the defendants' land was appropriate because defendants were convicted of growing and distributing marijuana on that parcel of land); *United States v. Lot 4, Block 5 of the Eaton Acres*, 712 F. Supp. 810 (D. Or. 1989), *rev'd*, 904 F.2d 487 (9th Cir. 1990) (finding real property used in actual delivery of cocaine was subject to

comfort for two reasons. First, civil forfeiture statutes are unconstitutionally overbroad. Although the typical forfeiture case would involve Dan's drugs, guns, and profits rather than Sarah's home, many cases are not so typical. The authorities may attempt to seize her property solely because she refused to cooperate in their investigation because they suspect her of some crime for which they cannot charge her, or simply to raise money for their departmental budget.⁵ The court may decide not to return her property if it fits the statute's broad definition of forfeitable property. In our view, civil forfeiture statutes are unconstitutionally overbroad because, in many cases, they authorize taking property without just compensation in violation of the Takings and Due Process clauses of the Fifth Amendment and impose excessive fines in violation of the Excessive Fines Clause of the Eighth Amendment.

Second, and more important, civil forfeiture statutes are unconstitutionally vague. This vagueness is important not only in the atypical cases such as Sarah's, but also in more common cases because police and prosecutors have broad discretion to decide which property to seize, and owners lack notice of the operational limits on forfeiture.

The overbreadth and vagueness points are related. Because courts limit the overbreadth of civil forfeiture statutes in a piecemeal fashion, the statutes, as written and interpreted, fail to provide sufficient notice of what conduct is prohibited. As a result, the statutes are unconstitutionally vague. There are four ways to prevent statutes from being unconstitutionally overbroad. First and ideally, the statute itself could establish generally applicable limits that are consistent with the Constitution. Second, if a broad construction of the statute makes it overbroad, the courts could interpret it narrowly to establish generally applicable limits that are consistent with the Constitution. Third, if the statute cannot be interpreted to avoid violations, the courts could strike it down as unconstitutional. Fourth, the courts could let the statute stand, and deal with constitutional violations case by case, either through *ad hoc*

civil forfeiture). *But cf.* *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (allowing forfeiture of a yacht valued at \$19,800 on which one marijuana cigarette was discovered although the yacht's owners were neither involved in nor aware of the lessee's unlawful use of their yacht).

5. *See* *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 n.2 (1993) (excerpting a 1990 memo from the Attorney General to United States Attorneys urging an increase in the volume of forfeiture cases in order to meet the amount targeted in the budget); *see also* David Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine), at 70.

statutory interpretation or findings of unconstitutionality.⁶ The fourth approach is the path courts have taken with civil forfeiture, and it is this approach that creates vagueness.⁷

Legislatures have written the forfeiture statutes in the broadest terms politically conceivable. Congress has said that all property that can constitutionally be seized is subject to forfeiture.⁸ When confronted with hypotheticals, such as Sarah's, which demonstrates that the statutes allow seizures that can be characterized as takings or excessive fines, courts do not strike down the statutes but rather consider the overbreadth challenges *ad hoc*.⁹ As a result, it is only a mild exaggeration to say that legislatures have written the statutes, and courts have interpreted them, to permit forfeiture of all property that the government can lay its hands on, subject to constitutional limitations. These limits are specified case by case. When interpreted in this fashion, the statutes are not unconstitutionally overbroad but they are unconstitutionally vague. Even the courts are in great doubts about the parameters of the Takings and Excessive Fines clauses. The statutes fail to give ordinary people notice of what conduct is prohibited, nor do they provide adequate guidance for law enforcement personnel in order to avoid arbitrary and discriminatory enforcement.

Civil forfeiture statutes most commonly are analyzed in terms of the Eighth Amendment's Excessive Fines Clause and the Fifth Amendment's

6. See, e.g., *United States v. Ford Coupe Auto.*, 272 U.S. 321, 333 (1926) (relying on *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921) in refraining from striking down a forfeiture statute based on potential but unargued claims).

7. See *infra* notes 83-116 and accompanying text.

8. Congress' motivation in authorizing forfeiture of certain kinds of property shows the far-reaching and punitive nature of 21 U.S.C. § 881. It is the intent of these provisions to authorize forfeiture of property "if such property is used, or intended for use, in the manufacture or distribution of illegal drugs or used or intended to be used to facilitate certain violations of the Act." See 1978 U.S.C.C.A.N. 9518, 9522. Furthermore, a congressional panel reviewing the purpose of the 1984 amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970 noted that few in Congress or law enforcement "fail to recognize that the traditional sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable [drug] trade . . . which is plaguing the country . . . [F]orfeiture is the mechanism through which such an attack may be made." 1984 U.S.C.C.A.N. 8182, 3374; see also *United States v. 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 424 (2d Cir. 1977) (identifying the "[c]ongressional concern [over] rising drug trafficking in this country and its conviction that those who profit and thrive upon the misery of drug addicts should be punished financially by forfeiture").

9. See *supra* note 6 and accompanying text.

Takings and Due Process clauses, but not for vagueness.¹⁰ Although litigants have occasionally raised this claim, courts have either misunderstood the vagueness claim as an attack on the vagueness of the underlying criminal statute that predicated the forfeiture rather than an attack on the vagueness of the forfeiture statute itself, or rejected the claim with little or no analysis.¹¹ These courts reject the vagueness challenge on the basis that the crime is clearly and specifically defined and, thus, provides adequate notice of the underlying crime and its possible punishments.¹² However, the notice provided by criminal statutes to criminal defendants does not notify non-criminal property owners, such as Sarah, that their property may be forfeited. Still other courts reject the vagueness claim on the basis that, regardless of whether the criminal statute is vague, conviction for the crime is not necessary for forfeiture.¹³

Part II of this article identifies three narrow justifications for forfeiture of property that are consistent with the Constitution and shows that two much broader justifications relied upon by prosecutors to support forfeiture statutes cannot be squared with constitutional protections. The results demonstrate that civil forfeiture statutes are overbroad.¹⁴ Part III

10. See, e.g., Steven L. Kessler, *Forfeiture and the Eighth Amendment*, N.Y. L.J., July 26, 1993, at 1 (finding that only recently have courts expanded their analysis of forfeiture statutes to criticize the disproportionately punitive nature of civil forfeiture statutes because the previous rationale of punishing "nameless, faceless drug dealers who have no rights anyway" does not support the required nexus between the financial relationship of the property forfeited to the underlying criminal activity). See also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987); *United States v. Walsh*, 700 F.2d 846 (2d Cir.), cert. denied, 464 U.S. 825 (1983).

11. See, e.g., *United States v. Parcels of Land*, 903 F.2d 36 (1st Cir. 1990); *United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989); *Murphy v. Matheson*, 742 F.2d 564 (10th Cir. 1984); *United States v. 1606 Butterfield Rd.*, 786 F. Supp. 1497 (E.D. Iowa 1991); *United States v. 26.075 Acres, More or Less*, 687 F. Supp. 1005 (E.D.N.C. 1988), *aff'd in part and rev'd in part*, 866 F.2d 1538 (4th Cir. 1989); *Windfaire, Inc. v. Busbee*, 523 F. Supp. 868 (N.D. Ga. 1981).

12. See, e.g., *Windfaire, Inc.*, 523 F. Supp. at 872; *United States v. Boffa*, 513 F. Supp. 444, 457-58 (D. Del. 1980). But see Steven L. Kessler, *Tide is Turning in Federal Forfeiture Rulings*, N.Y. L.J., Mar. 5, 1993, at 1 (reasoning from recent court opinions that it may no longer be enough to say that the defendant is a criminal and should have known better before subjecting his property to forfeiture proceedings). Of course, any vagueness in the underlying criminal statute would necessarily create vagueness in the corresponding forfeiture statute.

13. See, e.g., *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 733 (C.D. Cal. 1994).

14. See *infra* notes 16-81 and accompanying text.

explains that the overbreadth in the forfeiture statutes leads to unconstitutional vagueness.¹⁵

II. CIVIL FORFEITURE STATUTES ARE OVERBROAD

A. *A Fresh Look at the Takings Issue*

The Takings Clause of the Fifth Amendment provides that no “private property [shall] be taken . . . without just compensation.”¹⁶ Accordingly, the United States Supreme Court has repeatedly held that takings without just compensation are unconstitutional.¹⁷ However, civil forfeiture actions are an exception to this line of cases. Accordingly, we consider under what circumstances forfeiture can be reconciled with the general principles of takings law.

First, we identify and discuss three justifications that are consistent with constitutional principles: (1) forfeiture of contraband; (2) forfeiture of fruits of the crime; and (3) forfeiture to punish violators. Next, we consider two purported justifications for forfeiture that are inconsistent with the constitutional principles of due process and the taking of property: (1) that the property forfeited is an instrument of death and (2) that the property is the instrument of crime. This discussion presents those justifications which are consistent with the Constitution and those which are not.

1. Legitimate Rationales for Forfeiture

a. Contraband

The forfeiture of contraband, such as illegal drugs, is not a taking of property because contraband, by definition, is not supposed to be owned.¹⁸ Sarah’s home cannot be considered contraband. Although contraband is defined by the legislature, a legislature could not readily say

15. See *infra* notes 82-125 and accompanying text.

16. U.S. CONST. amend. V.

17. E.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Delaware & Hudson Co.*, 213 U.S. 366 (1909); *Ewing v. City of St. Louis*, 72 U.S. 413 (1866).

18. The United States Supreme Court has defined contraband as “objects the possession of which, without more, constitutes a crime.” *1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). Further, public policy dictates that the owner has no right to have the contraband returned. *Id.* See, e.g., *United States v. Jeffers*, 342 U.S. 48, 52-53 (1951) (defining contraband goods as those in which Congress has declared no property rights exist).

her home is contraband.¹⁹ A statute declaring homes such as Sarah's to be contraband would be unconstitutional.

Regulations generally may not completely deprive an owner of a property's value unless that property is a nuisance.²⁰ Moreover, a legislative determination declaring a particular class of property to be contraband would infuriate all owners of that class of property. Thus, Sarah would have many allies in the political process with whom to fight such legislation.

b. Fruits of the Crime

The forfeiture of fruits of the crime—for example, proceeds from the sale of drugs or profits from fraud—is not a taking of property because these proceeds are “unjust enrichment” under the law of restitution.²¹ Under the “fruits of the crime” doctrine, the criminal actor may not benefit from illegal activity; therefore, proceeds are forfeited to return the criminal to the position he was in before committing the crime.

Following this logic, the forfeiture of Sarah's home cannot be justified as depriving her of the fruits of a crime. Sarah's ownership of her house was not a proceed of any illegal activity.

c. Punishing Violators

Forfeiture of property owned by a lawbreaker is not considered a taking when it is punishment for the violation.²² If the violation is deemed criminal, then the government must show beyond a reasonable doubt that the owner violated the law. In addition to criminal punishment,

19. See *United States v. Farrell*, 606 F.2d 1341 (D.C. Cir. 1979). The court stated that the law recognizes two categories of contraband. *Id.* at 1344. First, traditional or *per se* contraband is defined as “objects the possession of which, without more, constitutes a crime.” *Id.* (citing *1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)). Second, derivative contraband includes “articles which are not inherently illegal, but are used in an unlawful manner.” *Id.* (quoting *People v. Steskal*, 302 N.E.2d 321 (Ill. 1973)) (footnote omitted).

For examples of state statutes defining contraband, see MINN. STAT. ANN. § 609.531(e) (West 1987) (defining “contraband property” as “property which is illegal to possess under Minnesota law”); R.I. GEN. LAWS § 21-28-5.06 (1989) (defining contraband as “[a]ll controlled substances which may be handled, sold, possessed, or distributed in violations of any of the provisions of this chapter”).

20. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).

21. GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 23.1, at 342-45 (1978).

22. See, e.g., Steven L. Kessler, *Protecting the Homestead from Forfeiture*, N.Y. L.J., Sept. 14, 1994, at 1, 4 (asserting that forfeiture is permissible because the law provides for punishment of persons convicted of illegal activity).

the Supreme Court has also allowed the government to impose civil punishments.²³ In prosecuting civil offenses, the government need only show by a preponderance of the evidence that the owner violated the law.²⁴ Paradoxically, most civil forfeiture statutes do not require the government to shoulder the burden of proving a violation. To the contrary, they require the owner to prove her innocence.²⁵ Using the concept of civil punishment to justify forfeiture without proving the owner committed a civil offense violates the Due Process Clause. The violation can be cured, however, by placing the initial burden of proof on the government.²⁶

2. Illegitimate Rationales for Forfeiture

In addition to the three legitimate rationales for forfeiture, law enforcement officials and the courts rely upon other rationales that cannot be squared with general principles of the Takings Clause or due process.

a. Instruments of Death

At early common law, inanimate objects that caused death (called "deodands") were forfeited to the king on the theory that the instrument itself was guilty of the crime. The king, it was said, would expiate that guilt by providing money for Masses held for the good of the victim's soul. Modern courts confirm that the deodand never became part of the common law of the United States.²⁷ Nonetheless, courts repeatedly refer

23. *United States v. Halper*, 490 U.S. 435, 450 (1989).

24. *See Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 308 (1971) (noting that the usual rule of evidence applicable to civil actions in federal court is that of preponderance of evidence).

25. *E.g.*, 21 U.S.C. § 881(a)(7) (1988) ("no property shall be forfeited . . . by reason of any act . . . established by that owner to have been committed . . . without [his] knowledge [or] consent . . .") (emphasis added).

26. *See Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991). The court held that the state bears the burden of proof by clear and convincing evidence at trial because of the significance of the constitutionally protected rights at issue. *Id.* at 967. The court reasoned that, in forfeiture proceedings, the "state impinges on basic constitutional rights of individuals who may never have been formally charged," and therefore the state must carry the burden of proof. *Id.*

27. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974).

to the theory of the deodand to justify forfeiture.²⁸ This judicial reliance on the deodand is misplaced.

As in Sarah's case, most forfeited property is not an instrument of death.²⁹ Even if Sarah's front steps were thought to be an instrument of death in some indirect sense, imputing guilt to an object is silly animism.

Such animism once served a purpose that was not so silly. As Oliver Wendell Holmes pointed out, the deodand theory sheltered people from the repulsion generally felt towards true instruments of death—for example, a knife that was plunged into someone's back.³⁰ Few people could bear the thought of pulling the knife out, washing it off, and using it to make dinner. But, modern forfeiture does not serve the purpose of protecting us from such repulsion. Today, rather than offering the instrument to God and holding Masses to benefit the victim's soul, the instruments of death are kept in the police evidence room. No expiation from guilt occurs for the general public. Instead, modern forfeiture serves the purpose of enriching the state. Enriching the state without more, however, does not justify taking private property.

b. Instruments of Crime

Courts sometimes justify forfeiture on the basis that it prevents the use of instruments of crime. After all, no one has a constitutionally protected right to use property to harm others.³¹ This rationale would support

28. See, e.g., *United States v. United States Coin & Currency*, 401 U.S. 715, 719-20 (1971) (stating that "modern forfeiture statutes are direct descendants of [the deodand] heritage"); *United States v. Securities That Represent Robbins' Interest*, No. 87 CV. 2544 (RJD) (S.D.N.Y. Sept. 29, 1987), at 14 (explaining that the concept of deodands was adopted through forfeiture statutes to serve a deterrent function); *United States v. One Parcel of Real Estate*, 675 F. Supp. 645 (S.D. Fla. 1987) (asserting that the theory of the deodand is appropriate in an action seeking forfeiture of property that is proceeds of illegal activity).

29. See, e.g., *Calero-Toledo*, 416 U.S. 663 (property forfeited was a pleasure yacht); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994) (property forfeited was the claimant's house.)

30. See OLIVER W. HOLMES, *THE COMMON LAW* 24-30 (Mark D. Howe ed., Harvard Univ. Press 1963) (1881).

31. The legal maxim underlying much of modern nuisance law is *sic utere tuo ut alienum non laedas*, literally meaning "one should use his own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (6th ed. 1990); see also *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387 (1926).

forfeiting property that has no non-contrived legitimate use.³² So limited, the rationale justifies forfeiture of contraband. It does not, however, justify forfeiture of property that has non-criminal, or legitimate, uses. But, most forfeiture is of property not peculiarly suited to crime, such as real estate, automobiles, and even Sarah's home.

Justice Scalia, in a concurring opinion in *Austin v. United States*,³³ argued that postal scales, even those made of gold that are used to commit crimes, could be seized as instruments of crime no matter what their value or non-criminal use.³⁴ However, his analysis emphasizes only the relationship between the property seized and the crime committed within the limits of the Excessive Fines Clause.³⁵ Justice Scalia did not address whether the forfeiture is a taking, especially when the owner is not a proven violator.

Of course, people can be restrained from the improper use of property that has legitimate uses. For example, if the owner of a baseball bat used it to menace others, a court could enjoin the owner to stop the menacing behavior or to stop carrying the bat. If the owner could not be trusted to comply, she could be ordered to relinquish possession of the bat. But because the injunction can go no further than needed to put the owner in her rightful position,³⁶ it could not order her to surrender the bat to the state. Moreover, the party seeking the injunction had satisfied the burden of proving that the owner used or threatened to use the bat in a dangerous way. However, in the case of forfeiture, no such burden of proof is

32. *See, e.g.,* *Stallone v. Abrams*, 584 N.Y.S.2d 535, 537 (App. Div. 1992) (upholding forfeiture of items that have no non-contrived legitimate use because they come within the core meaning of the statute authorizing forfeiture of equipment that can be used in "dispensing or administering a controlled substance," N.Y. PUB. HEALTH LAW § 3387(3) (McKinney 1993)).

33. 113 S. Ct. 2801, 2812-15 (1993) (Scalia, J., concurring in part and concurring in the judgment).

34. *Id.* at 2815 (Scalia, J., concurring in part and concurring in the judgment) (pointing out that statutory *in rem* forfeitures have been fixed by determining what property has been tainted by unlawful use, not by assessing the value of the property—the penalty—in relation to the crime committed).

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

36. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (stating that, in protecting First Amendment rights, "[t]he constitutional principle at stake is sufficiently vindicated if [a person] is placed in no worse a position than if he had not engaged in the [unlawful] conduct"); *see also* *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 503-04 (1993) (holding that in the usual case, there is no reason to take the drastic step of asserting control over property when the government has various other means such as physical limitations (on real property), *lis pendens*, and restraining orders, to protect its legitimate interests in forfeitable property).

placed on the prosecution; the element of intent of the owner is absent. Thus, using forfeiture in this manner is unnecessary and unjustified.

In sum, our fresh look at takings principles has identified only three justifications that reconcile forfeiture with the takings clause: contraband, fruits of the crime, and punishing violators.

*B. Forfeiture Statutes Authorize Seizure of Property That
Is Neither Contraband, Proceeds of a Crime,
Nor Owned by a Proven Violator*

State and federal statutes empower prosecutors to seize property when they can show that (1) a crime occurred and (2) the property was connected to its commission.³⁷ The prosecutor does not have to prove that the owner committed the crime to obtain forfeiture. Instead, in defense to the forfeiture proceeding, the owner must prove that she did not know of the crime or—depending upon the court—in the alternative, that she did all that she reasonably could to prevent it.³⁸ Under such a statute, if Sarah is unable to fully assert an innocent owner defense, her property can be forfeited even though it is neither contraband, fruits of a crime, nor owned by a proven violator.

The gap between forfeitures that are reconcilable with the Takings Clause and those that are authorized by statute results from two basic features of the statutes: a broad definition of property that is connected to the crime and the treatment of the owner's innocence. This gap directly leads to the overbreadth of civil forfeiture statutes.

1. Connection Between the Property and the Crime

Statutes use broad and imprecise words to indicate which property is sufficiently connected to a crime to be forfeitable. Typical indications are that property is forfeitable if it "facilitates the commission of"³⁹ a crime or "contributes directly and materially to the commission of a crime."⁴⁰

37. See, e.g., 21 U.S.C. § 881(a) (1988 & Supp. V 1993); N.Y. CIV. PRAC. L. & R. § 1311 (McKinney 1991).

38. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (implying that forfeiture could have been avoided had defendant proved that it did all it reasonably could to avoid the unlawful use of its property).

39. See, e.g., 21 U.S.C. § 881(a)(7) (1988) ("The following shall be subject to forfeiture . . . : [a]ll real property . . . used . . . to facilitate the commission of, a violation . . .") (emphasis added).

40. See, e.g., N.Y. CIV. PRAC. L. & R. § 1310(4) (McKinney 1994) ("'Instrumentality of a crime' means any property . . . whose use contributes directly and materially to the commission of a crime . . .") (emphasis added); MICH. STAT. ANN.

Such language invokes the concept of instruments of crime, but at the same time encompasses property that has legitimate uses. Taken literally, this language includes almost any object owned by a criminal. Furthermore, it sweeps in property within the vicinity of the crime even if it is not owned by the criminal, for example, Sarah's home. As a result, the language used in forfeiture statutes permits overbroad enforcement.

2. The Innocent Owner Defense

The innocent owner defense is a reaction to the overbreadth of forfeiture statutes. Traditionally, because forfeiture was justified by the property's connection to the crime rather than the owner's guilt, the actions of the owner were irrelevant.⁴¹ Early courts, therefore, held that forfeiture of property owned by an innocent person was constitutional.⁴² In response to the harshness of such holdings⁴³ an innocent owner provision was read into⁴⁴ or added to many of the forfeiture statutes.

The innocent owner defense suggests that forfeitures are justified under the Takings Clause as punishment of the guilty. But, because the prosecutor does not have to prove guilt, punishment cannot justify forfeiture. To the contrary, the owner bears the burden of proving her innocence.⁴⁵ Moreover, the innocent owner defense requires the owner to prove far more than innocence. Some courts interpret the defense as

§ 27A.4701(b) (Callaghan 1993) ("Instrumentality of a crime' means any property . . . the use of which *contributes directly and materially to the commission of a crime.*") (emphasis added).

41. *United States v. Ford Coupe Auto.*, 272 U.S. 321, 332-33 (1926); *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926) (citing *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *United States v. Stowell*, 133 U.S. 1 (1889); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877); *Logan v. United States*, 260 F. 746 (5th Cir. 1919); *United States v. One Saxon Auto.*, 257 F. 251 (4th Cir. 1919); *United States v. Mincey*, 254 F. 287 (5th Cir. 1918); *United States v. 220 Patented Machs.*, 99 F. 559 (E.D. Pa. 1900)).

42. *Van Oster*, 272 U.S. at 468.

43. *See generally Calero-Toledo*, 416 U.S. at 689 n.27 (noting that in order to avoid or mitigate harshness in forfeitures, courts have applied ameliorative policies in handling forfeitures).

44. *Id.* at 689 ("It would be difficult to reject the constitutional claim of an owner . . . [w]ho proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property . . .").

45. *See, e.g.*, 21 U.S.C. § 881(a)(4)(C) (1988) ("[N]o conveyance shall be forfeited . . . by reason of any act or omission *established by that owner* to have been committed . . . without [his] knowledge [or] consent . . .") (emphasis added).

requiring a showing that the owner had no knowledge of the illegal use and that she did not consent to the illegal use.⁴⁶ By limiting the applicability of the innocent owner defense, the courts justify forfeitures against owners who may have had knowledge of the events but did not consent to the crime. Therefore, forfeiture statutes allow seizure of property owned by a non-violator such as Sarah even though she actively opposed her son's peripheral involvement in the crime.

Other courts make it even harder for innocent owners to defend their property successfully. In *Calero-Toledo*, the Court stated in dicta that, for the defense to succeed, the owner not only had to be "uninvolved and unaware of" the illegal activity, but also had to have "done all that reasonably could be expected to prevent the proscribed use of his property."⁴⁷

Innocent owners may have difficulty meeting such burdens. Would Sarah have to kick her young son out of the house or spy on him for the police? If Dan were Sarah's tenant, would she have to evict him? Addressing the latter query, New York City's Housing Code has particular sections dedicated to evicting tenants involved with drugs.⁴⁸ Actions such as these, however, are available only on the recommendation of the prosecutor. Indeed, because Sarah did not cooperate with police, she is unlikely to win the prosecutor's recommendation to avoid having her house seized. Therefore, the innocent owner defense does not sufficiently protect against seizures by way of overbroad forfeiture statutes.

C. *How Courts Justify the Overbreadth of Forfeiture Statutes*

1. Precedent

Rather than taking a fresh look at whether modern forfeiture statutes accord with generally applicable principles of the Constitution, courts base their justification of forfeitures primarily on precedent. As early as 1920,

46. See *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (per curiam) (holding that a § 881(a)(7) claimant's knowledge of the illegal activity disqualified him from relying on the lack of consent provision of the innocent owner defense). But see *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 50 (E.D.N.Y. 1989) (analyzing § 881(a)(7) to be read in the disjunctive and thus allowing the owner to employ the defense if he can show either absence of knowledge or absence of consent).

47. *Calero-Toledo*, 416 U.S. at 689 (footnote omitted). The Court also recognized that when an owner neither has knowledge nor consents and does everything to avoid the illicit use, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* at 689-90.

48. N.Y. REAL PROP. ACTS. LAW §§ 711(5), 715 (McKinney 1994).

the Supreme Court stated that forfeiture actions are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."⁴⁹ Unfortunately, the precedent rested upon rickety support: a group of early cases that upheld forfeitures of ships and their cargoes involved in violations of customs laws.⁵⁰

These early smuggling cases provide weak justification for modern forfeiture statutes. Although these cases found that the property was guilty rather than the property's owner, the Court nevertheless understood that it is the ship's crew and not the ship itself who committed the crime.⁵¹ Chief Justice Marshall reasoned that it is fair to penalize the shipowner for the crew's acts because, working backwards, the ship is operated by the crew; the crew is commanded by the master; and the master is chosen and hired by the owner.⁵² However, such reasoning does not support modern forfeiture practice because its premise is that the non-criminal owner has the means available to stop the crime. This premise made sense in the early smuggling cases. In those cases, the ship's master was not just an employee of the owner, but frequently a partner, joint venturer, or at the least an agent of the owner—an alter ego rather than an employee.⁵³ In fact, the master ruled with a whip. Today, on the other hand, because of social norms and legal constraints, property owners lack such control over their children, relatives, employees, tenants, and guests—any one of whom, by their actions, could subject the property to civil forfeiture.

Despite such lack of control, *respondeat superior* has been used to justify the seizure of property under forfeiture statutes.⁵⁴ However,

49. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1920) (citing *Dobbins's Distillery v. United States*, 96 U.S. 395, 401-02 (1877)).

50. See George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 N.Y.L. SCH. L. REV. 121, 121-23 (1994); see also *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *Dobbins's Distillery*, 96 U.S. 395.

51. *Dobbins's Distillery*, 96 U.S. at 401 (stating that, in the typical case, the owner of a ship "impliedly submits to whatever the law denounces as a forfeiture attached to the ship by means of [the crew's] unlawful or wanton misconduct").

52. *United States v. The Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1818) (No. 15,612).

53. See *The Schooner Freeman v. Buckingham*, 59 U.S. 182 (1855) (recognizing this role of a ship's master). See generally Daniel E. Murray, *History and Development of the Bill of Lading*, 37 U. MIAMI L. REV. 689, 692-93 (1983) (discussing the relationship between ship master and owner).

54. See, e.g., *Harris v. Mississippi Real Estate Comm'n*, 500 So. 2d 958, 963 (Miss. 1987) (stating that under certain circumstances *respondeat superior* can apply to civil forfeiture proceedings). See generally *Vann v. District of Columbia Bd. of Funeral Directors and Embalmers*, 480 A.2d 688 (D.C. 1984); *Davis v. Missouri Real Estate*

forfeiture involves considerations unlike those in tort where the *respondeat superior* theory is used. In tort, the choice is whether the employer or the victim shall suffer the loss. In contrast, the purpose of forfeiture is not to allocate risk as in tort. Rather, its purpose is to punish.⁵⁵

Perhaps recognizing that the analogy between forfeiture and *respondeat superior* in tort is weak, the Supreme Court in *Austin v. United States* identified that, in early forfeiture cases, the forfeiture was justified by the owner's negligence in failing to prevent the crime.⁵⁶ In his concurrence, however, Justice Scalia disagreed that negligence is pervasively discernible in the cases upholding forfeiture.⁵⁷ In fact, he argued, the issue of whether negligence is constitutionally required has always been reserved for future decision.⁵⁸ Further, justifying forfeiture by the owner's negligence is wrong for a far more fundamental reason: culpability is not an element of forfeiture statutes and the government, therefore, does not have to prove it as an element of the crime.⁵⁹

As a result, forfeiture defendants inappropriately become strictly liable for failure to prevent crimes connected in some loose sense to their property. The government had a far stronger justification for imposing strict liability in the early smuggling cases—protecting America's borders—than it does in the more common sorts of modern forfeiture. When protecting our borders, the government's powers are particularly great.⁶⁰ This is because entry of a ship and cargo into this country is arguably a privilege that could be denied. It could also be conditioned upon a duty to refrain from customs violations at the peril of having the ship and cargo forfeited. This line of reasoning cannot, however, impose a strict duty, and thus strict liability, upon owners of real or personal property within our borders in order to prevent crime. First, the

Comm'n, 211 S.W.2d 737 (Mo. Ct. App. 1948).

55. See *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (stating that forfeiture under 21 U.S.C. § 881(a)(4) and (7) constitutes punishment); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See generally *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1920) (discussing the position of forfeiture in punitive and remedial jurisprudence).

56. *Austin*, 113 S. Ct. at 2807.

57. See *id.* at 2814 (Scalia, J., concurring in part and concurring in the judgment) ("We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures.").

58. See *id.* (Scalia, J., concurring in part and concurring in the judgment).

59. See, e.g., 21 U.S.C. § 881(a) (1988 & Supp. V 1993).

60. See, e.g., *United States v. Martinez*, 481 F.2d 214, 218, *reh'g denied*, 481 F.2d 1404 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (stating that, unlike other searches which require probable cause, border searches require only a reasonable suspicion that customs laws are being violated); 19 U.S.C. § 482 (1988).

Constitution provides procedural safeguards to limit the government's ability to seize property.⁶¹ Second, while the ship owner's affirmative duty arises at the time of entry into the country, the property owner's duty exists at all times. The strict duty to prevent crime, in effect, drafts the property owner into the police force involuntarily and without pay. The police did precisely this to Sarah.

Finally, even if Congress or state legislatures have the power to impose strict liability on property owners like Sarah for failure to prevent crime, it is doubtful that they have intended to do so. No forfeiture statute speaks explicitly of a duty to prevent crime. Legislators probably did not consider imposing any such duty because it would be highly unpopular with their constituents. Moreover, even if forfeiture statutes could be construed to include such a duty, they should be interpreted more narrowly for at least two reasons. First, courts disfavor interpretations that unnecessarily raise constitutional issues. Second, courts generally reason that legislators will speak explicitly and clearly when they intend a radical departure from current expectations and traditions of duties to prevent crimes. Therefore, because case law decisions are justified by outdated forfeiture purposes, today's courts should reevaluate today's forfeiture laws in light of today's purposes.

2. Public Purpose

The Supreme Court has sometimes tried to justify forfeiture of the property of innocent owners on the basis that it serves an important public purpose. In *J.W. Goldsmith, Jr.-Grant Co. v. United States*,⁶² while searching for further justification of forfeiture statutes, the Supreme Court recognized the power of Congress to raise revenues and fashion domestic policy.⁶³ In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁶⁴ the Court articulated public policy, stating that "forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable."⁶⁵

61. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law").

62. 254 U.S. 505 (1921).

63. *Id.* at 510.

64. 416 U.S. 663 (1974).

65. *Id.* at 686-87.

However, public purpose justifies a taking *with* just compensation, not without.

More fundamentally, punishment without proof of wrongdoing violates the due process protection of the Constitution. The Supreme Court recently expanded the due process protection afforded owners of property in civil forfeiture cases. In *United States v. James Daniel Good Real Property*,⁶⁶ the Court said that, but for "‘extraordinary situations where some valid government interest is at stake,’" a pre-seizure hearing is required before the government can seize real property.⁶⁷ Following this expansion of due process rights, the Court's next step should be to require the government to prove criminal wrongdoing on the part of the property owner.

Although courts use questionable reasoning to justify civil forfeiture statutes, they leave open the possibility that such statutes may authorize forfeitures that are takings.⁶⁸ But, instead of considering whether the statutes are overbroad on their face, courts decide takings challenges on an *ad hoc*, case-by-case method.⁶⁹

D. *The Excessive Fines Clause*

The United States Supreme Court has recognized that the Excessive Fines Clause applies to civil forfeitures as well as criminal forfeitures.⁷⁰ In *Austin*, the government seized Austin's mobile home and auto body shop pursuant to 21 U.S.C. § 881(a)(4) and (7).⁷¹ By seeking forfeiture, the government contended that the seizure of Austin's property was remedial rather than punitive in nature,⁷² and therefore not limited by the Excessive Fines Clause. The defendant argued that the Eighth Amendment's prohibition against excessive fines was not limited to criminal proceedings.⁷³ The Court determined that this forfeiture was

66. 114 S. Ct. 492 (1993).

67. *Id.* at 501 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)); *see also* Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 34-36 (1994).

68. *See Calero-Toledo*, 416 U.S. 663.

69. *See supra* note 6 and accompanying text.

70. *See Austin v. United States*, 113 S. Ct. 2801 (1993); *Alexander v. United States*, 113 S. Ct. 2766 (1993).

71. *Austin*, 113 S. Ct. at 2803.

72. *Id.* at 2804-05.

73. *Id.* at 2805-06; *see also* *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267-77 (1989) (detailing the history of the Excessive Fines Clause and noting that it was intended to prevent the government from abusing its power to

punitive as opposed to remedial and accordingly was subject to the limitations of the Excessive Fines Clause and that the government's contention that the forfeiture was remedial was unsupported.⁷⁴ Consequently, the Court remanded the case to determine whether the seizure of Austin's property was excessive.⁷⁵

Similarly, in *Alexander v. United States*, the Supreme Court vacated and remanded the district court's decision ordering petitioner to forfeit his entire business and almost \$9 million acquired through illegal racketeering activity.⁷⁶ The Court held that the Cruel and Unusual Punishments and the Excessive Fines clauses must be considered independently of each other.⁷⁷ The Court was concerned that the criminal forfeiture at issue was a monetary punishment within the traditional definition of the word "fine."⁷⁸ Accordingly, the Court stated that the forfeiture should have been analyzed under both the Excessive Fines and Cruel and Unusual Punishments clauses.⁷⁹ By failing to expressly analyze the penalty under each clause, the lower court may have improperly determined whether the forfeiture was excessive.⁸⁰ As in *Austin*, the Court emphasized that historical interpretation and legislative intent require that the seizure of Alexander's property be explicitly analyzed from the standpoint of the Excessive Fines Clause as well as the Cruel and Unusual Punishments Clause.⁸¹

However, despite *Austin* and *Alexander*, the Supreme Court has given lower courts little guidance as to the precise criteria applicable to an Eighth Amendment analysis. Presently, the limits placed on forfeiture by

punish, and noting that in a historical context, the word "fine" was understood to mean punishment).

74. *Austin*, 113 S. Ct. at 2812. In reaching this conclusion, the Court noted that the historical understanding of forfeiture as punishment, combined with the focus of the statute on the "culpability of the owner, and the evidence that Congress understood [the statute's] provisions as serving to deter and to punish," does not support the government's assertion that forfeiture is solely remedial in nature. *Id.*

75. *Id.* (directing the Second Circuit to determine if the forfeiture of Austin's property, which had non-criminal uses and was only incidentally involved in the crime, was excessive).

76. *Alexander v. United States*, 113 S. Ct. 2766, 2770 (1993).

77. *Id.* at 2775.

78. *Id.* at 2775-76.

79. *Id.* at 2776.

80. *Id.* at 2775-76 (finding that the district court "lumped the two [clauses] together" and, therefore, in a general statement concerning Eighth Amendment prohibitions, did not expressly resolve the question of whether the Excessive Fines Clause was violated).

81. *See id.*

the Excessive Fines Clause are determined *ad hoc*. As has been demonstrated, statutes authorize forfeiture in a wide variety of circumstances that cannot be reconciled with the Takings or the Excessive Fines clauses. As a result, the government's forfeiture power is restricted only by the Constitution and each court's *ad hoc* interpretation of those clauses; not by the language of the forfeiture statutes.

III. CIVIL FORFEITURE STATUTES ARE VOID FOR VAGUENESS

We now consider whether, as a consequence of the overbroad nature of civil forfeiture, those statutes are unconstitutionally vague. Under the "void-for-vagueness" rubric, the Supreme Court has held that vague penal statutes violate the Due Process Clause.⁸² We first examine whether civil forfeiture statutes meet the Court's vagueness standard and, second, examine whether the supposedly civil nature of civil forfeiture insulates these statutes from void-for-vagueness scrutiny.

A. Civil Forfeiture Statutes Fail the Vagueness Test

A statute is unconstitutionally vague if it does not define the offense with sufficient precision to give ordinary people notice of the prohibited conduct and provide adequate guidance to law enforcement personnel in order to avoid arbitrary and discriminatory enforcement.⁸³

1. Notice

To provide adequate notice, statutory language must not be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"⁸⁴ A typical forfeiture statute describes forfeitable assets as "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter"⁸⁵ The phrase "to facilitate the

82. See, e.g., *Kolender v. Lawson*, 461 U.S. 352 (1983) (loitering statute); *Smith v. Goguen*, 415 U.S. 566 (1974) (U.S. flag misuse statute).

83. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972) ("[W]e must insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited [and] provide explicit standards for those who apply them."); see also *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); LAWRENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 382 n.67 (1985) (discussing the void-for-vagueness doctrine).

84. *Goguen*, 415 U.S. at 572 n.8 (quoting *Connally*, 269 U.S. at 391).

85. 21 U.S.C. § 881(a)(7) (1988).

commission of” is ambiguous. It provides little information about the degree of connection required between the asset sought for forfeiture and the violation. Indeed, courts are split on the very question of whether the government must show a “substantial connection”⁸⁶ or simply something more than an “incidental or fortuitous connection”⁸⁷ to the criminal activity. Moreover, “substantial” is itself an ambiguous and highly malleable standard. For example, is the use of Sarah’s front steps as a lookout post considered substantial? If so, can the entire house be declared forfeit or just the steps?

This vagueness in the statute’s terms is compounded by the overbreadth in the statute. This means that often the only effective limit on forfeiture is the constitutional limitations on takings or excessive fines. Courts are in frequent dispute over the reach of these limitations. In addition, these limitations are even more of a puzzle to ordinary people, such as Sarah. Indeed, scholarship about civil forfeiture describes many cases of owners who had no reasonable means of suspecting that their property might be subject to forfeiture.⁸⁸ Therefore, forfeiture statutes fail the notice requirement of the void-for-vagueness test and are unconstitutional.

86. See *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1440 (11th Cir. 1991) (stating that probable cause for belief of a substantial connection to drug dealing is required under 21 U.S.C. § 881(a)(6)); *United States v. 28 Emery St.*, 914 F.2d 1, 3-4 (1st Cir. 1990) (stating that a substantial connection is required between the property forfeited and the illegal drug transaction); *United States v. Schifferli*, 895 F.2d 987, 989-90 (4th Cir. 1990) (holding a substantial connection is required although that does not mean that the property is indispensable to the commission of the crime).

87. See *United States v. 785 St. Nicholas Ave. and 789 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir.) (stating that there need not be a substantial connection between the crime and the property in question, only a nexus), *cert. denied*, 113 S. Ct. 2349 (1993); *United States v. 916 Douglas Ave.*, 903 F.2d 490, 493 (7th Cir. 1990) (holding that a “substantial connection” between the property and the related offense is not necessary under 21 U.S.C. § 881(a)(7)), *cert. denied*, 498 U.S. 1126 (1991); *United States v. Lewis*, 987 F.2d 1349, 1356 (8th Cir. 1993)). *But see Schifferli*, 895 F.2d at 989-90 (finding that under the substantial connection test, “the property either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime” and that an “incidental or fortuitous connection will not suffice.”).

88. See, e.g., DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 1.02, at 1-21 to 1-24 (1994) (detailing newspaper articles of particularly egregious forfeiture actions); Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994) (discussing numerous examples).

2. Guidance in Enforcement

Forfeiture statutes also fail to provide sufficient guidance to ensure non-arbitrary law enforcement.⁸⁹ The Supreme Court has recognized this lack of guidance as the more important aspect of the vagueness doctrine,⁹⁰ because without guidelines, a "statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"⁹¹

When looking for minimum guidelines, courts consider whether enforcement depends on a completely subjective standard, such as the standard of annoyance that was held impermissibly vague in *Coates v. City of Cincinnati*.⁹² The *Coates* ordinance punished the sidewalk assembly of three or more persons who "'conduct[ed] themselves in a manner annoying to persons passing by'"⁹³ The Court concluded that because no standard of conduct was specified in the statute "men of

89. The vagueness doctrine serves not only to ensure adequate notice and discourage unfair enforcement, but also to guarantee that the penal laws of our society are made by legislators, presidents, and governors rather than appointed officials and juries who are not accountable through elections. See *Smith v. Goguen*, 415 U.S. 566 (1974). As the Court has stated, vague statutes allow enforcement officials to cast a "net large enough to catch all possible offenders, and leave it to the courts to . . . say who could be rightfully detained This would, to some extent, substitute the judicial for the legislative department of government." *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). In this sense, forfeitures necessarily involve the "rule of law" rationale underlying the void-for-vagueness doctrine. The concept is "closely allied to the 'standardless' delegation argument that Congress cannot delegate its lawmaking power to either the executive or the judicial branch, unless it provides sufficient guidance as to the limited exercise of that power." George C. Freeman, Jr. & Kyle E. McSlarrow, *RICO and the Due Process "Void for Vagueness" Test*, 45 BUS. LAW. 1003, 1010 (1990) (footnote omitted). Under this theory, civil forfeiture is not only void because it is unconstitutionally vague but also because it is a standardless delegation of legislative power. *Id.* On the relationship between delegation and void-for-vagueness, see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 42 n.65, 45 (1993).

90. See *Goguen*, 415 U.S. at 574 (noting that the more important concern of the vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement").

91. *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 575).

92. 402 U.S. 611 (1971).

93. *Id.* at 611 n.1 (quoting the relevant Cincinnati ordinance).

common intelligence must necessarily guess at its meaning.”⁹⁴ When the statutory language “permits such selective law enforcement, there is a denial of due process.”⁹⁵

The ambiguities in civil forfeiture statutes, and in the constitutional provisions that provide their outer limits, result in inadequate guidance for law enforcement personnel. The right not to be punished without proof of wrongdoing—which is arguably violated by forfeiture statutes—is analogous to the right not to have your liberty restricted without having violated a clear rule of conduct. This is the case with vagrancy statutes which courts routinely strike down as being unconstitutionally vague.⁹⁶ In both instances, the danger of arbitrary or discriminatory enforcement exists.⁹⁷

The danger is real. Accounts of forfeiture practice contain many examples of prosecutors using forfeiture for improper purposes, such as coercing cooperation⁹⁸ and simply raising revenue.⁹⁹ The danger of selective enforcement is compounded because owners have to pay attorneys’ fees to defend their property regardless of their financial resources, due to the civil nature of the proceedings.¹⁰⁰ Given the

94. *Id.* at 614 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

95. *Goguen*, 415 U.S. at 576.

96. *E.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971); *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974).

97. Note the difference between statutory vagueness and constitutional vagueness. A statute failing to give adequate guidance in enforcement or notice of the offense is statutorily vague; a statute that is enforceable to the extent of the Constitution is constitutionally vague because constitutional limits are often undetermined. Of course a statute can be either statutorily or constitutionally vague, or both. In the case of forfeiture statutes there is ample vagueness in the actual language of the statutes to render them statutorily vague as well as unconstitutionally vague.

98. *See* Richard Minitzer, *Ill-Gotten Gains*, REASON, Aug.-Sept. 1993, at 32, 34.

99. *See supra* note 5.

100. Indeed, how can a defendant whose assets have been restrained afford to pay counsel at the hearing? *See* Bast, *supra* note 88 (describing legislation seeking to provide claimants with counsel). *See generally* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent criminal defendants are entitled to counsel but failing to define what the term “indigent” means); *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (finding that defendants who are subjected to pre-trial seizure are entitled to a hearing where the prosecution must show evidence independent of the indictment to justify forfeiture but noting that no hearing is required before a temporary restraining order is issued because the purpose of forfeiture is to surprise the defendant and prevent the disposition of the assets seized), *cert. denied*, 112 S. Ct. 382 (1991).

uncertainty of success in such litigation, a cash-poor owner often cannot borrow against the seized asset to finance efforts to reclaim it.¹⁰¹

3. Other Factors in the Vagueness Test

In addition to the two general concerns of notice and adequate guidance, courts generally look to a collection of other factors in determining whether to strike down a statute as unconstitutionally vague. Factors that weigh in favor of finding a statute vague include: that the violation described in the statute is one of omission rather than one of commission; that punishment requires no finding of *mens rea*; that the statute treads on a constitutionally protected freedom; that the legislature could have written a more precise statute; and that the statute determines whether any punishment is deserved, not merely the severity of the punishment. Each of these factors often is present in civil forfeiture cases.¹⁰²

a. Sins of Omission

Courts scrutinize statutes criminalizing acts of omission—for example, a felon's failure to register with the police¹⁰³ or a person's failure to produce credible and reliable identification on demand¹⁰⁴—more closely than statutes criminalizing acts of commission when applying the vagueness doctrine.¹⁰⁵ As in Sarah's case, civil forfeiture statutes frequently punish acts of omission such as failure to stop a crime or failure to keep property from being used in criminal acts. When forfeiture statutes are used to punish acts of omission, courts are more likely to examine them closely and to hold them unconstitutionally vague.

101. In addition, the government can even seize the money needed to hire an attorney under these statutes without a violation of the property owner's right to counsel. *See* *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989); *Monsanto*, 924 F.2d 1186.

102. *See infra* notes 103-16 and accompanying text.

103. *See, e.g.*, *Lambert v. California*, 355 U.S. 225, 229 (1957) (requiring a closer examination of a felon's failure to register with the police than the statute had provided).

104. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1983) (viewing with care a person's failure to produce credible and reliable identification on demand).

105. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-31, at 1033 n.3 (1988).

b. Lack of *Mens Rea*

In contrast, courts are less apt to strike down statutes that contain a mens rea element.¹⁰⁶ However, civil forfeiture statutes do not contain a mens rea element.¹⁰⁷ Even if there is a *mens rea* element required by the underlying crime which predicates the forfeiture, it does not save the forfeiture statute from the likelihood that it will be deemed vague; the statute itself still lacks the mens rea requirement that the owner had evil intent.

c. Constitutionally Protected Rights

Courts are particularly concerned about vagueness in statutes that tread on fundamental rights.¹⁰⁸ Under the vagueness doctrine, courts have invalidated statutes that have a chilling effect on the exercise of constitutional rights such as the right to assemble,¹⁰⁹ and the right to privacy.¹¹⁰ Similarly, vague civil forfeiture statutes jeopardize two fundamental rights: the right not to be punished without due process of law and the right against having property taken without just compensation.¹¹¹ Potential violation of these rights should weigh in favor of invalidating civil forfeiture statutes.

106. *See* *Screws v. United States*, 325 U.S. 91, 102 (1945) (stating that the mens rea element removes the claim that the statute “punishes without warning [of] an offense of which the accused was unaware”); *see also* *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982) (recognizing that a scienter requirement may mitigate a statute’s vagueness, especially regarding adequacy of notice).

107. While many statutes do include a “knowledge” element in the innocent owner affirmative defense, this is not an element that the state must prove to successfully seize property. *See* 21 U.S.C. § 881(a)(7) (1988); *supra* notes 37-69 and accompanying text.

108. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.9, at 950 (4th ed. 1991).

109. *See, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (invalidating a loitering statute because it regulated in a vague manner the right to assemble and punished constitutionally protected behavior).

110. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating an abortion regulation which, by conditioning possible criminal liability on vague criteria, had a chilling effect on the exercise of the constitutional right to privacy).

111. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); U.S. Const. amend. XIV (“[no] State [shall] deprive any person of life, liberty, or property, without due process of law”).

d. Feasibility of Writing a More Precise Statute

In a void for vagueness analysis, courts prefer statutes that are narrowly tailored and clearly written. Such statutes are more likely to reflect the considered judgment of the legislature.¹¹² Thus, one may infer that courts are more willing to find a statute vague if Congress could have written it more precisely. Unlike the statute in *United States v. Petrillo*,¹¹³ in which the language was sufficiently precise to stand against a vagueness challenge,¹¹⁴ the language of most civil forfeiture statutes could be more precise. For example, the statute could limit forfeiture to contraband, other property that has no non-contrived legitimate use, fruits of the crime, and property that the owner has acquired for the purpose of committing a crime or which he has used to commit a crime. The feasibility of more precise alternatives should weigh in favor of finding forfeiture statutes unconstitutionally vague.

e. Statutes That Determine Whether Any Punishment Is Justified

Another relevant factor in the vagueness test is whether the challenged statute simply determines the severity of the punishment or whether the statute determines if punishment is even justified.¹¹⁵ The premise underlying this idea is that the consequences of a guilty person receiving too severe a penalty is less disturbing than the consequence of punishing an innocent person. Because civil forfeiture statutes fall into the latter category—determining whether the property owner will keep or lose his property—a high degree of specificity within the statute is required.

There is also a need for greater specificity in civil forfeiture statutes because they are not criminal statutes, and thus, do not have the benefit

112. *TRIBE*, *supra* note 105, § 12-31, at 1034.

113. 332 U.S. 1 (1947). The statute provided for fines and imprisonment for those convicted of threatening a radio-broadcasting licensee to employ persons "in excess of the number of persons needed by such licensee to perform actual services." Pub. L. No. 344, ch. 138, 60 Stat. 89 (1946) (amending the Communications Act of 1934, ch. 652, 48 Stat. 1064). The statute, codified at 47 U.S.C. § 506, was repealed in 1980. Pub. L. No. 96-507, 94 Stat. 2747 (1980).

114. *Petrillo*, 332 U.S. at 7 (upholding the statute because, although "[c]learer and more precise language might have been framed by Congress to express what it meant . . . none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose").

115. John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985).

of the constitutional safeguards provided in the criminal context.¹¹⁶ Because the risk of arbitrary punishment is higher under civil forfeiture statutes than under criminal statutes, civil forfeiture statutes require a higher degree of scrutiny.

All of these factors that instruct the courts' application of the vagueness doctrine weigh in favor of finding civil forfeiture statutes void for vagueness.

B. *The Void-for-Vagueness Doctrine Applies to Civil Penal Statutes*

Although most statutes held unconstitutionally vague are criminal in nature, the supposedly "civil" nature of civil forfeiture statutes does not insulate them from void-for-vagueness scrutiny. Courts have applied the void-for-vagueness analysis to civil statutes that have penal purposes.¹¹⁷ In *Austin*, the Supreme Court held that civil forfeiture is punishment.¹¹⁸ It follows from this that civil forfeiture statutes are subject to vagueness scrutiny.¹¹⁹

This conclusion is not only a logical deduction from the cases, but also makes good sense because civil forfeiture not only punishes, but

116. *See, e.g.* *Duncan v. Louisiana*, 391 U.S. 145, 151-57 (1968) (holding that the intent of the Framers, combined with historical considerations through the late 18th Century, dictate that the right to trial by jury is granted to criminal defendants in order to prevent government oppression and overzealous judges and prosecutors); *see also* U.S. CONST. art. III, § 2, cl. 3, which states:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

See also U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence.

117. *See, e.g.*, *Jordan v. De George*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951) (applying vagueness scrutiny to statute relating to the deportation of aliens); *Stallone v. Abrams*, 584 N.Y.S.2d 535 (App. Div. 1992) (applying vagueness test to public health statute's provision for forfeiture of equipment used in dispensing or administering controlled substances).

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

119. *See Stallone*, 584 N.Y.S.2d at 536.

punishes severely.¹²⁰ The punishment is on account of the commission of a crime. As such, the purposes of the void-for-vagueness doctrine are fully applicable to civil forfeiture.¹²¹ Indeed, modern forfeiture practice provides many examples of forfeitures carried out against owners who had no fair notice of the legal risks to which they were exposed, and of unfair or self-interested conduct by police and prosecutors.¹²²

Moreover, in *United States v. James Daniel Good Real Property*,¹²³ the Supreme Court applied the notice and hearing requirements to civil forfeitures, holding that due process required them.¹²⁴ In this vein, it is clearly appropriate for another due process protection—that is, void for vagueness—to apply to civil forfeiture.

IV. CONCLUSION

The courts should strike down typical civil forfeiture statutes as unconstitutionally overbroad and vague. The problems of overbreadth and vagueness would be cured. If the current statutes were amended, legislatures would have to confront the severe criticisms of current forfeiture practice from all sides of the political spectrum. Law enforcement officials would have to answer politically for their abuses of power. Finally, in having to draft without platitudes such as “facilitation” and “substantial,” legislators will have to take responsibility for defining precisely which categories of property owned by innocent owners are subject to forfeiture. That ought to get the attention of their constituents.

120. *Jordan*, 341 U.S. at 223 (severity of civil punishment is reason to scrutinize for vagueness).

121. See Freeman & McSlarrow, *supra* note 89, at 1006 (noting that the vagueness doctrine applies in both civil and criminal contexts).

122. See, e.g., *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 504-05 (1993) (holding that absent exigent circumstances, the Due Process Clause requires notice and a hearing prior to the seizure of claimant's real property because of the punitive intent of the statute directed at those involved in a criminal enterprise); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (noting that allegation or proof that the claimant did all that it reasonably could do to avoid having its property unlawfully used would allow a court to examine the unduly oppressive nature of forfeiture proceedings and find the seizure unlawful); accord *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965) (holding that the goal of deterrence cannot be realized unless the exclusionary rule is applied in civil forfeiture proceedings); *In re Kingsley*, 614 F. Supp. 219, 222-23 (D. Mass. 1985) (finding that seizure of petitioner's property was not effected incident to the execution of a valid warrant), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986); see also Heilbronner, *supra* note 5.

123. 114 S. Ct. 492 (1993).

124. *Id.* at 505.