

**Losing One's Livelihood
to the Grasp
of
Fiction**

THE LAW OF CIVIL FORFEITURE IN THE UNITED STATES

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**THERE HAVE BEEN TIMES--THERE STILL ARE COUNTRIES AND TIMES,
WHEN AND WHERE THE RULE, FOUNDED IN JUSTICE AND NATURE, THAT
THE PROPERTY OF THE PARENT IS THE INHERITANCE OF HIS CHILDREN,
HAS BEEN INTERCEPTED IN ITS BENIGN OPERATION BY THE CRUEL
INTERFERENCE OF ANOTHER RULE, FOUNDED IN TYRANNY AND AVARICE--
THE CRIMES OF THE SUBJECT ARE THE INHERITANCE OF THE PRINCE. AT
THOSE TIMES, AND IN THOSE COUNTRIES, AN INSULT TO SOCIETY BECOMES
A PECUNIARY FAVOR TO THE CROWN; THE APPOINTED GUARDIAN OF THE
PUBLICK SECURITY BECOMES INTERESTED IN THE VIOLATION OF THE LAW;
AND THE HALLOWED MINISTERS OF JUSTICE BECOME THE RAPACIOUS
AGENTS OF THE TREASURY.**

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I. Introduction

In the United States of America, the Fifth and Fourteenth Amendments to our Constitution command that no person shall be deprived of life, liberty or property without due process of law.² The procedural safeguards and fundamental rights founded in these words have their origin in the belief that if personal freedom is to be valued and preserved, institutional restraints on the arbitrary exercise of government power must be maintained.³

The enormous scope and increased use of civil forfeiture laws in recent years have raised grave concerns about the arbitrary exercise of government power. Since 1984, the federal government alone has conducted more than 200,000 forfeitures, netting over \$3.6 billion in assets.⁴ Drug related forfeitures have skyrocketed from \$27 million in 1985 to \$875 million in 1992 alone.⁵

Civil forfeiture is greatly preferred over criminal forfeiture by law enforcement authorities because it allows them to operate under the fiction that they are punishing “guilty” property instead of a person.⁶ Consequently, the constitutional protections customarily afforded to a defendant in criminal proceedings are absent. To use civil forfeiture statutes, authorities need only show that there was probable cause to believe a piece of property was used for an illicit purpose as defined by statute. The property is then presumed guilty and its owner must either prove its innocence by a preponderance of the evidence or lose it altogether.⁷

This paper examines many of the controversial and troubling facets of civil forfeiture as it is used today. Parts II and III will examine the origins and history of civil forfeiture in England and the United States. Part IV will present an overview of the primary federal civil forfeiture laws and discuss the typical procedures and standards utilized when civil forfeiture proceedings are initiated. Part V will discuss the relationship between federal and state law enforcement agencies as shaped by federal forfeiture laws, the incentives which arise as a result, and the practical effects of these incentives on state policy and the citizenry. Part VI will present examples of the abusive practices that have become commonplace across the country pursuant to the authority granted under civil forfeiture laws. Part VII will address the plight of innocent owners and the protections afforded them by the innocent owner statutory defenses that are provided in a small minority of statutes. Part VIII will discuss the use of informants by law enforcement. And finally, part IX will offer suggestions for reform.

II. The Origins and History of Civil Forfeiture

English common law recognized three kinds of forfeiture: (1) deodand; (2) attainder forfeiture; and (3) admiralty forfeiture.⁸

A. Deodand

The deodand was a common law action by which the value of an inanimate object, whether directly or indirectly causing the death of a human being, was forfeited to the Crown.⁹ The origins of the deodand extend back to Biblical and Pre-Judeo-Christian

practices which viewed the instrument of death as the accused and thereby in need of religious expiation.¹⁰ While in theory the funds for the liquidated deodand were to be used to benefit the deceased by way of providing masses, this objective was gradually lost sight of and such forfeitures were soon retained in favor of the crown.¹¹

Deodand was seriously questioned even prior to the adoption of the United States Constitution. For example, Blackstone, who was not known to be critical of the English legal tradition, condemned deodand forfeiture as “superstition inherited from the blind days of feudalism.”¹² Likewise, Justice Story viewed it as “growing out of the avarice of the church, and the superstition of the laity, in ancient times.”¹³

While deodand survived in England until 1846, it did not become part of the common law tradition of this country. Some courts and commentators have tried to explain modern in rem forfeiture as descending from common law deodand due to the fact that modern statutes proceed directly against the property at issue. But because property became deodand only if it caused a human being’s death, because deodand (unlike modern forfeiture statutes) was limited to instruments of harm, and because deodands were only tried in criminal courts, there is very little evidence to suggest that modern civil forfeiture descended from the law of deodand.¹⁴ In fact, English courts specifically rejected any attempt to analogize the two.¹⁵

B. Attainder Forfeiture

Attainder forfeiture was the largest class of forfeiture at English law and was premised on the common law theory that the sovereign retained a superior interest in all property.¹⁶ If an individual committed a felony or treason, any interest in property owned by that individual would revert back to the Crown at the time the felony was committed.¹⁷ The commission of the felony would also lead to “corruption of blood” which rendered any inheritance rights, whether or not the heirs were innocent, forfeited as well.¹⁸

While England did not abolish attainder forfeiture until 1870, the Founding Fathers view of the nature of property and the proper limitations on government power led them to reject attainder forfeiture altogether. In fact, the Constitution’s framers forbade bills of attainder and placed limitations on punishment for treason by providing that “no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.”¹⁹ State governments followed the federal government’s lead which largely eliminated forfeiture in the early days of the republic.

C. Statutory Forfeiture

The third form of forfeiture under English law was statutory forfeiture, which involved the seizure of property used in violation of the customs and revenue laws.²⁰ The most notable laws in this area were the Navigational Acts of 1660, which were enacted to protect and expand upon England’s naval strength. Under the Acts, most imports and exports from England were carried by English ships which protected England’s maritime industry from foreign competition. The Navigational Acts provided for in rem procedures

which allowed the Crown to name the offending property as the defendant and prosecute the property directly.²¹ A violation of the Acts led to the forfeiture of any illegally transported goods as well as the ships that carried them.²² In 1849, England repealed the Navigational Acts in favor of free trade.²³

Of the three types of civil forfeiture, statutory forfeiture was the only type to become a part of the American legal tradition. In the Colonial era, American admiralty courts enforced the Navigational Acts which, by their terms, were made applicable to the colonies.²⁴ After the United States Constitution was ratified, the first Congress enacted and passed forfeiture statutes in order to aid the collection of customs duties which, at that time, were responsible for providing 80-90% of the federal government's financial resources.²⁵ Forfeiture proceedings were exclusively within the jurisdiction of federal courts, and being closely patterned after the Navigational Acts, proceeded in rem as opposed to in personam.²⁶

D. Civil Forfeiture in America: A Historical View

The first American cases to uphold civil forfeiture statutes were *The Palmyra*²⁷ and *Harmony v. United States*,²⁸ also known as “Malek Adhel.” In these early cases the Court held that because it was virtually impossible to obtain in personam jurisdiction over property owners, proceeding in rem and permitting courts to obtain jurisdiction over property was justified as the only means to successfully enforce admiralty, piracy and

customs laws. The *Palmyra* was decided in 1827 and involved a ship which had been used to commit several acts of piracy against other ships in violation of federal customs laws.²⁹ The United States Supreme Court upheld the forfeiture of the ship despite acknowledging that neither the crew on board at the time of seizure nor the owner of the ship bore any blame. The Court reasoned that the owner's culpability was irrelevant because "[t]he thing is here primarily considered the offender, or rather the offense is primarily attached to the thing."³⁰

In *Malek Adhel*, decided 17 years later, the insane captain of a ship erroneously perceived threats during voyage and fired several shots at other ships.³¹ Despite acknowledging that the owners of the ship were completely innocent of any wrongdoing,³² the Supreme Court stated that "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."³³ The Court repeated the common law fiction that guilt can attach to the property without reference to the guilt or innocence of the owner and justified its reliance by pointing to the guilty property fiction and its place in history.³⁴

The initial justification for the guilty property fiction was significantly expanded during the Civil War³⁵ when Congress was forced to respond to Southern rebels who evaded prosecution for treason by utilizing the protection of Confederate lines.³⁶ In addition, because the rebels were still citizens of the United States and thereby entitled to

the constitutional rights due every citizen, the United States Government was incapable of forfeiting Confederate property located in the North.³⁷

To solve this problem Congress passed a confiscation bill which permitted in rem forfeitures.³⁸ In 1863, the Kentucky Supreme Court held that the Act was unconstitutional. The Kentucky Supreme Court stated that “[t]hese [in rem] proceedings may to-day be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice and tyranny....”³⁹ Eight years later, the United States Supreme Court upheld the Act as constitutional on the ground that it was an exercise of the war power in taking enemy property.⁴⁰

In the 1870’s and 1920’s civil forfeiture and the guilty property fiction was further expanded by the Supreme Court which upheld the constitutionality of forfeitures for violations of tax and prohibition laws. In *Dobbins’s Distillery v. United States*,⁴¹ the Court again held that the common law did not provide for an innocent owner defense by affirming the forfeiture of a lessor’s real property which had been used by the lessee for illegal operations.⁴² The Court reasoned that the illegal conduct “attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner.”⁴³

In the 1920s, the Court decided *J.W. Goldsmith, Jr. Grant Co. v. United States*⁴⁴ and *Van Oster v. Kansas*.⁴⁵ *Goldsmith Grant* involved the forfeiture of an automobile. The owner of the automobile argued that under Fifth Amendment Due Process grounds

the forfeiture was violative of fundamental rights.⁴⁶ The Court rejected this argument, stating that Congress “ascribe[d] to the property a certain personality, a power of complicity and guilt in the wrong”⁴⁷ and held that the only material consideration was its illegal use. According to the Court, the guilt or innocence of the owner was “accidental”⁴⁸ and therefore it upheld the forfeiture.

Van Oster also involved the forfeiture of an automobile and an owner’s claim that she had no knowledge her vehicle was used for an illicit purpose.⁴⁹ The Court affirmed the forfeiture of the automobile on the grounds that it was used to transport intoxicating liquor. The Court stated that “It has long been settled that statutory forfeitures of property entrusted by the innocent owner . . . to another who uses it in violation of the . . . laws of the United States is not a violation of the Due Process Clause of the Fifth Amendment.”⁵⁰

As one commentator has noted, “Dobbins Distillery and J.W. Goldsmith deeply entrenched the guilty property fiction and broadened the scope of punitive sanctions using civil in rem procedures.”⁵¹

III. A War on Drugs?: Modern Day Forfeiture Law

Civil forfeiture played a very small role in the American legal landscape once the problem of piracy faded.⁵² As noted above, civil forfeiture was utilized in the prohibition

era,⁵³ but fell into disuse soon thereafter. It was not until 1970 that the civil forfeiture revival began.⁵⁴

In 1970 Congress enacted special legislation--the Drug Abuse Prevention and Control Act--which was designed to be “a formidable weapon in the government’s arsenal”⁵⁵ against major drug traffickers and organized crime. In 1970 it was said that gambling was probably the world’s largest business.⁵⁶ President Nixon’s administration estimated that the profits from such illegal gambling were anywhere “from 20 billion, which was over 2% of the gross national product, to \$50 billion.”⁵⁷ An expert who testified before the House Committee on the Judiciary in 1970 stated that “If U.S. Steel, American Telephone & Telegraph, General Motors, Standard Oil of New Jersey, General Electric, Ford Motor Co., IBM, Chrysler, and RCA all joined together into one conglomerate merger, they would still be in second place.”⁵⁸ A similar argument could be made about narcotics traffic which, in 1970, was estimated at \$50 billion annually.⁵⁹

One of the Act’s most significant provisions was §511, which was later codified as 21 U.S.C. §881.⁶⁰ This provision authorized the civil forfeiture of any contraband or property utilized or acquired in violation of federal narcotics laws. Specifically, §881 provided for the forfeiture of all controlled substances and all vehicles used to distribute such substances.⁶¹ In 1978, Congress added §881(6) which authorized the forfeiture of all profits from drug transactions in addition to any assets purchased by such profits.⁶² In 1984, the Act was amended again when Congress enacted the Comprehensive Crime Control Act of 1984.⁶³ The Comprehensive Crime Control Act added §881(a)(7), which

authorized federal agents to seize any real property used in any manner to facilitate the violation of federal narcotics laws.⁶⁴

Under §881, which is typical of other civil forfeiture statutes--both state and federal--procedural requirements are extremely lenient. The Act permits three methods for initiating civil forfeiture proceedings: 1) by following the procedures presented in the supplemental rules under §881(b);⁶⁵ 2) by obtaining a court ordered warrant;⁶⁶ or 3) by seizing the property without any judicial process when there is probable cause to believe the property is subject to civil forfeiture.⁶⁷ Whatever the means, probable cause is the standard which governs.

Once a forfeiture proceeding has been initiated, the government has the initial burden of showing that there was probable cause to believe the property was subject to civil forfeiture.⁶⁸ Once the government establishes probable cause, “the ultimate burden shifts to the claimant to prove by a preponderance of the evidence that the property was not used in connection with” the violation of law(s) at issue.⁶⁹ If the claimant fails to rebut the government’s proof, the government’s showing of probable cause will alone support a judgment of forfeiture.⁷⁰

The burden of proof can shift to the property owner because of the legal fiction that property forfeitures are forfeitures in rem (against the thing forfeited) as opposed to in personam (against the person who owns the thing). Because the forfeiture action is against the thing, the usual array of constitutional protections for an individual enmeshed

in criminal proceedings do not apply. As a result, the guilt or innocence of the property owner is irrelevant and the government need not prove anything “beyond a reasonable doubt.” In fact, studies indicate that in the vast majority of civil forfeiture cases, no one is ever prosecuted for a crime.⁷¹

That a mere showing of probable cause will support the forfeiture of an individual’s property has been the target of severe criticism from judges and commentators alike. While there is some variation among courts, probable cause most often means that the government need only demonstrate reasonable grounds for the belief that the property is properly subject to forfeiture, which can be supported by something less than prima facie proof, but more than mere suspicion.⁷² For example, in *United States v. One 56-Foot Motor Yacht Named the Tahuna*,⁷³ the requisite level of probable cause was defined by the Ninth Circuit Court of Appeals as “whether the information relied on by the government is adequate and sufficiently reliable to warrant the belief by a reasonable person” that the property was utilized for an illegal purpose.⁷⁴ The United States District Court for the District of Massachusetts upheld the forfeiture of a vessel when probable cause was based on the government’s subjective belief that the vessel’s use was intended for an illegal purpose.⁷⁵ In a case involving the forfeiture of money, the First Circuit held that “[t]he government need only show that it has probable cause to believe that the money is drug related,” and added that “this showing can be made wholly with otherwise inadmissible evidence.”⁷⁶ The United States District Court for the Southern District of Florida defined the government’s burden as “comparatively easy, even for a civil case.”⁷⁷ This court went on to find that evidence indicating a boat was modified to increase its speed and transport

capacity, in combination with the fact that it was found in the vicinity of a recent drug transaction, was sufficient to initiate a forfeiture proceeding.⁷⁸

If the statute provides for an innocent owner defense (discussed *infra*), the claimant has the burden of proving by a preponderance of the evidence that she is innocent of any wrongdoing.⁷⁹ Of the nearly 200 forfeiture statutes in the United States today, the vast majority do not provide for an innocent owner defense.⁸⁰

Section 881(a)(4)(C) and (a)(7) of the Drug Abuse Prevention & Control Act provide that no conveyance or interest in real property shall be forfeited by reason of an act or omission which the owner establishes was committed or omitted without her knowledge or consent.⁸¹ But as will be developed below, because the government's burden consists of showing only probable cause that the property is subject to forfeiture, and because the owner of the property has the burden of showing a lack of knowledge or consent by a preponderance of the evidence, the innocent owner defense often fails to adequately protect citizens whose property is subject to civil forfeiture.⁸²

While the balance of this paper has as its primary focus forfeitures under §881 of the Drug Abuse Prevention & Control Act, it should be noted that to date our Federal Congress has enacted over 200 civil forfeiture statutes authorizing forfeiture “for items ranging from contaminated food to the pelts of endangered species.”⁸³

IV. Equitable Sharing and Corrupt Incentives

The Comprehensive Forfeiture Act of 1984 provides for the “equitable sharing” of forfeiture proceeds between the federal government and states.⁸⁴ Under equitable sharing, which may or may not involve the federal government in the actual seizing of property, state law enforcement agencies can choose to forfeit property under federal laws. Consequently, even if the United States government did not participate in the forfeiture, state or local law enforcement agencies can still receive as much as 80% of the forfeiture proceeds from the federal government.⁸⁵ This remains true despite the presence of state law designating that less than 80% of the forfeiture proceeds should go to law enforcement.⁸⁶

As a result of the potential 80% “kickback” from the federal government,⁸⁷ law enforcement agencies across the country have an extremely strong incentive to request federal adoption of those cases in which they have seized property single-handedly. This incentive is reflected in the degree to which states have utilized equitable sharing. For example, the United States has deposited over \$1 billion with state and local law enforcement agencies since the Comprehensive Forfeiture Act was adopted in 1984.⁸⁸ Equitable sharing has resulted in an immense increase in the amount the United States has confiscated in cash and saleable properties: a total of nearly \$3 billion through 1992, with an additional reservoir of almost \$2 billion in unsold physical assets.⁸⁹ Forfeiture receipts have continued to double from 1985. Since 1990, state and local law enforcement agencies have received approximately 40% of the total deposits in the federal Asset Forfeiture Fund.⁹⁰

Equitable sharing has two extremely detrimental effects. First, equitable sharing has the effect of subverting state policy. As mentioned above, many states have determined that less, sometimes much less, than 80% of the proceeds from forfeitures should go to law enforcement. In a dozen states, the percentage of proceeds funneled to law enforcement from any particular seizure varies from only 10% in New Hampshire to 50% in Massachusetts.⁹¹ In states such as California, 65% of the proceeds will go to the enforcement agencies participating in the seizure, minus a percentage for the prosecutors office.⁹² Seven states allow all of the proceeds to go to law enforcement (though they have no guarantee that they will receive all of the proceeds), and in twenty states no provision is made for money to go to law enforcement; rather, proceeds are earmarked to go into a general fund. Eleven states have no law on the subject.⁹³

In addition, many states have determined that forfeiture proceeds should be utilized to address particular social issues that require much needed financing.⁹⁴ Equitable sharing allows law enforcement agencies to bypass state law and involve the federal government when it will be of greater benefit to them.⁹⁵ This dynamic was portrayed clearly when a Congressman asked a federal attorney to explain why in 1987, forty-eight percent of all California's forfeiture proceeds were received through the equitable sharing program. The attorney responded that "The money in California, as I understand it, goes to a mental health fund of some sort. Therefore, there are not many incentives on the part of state and local law enforcement to use their own state procedures."⁹⁶ The Congressman responded to this by asking whether the attorney was implying that the abolition of adoptive forfeiture would result in less forfeiture money. The attorney's

response was, “Yes sir, in California particularly.”⁹⁷ This led the Congressman to conclude that the federal government was subverting state law by preventing forfeiture funds that are seized by state and local officials from being utilized for purposes designated by state law.⁹⁸

In response to the obvious subversion of state law taking place around the country, Congress intended to limit adoptive forfeiture in 1989⁹⁹ by ensuring that “property is not transferred following utilization of an adoptive seizure process to circumvent any requirement of state law that limits the disposition of property forfeited to state and local agencies.”¹⁰⁰ Unfortunately, political pressure from police officers across the country and the International Association of Chiefs of Police was too strong. Congress first postponed the time at which the measure was to take effect by two years and eventually revoked it altogether. Today adoptive forfeiture remains fully intact.¹⁰¹

Second, equitable sharing encourages the opportunity for corrupt practices in that it creates the incentive for law enforcement to act with an eye toward personal benefit. The individual, acting under the authority of the state, is enabled to use state power for personal benefit at the expense of the citizenry. The reward of serving one’s community, of being a “public servant” with the objective of upholding the law, is subverted.

This corrupt incentive reflects itself in numerous ways. For example, after a city police department received a check for \$1.5 million in forfeiture funds, the department spent \$1,235 on the Chief’s Christmas party, \$208 on an aquarium, \$2,100 on a buffet for

policemen who worked on Labor Day, \$720 on amusement park tickets, and \$32,375 on banquets.¹⁰²

Little Compton, Rhode Island, which has a population of under 3,500, has a police force of seven officers. The police force received, under an equitable sharing arrangement, a total of \$4 million as its share from a seizure of cash belonging to a hashish smuggler. Little Compton had no robberies, no rapes, and no murders in 1993. After receiving \$4 million from the federal government the police chief rewarded the officer mainly responsible for the seizure with a Pontiac Firebird and funded his salary for a ten year period, including health and retirement benefits at a cost of \$720,000.¹⁰³ The police chief also bought a \$16,000 wood chipper for the maintenance department, \$16,000 for a computer system used to monitor the police department's budget, and almost as much for truck maintenance. The police chief also treated the town to a Fourth of July fireworks show and budgeted for a new building for the fire and police department at a cost of \$1 million. In addition, the Little Compton Police Department benefited from new weapons, bulletproof vests, cellular phones, video cameras, and heat sensing devices designed to seek out hidden criminals.¹⁰⁴

Spending money in this manner is disturbing in that it fails to take account of where money is needed; it allows valuable resources obtained by the state, for the state, which is governed by the people of the state, to be distributed according to a police chief in a manner that benefits his inner circle. Representative John Conyers of the House Committee on Government Operations has acknowledged that although forfeiture money

under the equitable sharing plan is supposed to be for law enforcement purposes only, that is not the reality.¹⁰⁵ Representative Conyers stated:

No one monitors what the spending actually is. In fact, we know that the basic rule of thumb for the Justice Department is.....whether it can pass two tests: 1) The straight face test, which asks, can you tell me this with a straight face?' And 2) the Washington Post Test, which asks, taken out of context and put on the front page of the Washington Post, will it still look good?¹⁰⁶

The disturbing incentives created by civil forfeiture laws have been acknowledged at all levels of the criminal justice system. Michael Zelden, former director of the Justice Department's Executive Office of Asset Forfeiture stated publicly that "the desire to deposit money into the asset forfeiture fund became the reason for forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."¹⁰⁷ Another Justice Department official wrote that "increasingly you are seeing supervisors of cases saying, 'Well, what can we seize?' when they are trying to decide what to investigate.....They are paying more attention to the revenues they can get....and it is skewing the cases they get involved in."¹⁰⁸ A senior Customs official stated that if police had "a guy with a ton of marijuana and no assets versus a guy with two joints and a lear jet, I guarantee you they will bust the guy with the lear jet."¹⁰⁹ Even federal judges are making their views known. One federal court has stated that "More and more courts are voicing frustration at what appears to be overreaching by the United States in the drug war, particularly in forfeiture cases where law enforcement agencies have a built in conflict of interested because they share in the product of seizure."¹¹⁰

V. Abuse

The overriding objective of civil forfeiture laws is to deprive organized crime and drug kingpins of the property utilized to further their criminal activity. This is the objective which has been voiced again and again by law enforcement agencies, our federal legislature, and legislatures across the country. Gary Copeland, director of the Justice Department's forfeiture office, stated that forfeiture is "particularly effective against the intricate financial structures developed by drug traffickers, money launderers, organized criminal groups, and other complex criminal organizations."¹¹¹ But evidence suggests that civil forfeiture laws have been utilized, more often than not, against the ordinary citizen.¹¹² It is from this perspective that one can begin to understand the term "corrupt incentive" and the growing sentiment that individual rights are suffering pursuant to civil forfeiture laws.

The abuses taking place under civil forfeiture laws abound; they are a daily occurrence across the country.¹¹³ Studies have shown that in the overwhelming number of civil forfeitures no one is prosecuted for a crime,¹¹⁴ and the property is owned by ordinary citizens. In California, for example, prosecutors conducted over 6,000 civil forfeitures in 1992; ninety-four percent of these involved seizures of \$5,000 or less.¹¹⁵

In a ten month study by two reporters from the Pittsburgh Press, 25,000 seizures by the DEA were examined. The study found that 80% of the people who lost their property were never charged with a crime and that "most of the seized items weren't the luxurious playthings of drug barons, but modest homes and simple cars and hard-earned

savings of ordinary people.”¹¹⁶ The study found that only 17 percent of the 25,297 items seized by the DEA during the eighteen month time period studied were valued at more than \$50,000.¹¹⁷

The Pittsburgh Press study also included an examination of 121 cases in various airports, train stations, and bus terminals in which police found no drugs, made no arrests, but seized cash anyway.¹¹⁸

The individual cases comprising these statistics are readily available. Kevin Perry of New Hampshire, a gravel pit laborer, pleaded guilty to the misdemeanor of growing four marijuana plants behind his mobile home with his wife, a waitress.¹¹⁹ Mr. Perry and his wife paid a small fine as a result. One month later he received a registered letter indicating that his mobile home, worth \$22,000, was being seized as property used to facilitate the crime.¹²⁰

Donald Regan of Montvale, New Jersey, gave a ride to an individual known to police; he was stopped and cocaine was found on the passenger. Both Mr. Regan and the passenger were arrested. Because the passenger insisted that Mr. Regan had no connection to him the charges against Mr. Regan were dropped, but the police kept his car.¹²¹ Mr. Regan fought the forfeiture after the police agreed to return the car to him if he paid half of the Blue Book value. Mr. Regan refused and lost the car in a court battle due to the fact that he failed to rebut a showing of probable cause that the car was used to facilitate a drug deal.¹²²

Dick Kater was convicted of illegally catching fish which resulted in a fine. State wildlife agents seized his \$6,000 boat. He has fought this case to the State Supreme Court but has yet to receive his boat back.¹²³ In Washington D.C., there are several cases in which small amounts of cash have been seized--\$4 in one case--without arrests being made.¹²⁴ In another case a woman's \$18,000 automobile was forfeited as a getaway car; this woman had been arrested for shoplifting.¹²⁵ Paul Born lost his home because he used his home telephone to arrange a drug deal--the house was not the location of the drug deal, nor were any drugs ever present in the house.¹²⁶ George Jackson lost his twenty-eight foot boat because authorities found marijuana residue in a concealed compartment;¹²⁷ Linda Bows lost her Porsche when DEA agents identified less than one quarter of a gram of marijuana in it.¹²⁸

These are just a few of the many documented cases which portray the extremely troubling use of government power under civil forfeiture laws. The numerous instances of abuse have led the president of the National Association of Criminal Defense Attorney's to declare that "civil forfeiture is essentially government thievery."¹²⁹ This sentiment is being echoed more and more in the halls of Congress. Congressman Henry Hyde of Illinois, in testimony before the House Government Operations Committee, testified as follows:

Please enter with me the Kafkaesque world of civil asset forfeiture. I advise you never to buy an airplane ticket at an airport for cash. This behavior will likely cause the ticket agent to alert police as to a possible "drug dealer" (which can potentially result in a reward for the agent). You will be searched, and if you are carrying a large amount of cash it will be confiscated. Unfortunately for you, you

fit the “drug profile.” And be very careful how you leave the plane. As the Pittsburgh Press reported, “agents in Illinois are told it is suspicious if their subjects are among the first people to leave the plane, because it shows they are in a hurry. In Michigan, the DEA says that being the last person off the plane is suspicious because the suspect is trying to appear unconcerned. And in Ohio, agents are told suspicions should surface when suspects deplane in the middle of the group because they may be trying to lose themselves in a crowd.”¹³⁰

VI. Innocent Owners

As the early American cases demonstrate, civil forfeiture has been imposed on citizens despite claims and evidence of innocence.¹³¹ The United States Supreme Court has followed the dictates of precedent and has repeatedly upheld the fiction that guilt attaches to the property itself, and as such, the innocence of an owner is irrelevant.¹³²

In 1974, the United States Supreme Court acknowledged, in dicta, the possibility of an innocent owner defense under the Fifth Amendment’s Takings Clause. In that case, *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹³³ the claimant leased a yacht to two Puerto Rican residents who brought a marijuana cigarette on board.¹³⁴ The butt of the marijuana cigarette was found by authorities, who proceeded to initiate a forfeiture proceeding against the yacht.¹³⁵ The yacht company which leased the yacht argued that the forfeiture was a government taking without just compensation because the company was innocent of any illegal conduct or knowledge of such conduct.¹³⁶ The Court held that under the Constitution, Congress could authorize the forfeiture of property used illegally even when the owner did not participate and had no knowledge of the illegal conduct.¹³⁷ The Court emphasized that the owners exercised judgment and control in leasing the yacht, but

implied there may be a narrow exception by distinguishing this situation from one where a property owner exercised no discretion in entrusting the property to others.¹³⁸ The Court went on and identified two types of truly innocent owners: those who have had their property taken without “privity or consent,” and those who had done everything that “reasonably could be expected to prevent the proscribed use.”¹³⁹ The Court stated that either of these situations would “give rise to serious constitutional questions.”¹⁴⁰

A decade after Calero-Toledo was handed down, Congress amended the federal civil forfeiture statute to include an innocent owner defense.¹⁴¹ For example, sections 881(a)(4)(C) and (a)(7) provide that no conveyance or interest in real property shall be forfeited by reason of any act or omission established by the owner to have been committed or omitted without his or her knowledge or consent.¹⁴² In addition, Congress provided an innocent owner defense for those that have no involvement in drug transactions that take place on their property. This provision states that, “[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”¹⁴³ Almost identical provisions apply to the forfeiture of drug proceeds¹⁴⁴ and conveyances, though the exception for conveyances does not apply to owners that act with “willful blindness.”¹⁴⁵ While these provisions appear to completely protect innocent owners, the government still is required to show only probable cause that there was reason to believe the property was subject to forfeiture; once this almost routine task is accomplished, the burden is on the property owner to prove, by a preponderance of the evidence, that there was lack of knowledge or

consent.¹⁴⁶ Case law indicates that this can be a difficult and often unsuccessful task.

Aside from the federal provisions outlined above, the vast majority of almost two hundred civil forfeiture statutes in the United States do not provide for an innocent owner defense.¹⁴⁷

Because the federal statutory provisions providing an innocent owner defense are so much alike, and in some cases identical, courts have felt bound by precedent involving the forfeiture of one type of asset, such as real property, to the forfeiture of other assets, such as a vehicle.¹⁴⁸ In doing so, courts have not interpreted the requirement of “knowledge” as knowledge of the act upon which the forfeiture is based.¹⁴⁹ Instead, the majority of courts consider the property owner’s general knowledge of any past illegal conduct involving the property and view this as depriving the owner of his or her innocence.¹⁵⁰

Federal cases involving innocent owner defenses portray the degree to which citizens lacking any involvement in the illegal conduct at issue are actually protected. For example, a common situation in the federal courts involves a drug dealing husband and an uninvolved wife. Case law indicates that a wife who may have had knowledge of her husband’s illegal activity at some point in time, but did not act reasonably to stop it, will lose her interest in the home under the forfeiture statutes.¹⁵¹ In discussing what “reasonable” means, one commentator has noted that

In virtually every published case involving spouses, the wife either had no knowledge of, or took no steps to prevent, the illegal conduct. Thus, the courts have not had occasion to determine the reasonableness of a wife's conduct toward her husband, nor have they suggested steps that a wife could reasonably take..... One district court, however, did suggest "[a]s pure speculation, [that] perhaps [the wife] was required to seek a divorce in order to divorce herself from this possible result."¹⁵²

In *United States v. Sixty Acres*,¹⁵³ the government seized and forfeited an Alabama farm and residence because the husband was selling marijuana from the property. The wife testified, and other evidence corroborated, that she lived in fear of her husband.¹⁵⁴ The court also heard testimony concerning an interview of the wife's teenage daughter who said she was scared of her father and "did not know what he would do to her mother if she talked to [the police]."¹⁵⁵ The court concluded that "'consent' can be implied to a wife, even a wife dominated by an overbearing and abusive husband, if that wife takes no affirmative action whatsoever to stop her husband's criminal activity . . . except perhaps to object verbally in a bland and ineffective way."¹⁵⁶

This same court subsequently granted a new trial for purposes of allowing the wife to more thoroughly present evidence concerning fear of her husband. This subsequent evidence included the fact that the husband had served a prison term for beating his first wife to death, that he had previously choked his current wife and threatened to kill her if she left him, that he drank heavily, and that he owned several guns, including a semi-automatic rifle.¹⁵⁷ Additionally, a witness testified that had the wife gone to the police, she would have been killed.¹⁵⁸

This evidence led the court to dismiss the government's forfeiture complaint with prejudice.¹⁵⁹ The Eleventh Circuit subsequently reversed the district court on the grounds that the wife's defense was not adequate in that the evidence she presented did not satisfy the elements of duress. The court concluded that the wife's generalized fear of persecution from her husband was not enough to allow her to "escape the consequences of her consent to his illegal acts."¹⁶⁰

Courts have also refused to allow for claims based on children's future possessory interest in property. For example, in *United States v. 6109 Grubb Road*, five minor children argued that they had a valid possessory and future interest in the property.¹⁶¹ The court concluded that the children did not have a possessory or future interest, but rather had a mere expectancy of inheritance.¹⁶² As such, the court held that the children lacked standing to oppose the forfeiture. The court stated that

While we are not unmindful of the grave consequences arising from the forfeiture of a 'family home' where minor children are involved, we are constrained by the clear language of the statute. If some further exemption is to be carved out of §881 for the benefit of minor children, it must be done by Congress.¹⁶³

Another category of cases commonly found in the federal courts concerns the forfeiture of parents' property due to the illegal conduct of children. As one commentator has described, the majority of cases involve

older, single mothers who work full time and own a modest home. These mothers often live with their adult or minor children who frequently have young children of

their own. The number of family members ranges from as few as five to as many as eighteen. The older children may have keys to the home or a separate room or apartment that they may share with siblings. In each case, at least one of the children becomes involved in drug use and drug sales, usually a small time street level dealer.¹⁶⁴

In *United States v. 19 & 25 Castle Street*, the parents were aware of their children's involvement with drugs in the past.¹⁶⁵ The evidence suggested, however, that the parents believed the involvement with drugs had ceased.¹⁶⁶ The evidence also suggested that the four adult male children concealed their continued drug involvement and repeatedly lied to their parents concerning their drug activities.¹⁶⁷ Despite this evidence, the court concluded that the parents had "knowledge" of drug distribution from the property at issue.¹⁶⁸

On appeal, the Second Circuit considered the effort made by the parents to help the children overcome their involvement with drugs: they sent three children to Florida to get away from the drug infested environment near home; they made efforts to get one child into a drug rehabilitation program; they confronted drug dealers in the area and requested that they leave the area which resulted in retaliatory attacks on their home; and they regularly reported narcotics activity to the police.¹⁶⁹ This was not enough for the Second Circuit which affirmed the district court's ruling on appeal.¹⁷⁰ The Second Circuit indicated that to avoid forfeiture the parents should have engaged in searches of the premises for drugs and drug related activity,¹⁷¹ and stated that "it would not have been

unreasonable for them to ask the police to take some action in regard to the narcotics activity at their dwelling.”¹⁷² The parents lost their home.

In a similar case, a single mother with a fifth grade education lost her home.¹⁷³

The court stated that

she should have called the police department or the Drug Enforcement Agency for help with her children....She did not throw her daughters out of the house because she was concerned about providing shelter for their young children. Although Ms. Jenkins’ maternal love and concern for her grandchildren are certainly commendable, her actions do not constitute reasonable efforts to prevent the use of her property in the drug transactions.... [I]t seems unduly harsh to order the forfeiture of Easter Mae Jenkins' h ome. Although loss of the family dwelling will somewhat punish Sharon, the perpetrator of the offenses, Easter Mae Jenkins will bear the full effect of the forfeiture. She loses the home that she prudently purchased with proceeds from her husband' s wrongful death settlement because she continued to provide for her daughters through hard work even when their treatment of her was reprehensible and their respect for her minimal. Unfortunately, the law requires this result. Accordingly, it is hereby ordered, adjudged and decreed that the defendant property be and is forfeited to the United States of America.¹⁷⁴

When becoming familiar with enforcement of the law as it is executed in the context of civil forfeiture, one is compelled to wonder what has happened to the recognition that “the Constitution protects the integrity of the family unit and the essential right to raise one’s children” as declared by the Supreme Court in *Stanley v. Illinois*.¹⁷⁵

What has happened to the rule of law which commands that “it is cardinal....that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor

hinder”?¹⁷⁶ What has happened to the basic presupposition that the “tradition of American liberty” is in the maintenance of parental authority?¹⁷⁷

Cases like *United States v. 19 & 25 Castle Street* and *United States v. Sixty Acres* imply that not only can the federal government seize one’s entire home with a mere showing of probable cause, but that the government can set standards of behavior concerning how parents should relate and respond to the problems of family members and seize property when such standards are believed to have been violated. Such rulings are premised on the outrageous notion that personal or family crises are better addressed and resolved by an impersonal government than the parents of children.

VII. Use of Informants

The law of civil forfeiture is further tainted by the liberal use of informants. Not only is property presumed guilty unless proven innocent once the government makes a showing of probable cause, but innocence must often be established against the word of an unknown informant with information that is largely unsubstantiated.¹⁷⁸

The United States Department of Justice pays up to 25% of the amount forfeited per case to informers for their tips. The Justice Department budget provides approximately \$25 million annually for compensating informers. In 1991, approximately 24 informers made between \$100,000 and \$250,000 providing tips. In that same year, at

least eight informers exceeded the \$250,000 mark, one of which received \$780,000, another receiving \$591,000.¹⁷⁹

Paying informants such large sums of money, with little to no requirements for who can be an informant, simply corrupts the world of civil forfeiture more than it otherwise is. In September of 1993, the New York Times featured a professional thief who had spent 28 years in prison. He referred to informants as “new bounty hunters” who often sell drugs and then set up their customers. The thief wrote that “A DEA informant has more power than an agent can ever dream of,” and stated that “under the tutelage of cynical agents, [DEA informants] lied, cheated and did whatever was necessary to make the cases and rewards.”¹⁸⁰

A story aired by CBS in 1992 provides a good example of the problems that can arise when using informants. Bobby Watts, who was facing 35 years in prison for running a large scale marijuana operation on his farm, agreed to act as an informant. Mr. Watts told prosecutors that the Cwikla family was storing 300 pounds of marijuana at their residence. Watts subsequently changed the amount to 200 pounds and eventually to one pound. In addition to these varying accounts of the amount of marijuana stored, another informant who corroborated Watts’ story failed a lie detector test. Without searching the Cwikla’s residence or verifying Watts’ information further, the Assistant U.S. Attorney Leslie Ohta’s office proceeded to seize and initiate a forfeiture proceeding against the Cwikla’s home.¹⁸¹

The Justice Department's policy of offering up to 25% of the amount forfeited is not only disturbing to one who uses common sense, but it is in conflict with long-standing rules concerning payment to witnesses. The ABA Model Rules of Professional Conduct dictate that it is unethical to pay an occurrence witness any fee.¹⁸² The ABA Model Code on Professional Responsibility indicates that a lawyer "shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon....the outcome of the case."¹⁸³ Both sets of rules prohibit contingent fee arrangements with any witnesses, including expert witnesses.¹⁸⁴

Informants providing information in civil forfeiture cases will not get paid unless property is actually forfeited and liquidated. This is in direct conflict with the standard ethical rules. No citizens should suffer losing their property to purchased testimony. It creates an obvious conflict of interest which itself casts doubt on the entire process.

VIII. Civil Forfeiture Should be Abolished

Despite the widespread use and misuse of civil forfeiture, it is an arcane legal doctrine which endures in American society simply due to its historical foundation and the many advantages it offers to law enforcement. The historical justifications for civil forfeiture simply no longer have a place in contemporary society. No one actually believes that tainted property itself possesses "a certain personality, a power of complicity and guilt in the wrong."¹⁸⁵ Nor does civil forfeiture assist any government in enforcing laws due to the difficulty in acquiring personal jurisdiction over offenders.¹⁸⁶ As stated by Justice Oliver Wendell Holmes, "It is revolting to have no better reason for a rule of law than

that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹⁸⁷

Civil forfeiture should be abolished completely while leaving criminal forfeiture laws intact. This course of action has several justifications. First, as a weapon against drug kingpins and organized crime, civil forfeiture has failed. Second, civil forfeiture, despite its civil label, is punishment and should therefore be initiated only in a criminal context with all of the due process protections inherent to criminal proceedings. Third, abolishing civil and preserving criminal forfeiture laws will resolve problems associated with the use of informants. Fourth, as part of a criminal prosecution, the problems of depriving innocent owners of their property will diminish greatly, if not disappear completely. And finally, requiring that all forfeiture of property take place under criminal laws will put the burden of proof where it actually belongs and restore the constitutional principles promised to every citizen as an essential tenet of American democracy.

A. As a Weapon Against Drugs and Organized Crime Forfeiture has Failed

Forfeiture laws, both civil and criminal, were enacted to fight drug lords and organized crime. Those who backed the 1970 federal legislation repeatedly insisted that forfeiture laws would “take the profit out of crime, paralyze drug operations, eradicate the criminal infiltration of legitimate businesses and labor organizations and end criminal tactics in business and trade unions.”¹⁸⁸ These objectives have not been met.

An examination of forfeitures under federal laws from 1985 until 1994 makes clear that as a weapon against drug kingpins and organized crime, forfeiture has failed horribly. The value of forfeited properties under civil and criminal forfeiture laws from 1984 to 1992 has a cumulative value of \$2.5 billion.¹⁸⁹ The cumulative value from 1984 until 1994 is far less than \$5 billion.¹⁹⁰ This must be compared to the annual, not cumulative, value of profits made by organized crime and white collar crime which amounts to several hundred billion dollars a year.¹⁹¹ Drug profits alone amount to over \$50 billion a year.¹⁹² The annual federal budget for drug programs in 1992, according to the National Institute for Drug Abuse, was \$20 billion,¹⁹³ more than four times the cumulative forfeiture proceeds from 1984 to 1994. Even the cost of providing medical care to crack babies, which amounts to \$2.5 billion dollars a year, is eleven times more than the cumulative amount of forfeitures when added up from 1985 to 1994.¹⁹⁴ These statistics indicate that the financial losses from abolishing civil forfeiture would not be terribly significant. In light of the abusive practices taking place under the guise of a war against drugs, abolishing civil forfeiture is exactly what should be done.

B. Civil Forfeiture is Punishment

The United States Supreme Court has stated that punishment at the hands of the State is not a legitimate goal of a civil penalty.¹⁹⁵ Civil forfeiture has its basis in the notion that the action is against the property itself, not the person.¹⁹⁶ Continued adherence to this fiction overlooks the obvious fact that the effect of civil forfeiture is to punish the person, often times severely.

As indicated by Jeremy Bentham, property is “not a ‘thing’ at all, though ‘things’ are the subject of property.”¹⁹⁷ Property is the legally protected “expectation...of being able to draw such or such an advantage from the thing in question.”¹⁹⁸ Property is a series of complex rights and liabilities, and to state the obvious, these are rights and liabilities of the person, not the thing. In today’s society, many of our most precious personal freedoms--our opportunities to learn, to achieve, to provide, to remain secure--are directly linked to our individual resources, which in turn, derive meaning from the personal freedoms they make possible. When the government seizes the means an individual has for living, the government is in fact taking action against the person and is punishing the person.

One need not resort to analyzing the personal experiences of those who have been deprived of property to justify the conclusion that civil forfeiture is in fact punishment, and therefore criminal in nature. The United States Supreme Court has said so itself. In fact several rulings by the Court have gone so far as to make constitutional rights normally afforded only to the criminal defendant applicable in the civil forfeiture context.

As early as 1886, the United States Supreme Court held that although an in rem proceeding is civil in nature, forfeiture has a quasi-criminal character because it is punitive as well as remedial.¹⁹⁹ The Court declared that it was “clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man’s property... though they may be civil in form, are in their nature criminal.”²⁰⁰

In *United States v. U.S. Coin & Currency*,²⁰¹ the Court went so far as to say:

From the relevant constitutional standpoint there is no difference between a man who “forfeits” \$8,674 because he has used the money in illegal gambling activities and a man who pays a “criminal fine” of \$8,674 as a result of the same course of conduct. In both instances, money liability is predicated on a finding of the owner’s wrongful conduct.²⁰²

In *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*,²⁰³ the Court reaffirmed its view that civil forfeiture was quasi-criminal in nature. In that case, the Court reversed the Pennsylvania Supreme Court’s ruling that the Fourth Amendment exclusionary rule derived from criminal law and therefore did not apply in civil forfeiture cases. The United States Supreme Court stated that

The [case], though technically a civil proceeding, is in substance and effect a criminal one....As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think they are within reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution.²⁰⁴

In addition to the Fourth Amendment’s search and seizure clause, the United States Supreme Court has extended several other constitutional rights recognized in criminal cases to the civil forfeiture context. In *United States v. U.S. Coin & Currency*,²⁰⁵ the defendant failed to report his gambling activities as required by an act of Congress. The government proceeded to institute forfeiture proceedings against him. The defendant objected on Fifth Amendment grounds and the government contended that the right against self incrimination was irrelevant in the context of civil forfeiture proceedings. The Court disagreed with the government and stated that when

the civil forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty upon those who are significantly involved in a criminal enterprise. It follows....that the Fifth Amendment's privilege [against self incrimination] may be invoked in those proceedings.²⁰⁶

Other constitutional protections determined by the Court to apply in a civil forfeiture context include the Sixth Amendment's speedy trial guarantee,²⁰⁷ and in 1993, the Eighth Amendment's Excessive Fines Clause.²⁰⁸

Unfortunately, these cases rest among many others that continue to assert the guilty property fiction and uphold civil forfeiture proceedings as civil, not criminal. For example, in *One Lot Emerald Cut Stones and One Ring v. United States*,²⁰⁹ the government sought to forfeit emeralds allegedly imported in violation of customs laws. Prior to initiating the civil forfeiture proceeding, the government tried to convict the defendant of smuggling, but he was acquitted.²¹⁰ The defendant claimed he was being exposed to double jeopardy in violation of the Fifth Amendment.²¹¹ In response to this argument, the United States Supreme Court ignored its prior rulings that civil forfeiture was quasi-criminal in nature such that it justified application of the Fourth and Fifth Amendments. According to the Court, in this instance, the purpose of the civil forfeiture proceeding was remedial, not criminal.²¹²

This was followed by a similar case in 1984.²¹³ The government prosecuted the defendant for selling weapons without a license.²¹⁴ After the jury returned a verdict of not guilty, the government initiated a forfeiture proceeding in an attempt to confiscate the

weapons.²¹⁵ In response to the defendant's argument that he was being exposed to double jeopardy in violation of the Fifth Amendment, the Court again selectively emphasized its precedent and ruled that Congress intended civil forfeiture to be remedial in nature, not punitive.²¹⁶

In addition to the Fifth Amendment's Double Jeopardy Clause, the Court has refused to extend the Sixth Amendment's Confrontation Clause²¹⁷ and right to counsel²¹⁸ in civil forfeiture proceedings. And even within the last year, in *Bennis v. Michigan*,²¹⁹ the United States Supreme Court reaffirmed its determination that under statutes which do not provide for an innocent owner defense, the innocence or guilt of the property's owner is irrelevant. Justice Rehnquist stated that

a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put, even though the owner did not know that it was to be put to such use....²²⁰ We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."²²¹

Notwithstanding the Court's efforts to define civil forfeiture as civil in nature, one can only realistically conclude from both the Court's conflicting rulings and civil forfeiture's obvious affect on citizens, that it is punitive and criminal in nature. Yet today there are citizens across the country who continue to have their cars, boats, aircraft, businesses and even homes taken from them without the constitutional protections afforded to major drug traffickers that are prosecuted under the criminal forfeiture statutes such as RICO²²² and the Continuing Criminal Enterprise Statute.²²³ Under these criminal

statutes, a defendant's property cannot be forfeited until the government proves, beyond a reasonable doubt, in a court of law, that the defendant is guilty of the crime charged. It is absurd that major drug traffickers prosecuted under these statutes are afforded greater due process protections than the average citizen who is deprived of the resources he may have spent the majority of his life accumulating for the benefit of his children and grandchildren. Abolishing civil forfeiture completely will ensure that no punishment is imposed without first obtaining a conviction in accord with the dictates of our Constitution.

C. Abolishing Civil Forfeiture will Restore Integrity to our Forfeiture Laws

In addition to the corrupt incentives that current civil forfeiture laws encourage and the inverted procedures that place the burden of proof on property owners, the integrity of civil forfeiture is poisoned by the use of informants. These informants are, for the most part, criminals with extensive records. Often informants are selected based on arrests and their desire to provide information on people in exchange for getting their own charges reduced or dismissed.²²⁴ Because of their criminal propensities and their personal stake in providing arrests to law enforcement, paid informants have a strong incentive to lie.

Because the identities of informants remain unknown in a civil forfeiture proceeding, there is no way for a property owner to attack the veracity of the informant. The average citizen, unentitled to paid-for counsel in a civil forfeiture proceeding,²²⁵ has

no way of finding out whether the informant has a criminal record, a reason to be biased, or whether money is being paid for the information.

As the laws are now written and applied, a dishonorable, deceitful, double-dealing, financially compensated informant can be used in civil forfeiture proceedings, and the burden of proof is on the property owner to prove herself innocent. As such, the side presenting purchased testimony is given the benefit of doubt.

By abolishing civil forfeiture and retaining criminal forfeiture statutes, informants can remain useful to law enforcement without poisoning the forfeiture process and sacrificing the rights of citizens. In criminal cases, the defendant has the right to confront and cross examine his accusers.²²⁶ Through cross examination, information that is questionable due to an informant's criminal past, his bias against the people accused, deals with the prosecutor in exchange for testimony, promises of cash rewards in exchange for testimony, will all be revealed, taken into account and given weight by twelve impartial members of the community in determining the facts at issue and the credibility of witnesses.

**D. The Innocent Owner Defense Should be Disproven, Beyond a Reasonable Doubt,
by the Prosecution in a Criminal Proceeding**

In the vast majority of jurisdictions in the United States, affirmative defenses arising under civil laws must be proven by the defendant asserting them.²²⁷ If civil forfeiture remains, statutes which offer an innocent owner defense will likely continue to place the burden of proof on innocent owners; they will be required to prove that they did not have knowledge of or consent to the illegal activity involving their property. For the overwhelming number of jurisdictions which do not offer an innocent owner defense, innocent owners will continue to be victimized by the government.

By contrast, in the vast majority of jurisdictions in the United States, a defendant in a criminal case has the burden of production in setting forth an affirmative defense.²²⁸ Once the burden of production is met by the defendant, the prosecution has the burden of persuasion (proof beyond a reasonable doubt) in proving every element of the crime charged and disproving the affirmative defense set forth by the defendant.²²⁹

The current standards of proof required to successfully assert an innocent owner defense should be abolished along with civil forfeiture in its entirety. Adequate protection of the innocent owner cannot exist when the government has a burden which is even lower than the “preponderance of the evidence” standard for plaintiffs in a routine civil case. As the laws are now written, the property owner is required to bear the burden of proving a negative--an absence of implied or constructive consent.²³⁰ How is one to offer affirmative evidence that establishes a negative?

As a part of abolishing civil forfeiture the innocent owner defense should be maintained. In criminal cases, the innocent owner should be required to bear the burden of production--i.e., produce enough evidence that a reasonable juror could find that the owner was in fact innocent of any wrongdoing. The prosecution should then be required to disprove, beyond a reasonable doubt, the lack of knowledge or consent, either constructive or implied, on the part of the property owner.

IX. Conclusion

Civil forfeiture is punishment. Ordinary citizens are presumed guilty and innocence must be proven. Property of all kinds, including the sacred sanctuary called “home” which houses parents and children, which provides shelter and warmth, and which potentially carries with it generations of memories, can be seized by government authorities relying on what frequently amounts to nothing more than a fiction.

Civil forfeiture allows citizens to be punished even before having a trial, often without any sense of proportionality to the wrong committed, often without regard even to the presence of culpability.

Civil forfeiture operates without providing a right to counsel, leaving the average citizen without the means to navigate through the complexities of the legal system.

In the name of protecting communities against crime and drugs, citizens are being harmed and the bedrock constitutional doctrines upon which this nation was founded are

being violated. It is time to end this abuse by abolishing civil forfeiture altogether. It is time to restore conditions that are favorable to the pursuit of happiness; restore principles that are fundamental to our Constitution; and restore institutional restraints on the arbitrary exercise of government power that are essential to the preservation of personal freedom.

¹ 2 James Wilson, *The Works of James Wilson* 630-31 (reprinted 1976)(1804).

² U.S. Const. amend. V, IV.

³ Laurence H. Tribe, *American Constitutional Law* 663-64 (1988).

⁴ Judd B. Balmer, *Civil Forfeiture under 21 U.S.C. §881 and the Eighth Amendment's Excessive Fines Clause*, *ARIZ. L. REV.* 999 (1996).

⁵ Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and The War on Drugs*, 83 *J. CRIM. L. & CRIMINOLOGY* 274, 275 (1992).

⁶ *United States v. One Mercedes-Benz 380 SEL*, 604 F. Supp. 1307, 1312 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985).

⁷ See notes 46-76.

⁸ See Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 *CORNELL L. REV.* 1151, 1154 (1990).

⁹ *Calero-Toledo*, 416 U.S. at 680-81

¹⁰ Scott A. Hauert, Comment, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 *U. DAYTON L. REV.* 159, 163 (1994).

¹¹ See 2 Frederick Pollock & Frederic William Maitland, *The History of English Law* 473 (1968).

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- ¹² United States v. United States Coin & Currency, 401 U.S. 715, 720-21 (1971) (Harlan, J.) (quoting 1 William Blackstone, Commentaries on the Laws of England, c. 8, 300 (1765)).
- ¹³ United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 413 (1814) (Story, J., dissenting).
- ¹⁴ Donald. J. Boudreaux and A.C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 601 (1996).
- ¹⁵ Boyd v. United States, 116 U.S. 616, 637 (1886).
- ¹⁶ Lawrence A. Kasten, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 198 (1991).
- ¹⁷ Id. at 198.
- ¹⁸ Id.
- ¹⁹ U.S. Const. art. III, S 3, cl. 2.
- ²⁰ Calero-Toledo, 416 U.S. at 682.
- ²¹ Id.
- ²² Austin, 113 S. Ct. at 2807.
- ²³ Alan Nicgoriski, *The Continuing Saga of Civil Forfeiture, The War on Drugs and Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures*, 91 NW. U.L. REV 374, 383 (1996).
- ²⁴ Jon E. Gordon, Note, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744, 746 (1995).
- ²⁵ James R. Maxeiner, *Bane of American Forfeiture Law-Banished at Last?*, 62 CORNELL L. REV. 768, 782 n.86 (1977).
- ²⁶ Id. at 780.
- ²⁷ 25 U.S. (12 Wheat.) 1 (1827).
- ²⁸ 43 U.S. (2 How.) 210 (1844).
- ²⁹ The Palmyra, 25 U.S. (12 Wheat.) 1, 8 (1927).
- ³⁰ Id. at 14.
- ³¹ Malek Adhel, 43 U.S. (2 How.) 210, 229 (1844).
- ³² Id. at 230.
- ³³ Id. at 233.
- ³⁴ Id.
- ³⁵ Maxeiner, supra note 25, at 785.
- ³⁶ Id. at 786.
- ³⁷ Id. at 786.
- ³⁸ Id. at 786-87; see Act of July 7, 1862, 12 Stat. 589
- ³⁹ Id. at 787 & n.11 (quoting Norris v. Doniphan, 61 Ky. (4 Met.) 385, 426 (1863)).
- ⁴⁰ Id. at 787 & n.112 (footnotes omitted).

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- ⁴¹ 96 U.S. 395 (1877)
- ⁴² *Id.* at 399.
- ⁴³ *Id.* at 396-97.
- ⁴⁴ 254 U.S. 505 (1921).
- ⁴⁵ 272 U.S. 465 (1926).
- ⁴⁶ *Goldsmith-Grant*, 254 U.S. at 505.
- ⁴⁷ *Id.* at 510.
- ⁴⁸ *Id.* at 513.
- ⁴⁹ *Van Oster*, 272 U.S. at 465-66.
- ⁵⁰ *Id.* at 467-67.
- ⁵¹ *Kasten*, *supra* note 30, at 202.
- ⁵² Walter J. Van Eck, Comment, *The New Oregon Civil Forfeiture Law*, 26 WILLAMETTE L. REV. (1990).
- ⁵³ See *supra*, pg. 8-9; notes 41-51.
- ⁵⁴ *Id.* at 449-50.
- ⁵⁵ *United States v. All Assets and Equip. of W. Side Bldg. Corp.*, 58 F.3d 1181, 1182 (7th Cir. 1995) (quoting *United States v. \$40,877 in U.S. Currency*, 32 F.3d 1151, 1157 (7th Cir. 1994)).
- ⁵⁶ Leonard W. Levy, *A License to Steal--The Forfeiture of Property* 63 (1996).
- ⁵⁷ *Id.* (quoting “Message of the President of the United States Relative to the Fight Against Organized Crime, April 23, 1969, to the Congress” in *Measures Relating to Organized Crime Hearings*, pp. 1069, 445).
- ⁵⁸ *Id.* (quoting *Organized Crime Control (Hearings before Subcommittee No. 5 of the House Committee on the Judiciary), on S. 30 and Related Proposals, Serial No. 27, 158, p.78.*)
- ⁵⁹ *Id.* (citing *Congressional Record* 116 (January 21, 1970): 597)).
- ⁶⁰ M. Lynette Eaddy, Note, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After Austin v. United States*, 45 FLA. L. REV. 709, 712 (1993).
- ⁶¹ *Stahl*, *supra* note 5, at 276.
- ⁶² 21 U.S.C. § 881(a)(6) (1994). That provision provides as follows: All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter
- ⁶³ Pub. L. No. 98-473, § 301, 98 Stat. 1837, 2040 (1984).
- ⁶⁴ 21 U.S.C. § 881(a)(7) (1994). The provision states: All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenance or

improvements, 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 punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

⁶⁵ Section 881(b) provides that seizure of "[a]ny property subject to civil forfeiture to the United States...may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property...." The Supplemental Rules for Certain Admiralty and Maritime Claims can be found in Title 28.

⁶⁶ The warrant must be issued pursuant to FED. R. CRIM. P. 41(c). Rule 41(c) provides:

A warrant...shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce....

⁶⁷ 21 U.S.C. § 881(b)(4) (1988).

⁶⁸ As incorporated into the Drug Act pursuant to § 881(d), 19 U.S.C. § 1615 (1988) provides for the allocation of the burden of proof in forfeiture proceedings.

⁶⁹ *United States v. All Assets and Equip. of Westside Bldg. Corp.*, 58 F.3d at 1189. See also *United States v. 18755 North Bay Rd.*, 13 F.3d 1493, 1496 (11th Cir. 1994).

⁷⁰ See *United States v. All Assets and Equip. of W. Side Bldg. Corp.*, 58 F.3d at 1189.

⁷¹ *Levy*, supra note 56, at 120.

⁷² *United States v. \$38,600.00 in U.S. Currency*, 784 F.2d 694, 697 (5th Cir. 1986); see, e.g., *United States v. Daccarett*, 6 F.3d 37, 55 (2d Cir. 1993); *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir.); *United States v. Walker*, 900 F.2d 1201, 1204 (8th Cir. 1990); *United States v. Padilla*, 888 F.2d 642, 643-44 (9th Cir. 1989); *United States v. Dickerson*, 873 F.2d 1181, 1184 (9th Cir. 1988).

⁷³ 702 F.2d 1276 (9th Cir. 1983).

⁷⁴ *Id.* at 1282.

⁷⁵ *United States v. One 55 Foot Fishing Vessel*, 656 F. Supp. 967, 968- 69 (D. Mass. 1987).

⁷⁶ *United States v. \$250,000.00 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987).

⁷⁷ *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F. Supp. 290, 295 (S.D. Fla. 1985).

⁷⁸ Id. at 292, 296.

⁷⁹ *United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995).

⁸⁰ Levy, *supra* note 56 at 162.

⁸¹ See 21 U.S.C.A. §§ 881(a)(4)(c), (a)(7) (West Supp. 1995).

⁸² *United States v. Milbrand*, 58 F.3d 841, 844 (2d Cir. 1995).

⁸³ Levy, *supra* note 56, at 140.

⁸⁴ Id. at 145.

⁸⁵ Id. at 147-49.

⁸⁶ Id.

⁸⁷ The amount acquired by state law enforcement agencies will depend upon whether the state agency acted with or without assistance from the federal government or another state agency. If an agency received assistance, less than 80% will be funneled to that law enforcement agency.

⁸⁸ *New York Times*, May 31, 1993, p. B1.

⁸⁹ Id.

⁹⁰ Levy, *supra* note 56, at 151 (citing *National Drug Control Strategy*, February 1991, p.74).

⁹¹ Id. at 149-50.

⁹² Id.

⁹³ Id.

⁹⁴ Levy, *supra* note 56, at 149. For example, in the District of Columbia forfeiture proceeds go to a fund for drug abuse prevention, the rehabilitation of addicts and public education.

⁹⁵ Id. at 153-156.

⁹⁶ Id. at 155 (citing *Federal Drug Forfeiture Activity* (Hearing before Subcommittee on Crime of the House Committee on the Judiciary)) 94-995.

⁹⁷ Id.

⁹⁸ Levy, *supra* note 56, at 156.

⁹⁹ Id. at 154.

¹⁰⁰ Id. (quoted in *Doyle, Drug Related Seizure of Property*. CRS Report for Congress, October 15, 1992. Washington, D.C.: Congressional Research Service, Library of Congress, 1992).

¹⁰¹ Id. at 156.

¹⁰² David Cauchron, "Are Seizures Legalized Theft?", *USA Today*, May 18, 1992, P. 1A.

¹⁰³ *Christian Science Monitor*, July 1, 1994, pp.1,4.

¹⁰⁴ Id.

¹⁰⁵ Levy, *supra* note 56, at 145.

¹⁰⁶ Id. (citing *Review of Federal Asset Forfeiture Program* (Hearing before the Legislative and National Security Subcommittee of the House Committee on Government Operations, p. 8)).

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- ¹⁰⁷ New York Times, May 31, 1993, §1, p.1.
- ¹⁰⁸ Washington Post, April 1, 1991, p. A. 1.
- ¹⁰⁹ Quoted in the Oregonian, February 8, 1993, p. B7.
- ¹¹⁰ United States v. That Certain Real Property Located at 632-636 Ninth Avenue., Calera, Ala, 798 F. Supp. 1540 (N.D. Ala. 1992).
- ¹¹¹ Levy, supra note 56, at 139.
- ¹¹² See notes infra, pages 17-19, notes 113-130.
- ¹¹³ Levy, supra note 56, at 124.
- ¹¹⁴ Andrew Schneider & Mary Pat Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs (series of articles reprinted from the Pittsburg Press) Aug. 11-16, 1996, p. 3; Levy, supra note 56, at 120.
- ¹¹⁵ New York Times, September 30, 1992, p. D. 15.
- ¹¹⁶ Schneider and Flaherty, supra note 114, at 3.
- ¹¹⁷ Id. at 4.
- ¹¹⁸ Id. at 15.
- ¹¹⁹ USA Today, May 18, 1992 p. 1A.
- ¹²⁰ Id.
- ¹²¹ Oregonian, July 4, 1993, p. 7A.
- ¹²² Id.
- ¹²³ Orlando Sentinel, Aug. 2, 1992, pp. A1, A 21.
- ¹²⁴ Levy, supra note 56, at 132.
- ¹²⁵ Id.
- ¹²⁶ United States v. One Parcel of Real Estate Commonly Known as 916 Douglas Ave., 906 F.2d 490 (7th Cir. 1990).
- ¹²⁷ United States v. One 1982 28' Int'l Vessel, 741 F.2d 1319 (11th Cir. 1984).
- ¹²⁸ United States v. One 1976 Porsche 911S, 670 F.2d 810 (9th Cir. 1979).
- ¹²⁹ Id.
- ¹³⁰ Id. (citing Review of Federal Asset Forfeiture Program (Hearing before the Legislative & National Security Subcommittee of the House Committee on Government Operations) p. 35.
- ¹³¹ See, e.g., J.W. Goldsmith, Jr.- Grant Co. v. United States, 254 U.S. 505 (1921); Dobbins' s Distillery v. United States, 96 U.S. 395 (1877).
- ¹³² See, e.g., J.W. Goldsmith, Jr.-Grant Co., 254 U.S. at 511 (the view of property as offender "is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced"); Dobbins' s Distillery, 96 U.S. at 400 ("[t]he thing ... is primarily considered as the offender"); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as

the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.").

¹³³ 416 U.S. 663, 689-90 (1974).

¹³⁴ Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 665 (1974);

¹³⁵ Id.

¹³⁶ Id. at 680.

¹³⁷ Id. at 688.

¹³⁸ Id. at 690.

¹³⁹ Id. at 689.

¹⁴⁰ Id. at 689.

¹⁴¹ Comprehensive Drug Abuse Prevention & Control Act of 1970 § 511(a)(4)(B), 21 U.S.C. § 881(a)(4)(C) (1994).

¹⁴² See 21 U.S.C.A. §§ 881(a)(4)(c), (a)(7) (West Supp. 1995).

¹⁴³ Comprehensive Drug Abuse Prevention & Control Act of 1970, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1994)).

¹⁴⁴ Psychotropic Substances Act of 1978, § 301(a), 21 U.S.C. § 881(a)(6) (1994).

¹⁴⁵ Comprehensive Drug Abuse Prevention & Control Act of 1970 § 511(a)(4)(B), 21 U.S.C. § 881(a)(4)(C) (1994).

¹⁴⁶ United States v. Milbrand, 58 F.3d 841, 844 (2d Cir. 1995).

¹⁴⁷ Levy, *supra* note 56, at 162.

¹⁴⁸ Sandra Guerra, Family Values?: *The Family as an Innocent Victim of Civil Drug Forfeiture*, 81 CORNELL L. REV. 343, 368 (1996).

¹⁴⁹ Id. at 375.

¹⁵⁰ Id. at 373.

¹⁵¹ Id. at 376.

¹⁵² Id. at 377.

¹⁵³ United States v. Sixty Acres (Sixty Acres I), 727 F. Supp. 1414, 1416 (N.D. Ala. 1990), rev'd, 930 F.2d 857 (11th Cir. 1991).

¹⁵⁴ Id. at 1416.

¹⁵⁵ Id.

¹⁵⁶ Id. at 1421.

¹⁵⁷ United States v. Sixty Acres (Sixty Acres II), 736 F. Supp. 1579, 1582-83 (N.D. Ala. 1990).

¹⁵⁸ Id.

¹⁵⁹ Id. at 1583.

¹⁶⁰ United States v. Sixty Acres, 930 F.2d 857, 860 (11th Cir. 1991).

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- ¹⁶¹ 708 F. Supp. 698, 704 (3d Cir. 1989).
- ¹⁶² *Id.*
- ¹⁶³ *Id.* at 704.
- ¹⁶⁴ Guerra, *supra* note 148, at 383.
- ¹⁶⁵ *United States v. 19 & 25 Castle St.*, 31 F.3d 35 (2d Cir. 1994)
- ¹⁶⁶ *Id.* at 37-38.
- ¹⁶⁷ *Id.*
- ¹⁶⁸ *Id.* at 39.
- ¹⁶⁹ *Id.* at 37-38.
- ¹⁷⁰ *Id.* at 40.
- ¹⁷¹ *Id.*
- ¹⁷² *Id.*
- ¹⁷³ *United States v. 4.14 Acres*, 801 F. Supp. 737 (S.D. Ga. 1992).
- ¹⁷⁴ *Id.* at 742-43.
- ¹⁷⁵ 405 U.S. 645, 651 (1972).
- ¹⁷⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).
- ¹⁷⁷ *Bellotti v. Baird*, 443 U.S. 622, 638 (1979).
- ¹⁷⁸ See *New York Times*, April 17, 1993 pp. 1, 21.
- ¹⁷⁹ Levy, *supra* note 56, at 142 (citing Review of Federal Asset Forfeiture Program (Hearing before the Legislative & National Security Subcommittee of the House Committee on Government Operations) p. 382-283.
- ¹⁸⁰ *New York Times*, April 17, 1993 pp. 1, 21.
- ¹⁸¹ CBS Street Stories, July 9, 1992, transcript pages 14-20.
- ¹⁸² Model Rules of Professional Conduct Rule 3.4(b) cmt. 3. (1994).
- ¹⁸³ Model Code of Professional Responsibility DR7-109(C) (1992).
- ¹⁸⁴ See Model Rules and Model Code.
- ¹⁸⁵ *Austin v. United States*, 113 S.Ct. 2801, 2809 (1993) (quoting *Goldsmith Grant Co. v. United States*, 254 U.S. 505, 510 (1921)).
- ¹⁸⁶ See *supra*, pages 7-8; notes 27-40.
- ¹⁸⁷ Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with Common Sense Application for the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265 (1995) (citing Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897)).
- ¹⁸⁸ Levy, *supra* note 56, at 207.
- ¹⁸⁹ *Id.* at 206.
- ¹⁹⁰ *Id.*

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- ¹⁹¹ Id.
- ¹⁹² See note 51.
- ¹⁹³ New York Times, April 17, 1993, pp. 1, 21.
- ¹⁹⁴ Id.
- ¹⁹⁵ Bell v. Wolfish, 441 U.S. 520, 539 n. 20 (1979).
- ¹⁹⁶ See supra, page 11; note 71.
- ¹⁹⁷ Cunningham, Stoebach, Whitman, The Law of Property 1 (2nd ed. 1993).
- ¹⁹⁸ Id. (quoting J. Bentham, Theory of Legislation, 68 (1975)).
- ¹⁹⁹ Boyd v. United States, 116 U.S. 206, 217 (1960).
- ²⁰⁰ Id.
- ²⁰¹ 401 U.S. 715 (1971).
- ²⁰² Id. at 718.
- ²⁰³ 380 U.S. 693 (1965)
- ²⁰⁴ One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693, 697-98 (1965).
- ²⁰⁵ United States v. U.S. Coin & Currency, 401 U.S. at 718.
- ²⁰⁶ Id. at 718.
- ²⁰⁷ Unites States v. \$8,850, 461 U.S. 555 (1983).
- ²⁰⁸ Austin v. United States, 113 S.Ct. 2801 (1993).
- ²⁰⁹ 409 U.S. 232 (1972).
- ²¹⁰ Id. at 232-33.
- ²¹¹ Id.
- ²¹² Id. at 235-37.
- ²¹³ United States v. One Assortment of Firearms, 465 U.S. 354 (1984).
- ²¹⁴ Id.
- ²¹⁵ Id.
- ²¹⁶ Id. at 361-62, 364.
- ²¹⁷ United States v. Zucker, 161 U.S. 475 (1896).
- ²¹⁸ United States v. Monsato, 491 U.S. 600 (1989); Caplin & Drysdale v. United States, 491 U.S. 617 (1989).
- ²¹⁹ 116 S.Ct. 994 (1996).
- ²²⁰ Id. at 998.
- ²²¹ Id. at 1001.
- ²²² 18 U.S.C. §1963.
- ²²³ 21 U.S.C. §848.
- ²²⁴ See notes 178-184.

²²⁵ *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale v. United States*, 491 U.S. 617.

²²⁶ U.S. Const., amend. VI.

²²⁷ See Joshua Dressler, *Understanding Criminal Law* 51-61 (1995).

²²⁸ *Id.* at 60-61.

²²⁹ *Id.*

²³⁰ Guerra, *supra* note 148, at 374.