Forfeitures Revisited: Bringing Principle to Practice in Federal Court

David Pimentel*

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* Visiting Associate Professor, Ohio Northern University; BA, Brigham Young University; MA, University of California, Berkeley; JD, Boalt Hall School of Law, University of California, Berkeley. A special and long overdue thanks to Karl Yohe, for inspiration and instruction for my earliest work in the area of forfeitures. Thanks to Dee Edgeworth, David B. Smith, Stefan Cassella, Simon Young, Brad Shannon, and Dennis Olson, for gracious comment and insight. And particular thanks to Lydia Sturgis, Felicia Vereen, Tony Constantini, and Jason Antley for invaluable research assistance. Notwithstanding the contributions of so many, the opinions expressed herein are exclusively those of the author.

Introduction

The law of forfeitures, particularly its procedure, is arcane, reflecting ancient concepts and old admiralty practices. Starting in the 1980s, renewed emphasis on forfeitures highlighted problems and injustices inherent in the procedure, mostly rooted in historical idiosyncrasies of forfeiture law.

Congress responded in 2000 with the Civil Asset Forfeiture Reform Act (CAFRA), which attempted to address some of the most glaring inequities in the administration of forfeitures. But the problems with forfeiture procedure are not so easily patched up.

The real problem lies with the unexplored policy basis for forfeitures. Unless and until the policy is better defined, and the procedure is tied to the underlying policy, federal forfeitures are bound to generate anomalous and inequitable results.

Defining and refining the policy basis for federal forfeitures requires recognition of the different types of forfeitures; distinctions must be made between forfeitures (1) of contraband, (2) of proceeds of crime, and (3) of "facilitating property," which is sometimes characterized more narrowly as "instrumentalities" of crime. Because the policy foundation for each of these forfeitures is different, the appropriate procedure for each—striking a proper balance between legitimate government interests and the rights of property owners—must also be different.

Policies and procedures appropriate for the summary removal of methamphetamine from circulation (a contraband forfeiture) may be grossly inappropriate to the confiscation of a family home when one of the family members is suspected of running an illegal gambling operation in it (a facilitating-property forfeiture). Indeed, the forfeiture of profits of either the drug or gambling operations (a proceeds forfeiture) may require an entirely different set of procedural considerations.

A more nuanced approach to forfeiture procedure is needed for federal court, with procedural requirements that reflect diverse and even conflicting policy objectives. CAFRA was a positive step toward preventing the worst injustices, but the procedural requirements will lack coherence until they are specifically tailored to each of the three different types of forfeitures.

Once the analysis of forfeitures is broken down this way, it becomes apparent that the most serious problems arise in the context of facilitating-property forfeitures. The policy justifications are by far the weakest, and the injustices and inequities—including the impact on innocent owners—are the most problematic in this category. Moreover, even when the owner is not innocent, the forfeiture amounts to little more than a truly arbitrary fine, doing violence

to principles of uniform and proportionate sentencing, and in some cases violating Eighth Amendment protections against excessive fines.

This Article will summarize the procedural requirements for federal forfeiture, including the history of the doctrine, and the weak and poorly articulated policy justifications that have been offered over the years. After summarizing CAFRA's key innovations and detailing the most serious problems that persist, the Article attempts a more complete discussion of the first principles of forfeitures. Categorizing forfeitures by type, and highlighting the unique policy basis behind each, will provide a foundation for proposing more appropriate and effective procedures, tailored to each type of forfeiture.

In this analysis, the dubious policy objectives underlying facilitating-property forfeitures—coupled with the serious problems that arise in that category—become apparent, raising concerns that such forfeitures are more trouble than they are worth. In any case, a long-overdue examination of the policy foundation for forfeitures strongly suggests that separately defined procedures, including burdens of proof, are warranted for forfeitures (1) of contraband, (2) of proceeds of crime, and (3) of facilitating property (to the extent these latter forfeitures can be justified at all). At the same time, the categorical breakdown of forfeitures suggests a much-needed framework for assessing when forfeitures violate the Eighth Amendment.

I. Basics of Forfeiture Procedure

At present, there are two basic procedural approaches to forfeitures in federal court: criminal forfeiture and civil forfeiture. Although the impact and purpose of these two procedures are virtually identical, the mechanics and conceptual approach are quite different.

A. Criminal Forfeitures

Criminal forfeiture is an in personam action that follows a criminal conviction of the property owner. After a finding of guilt, the jury is asked to consider, by special verdict, which of the property identified in the indictment is subject to forfeiture.[1] Upon a jury's finding that the property is forfeitable, the court may enter a preliminary order of forfeiture and allow discovery to locate the property and a hearing to litigate any third-party claims to the property.

Because the procedural standards for criminal conviction—including burden of proof and Fourth (seizure), Fifth (due process), and Sixth (right to counsel) Amendment protections—are so high, these forfeitures have not been controversial. Moreover, the forfeiture order applies only to the property of the convicted defendant, so as long as third-party claimants get adequate notice and an opportunity to assert their own claim to the property, due process is easily satisfied.[2]

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[1] Fed. R. Crim. P. 32.2(b)(1) (amending Fed. R. Crim. P. 31(e) (1972)).

[2] *See, e.g.*, United States v. Totaro, 345 F.3d 989 (8th Cir. 2003) (involving a criminal forfeiture under RICO, where the defendant's wife asserted partial ownership of the defendant's estate; the court of appeals held that she had met her burden of showing by a preponderance of the evidence that the estate was partially hers, and not entirely paid for by the

Criminal forfeitures are distinct from civil forfeitures in several respects. Because the forfeiture is in personam, only the property of the convicted defendant may be forfeited, not the property of third parties used to facilitate the crime.[3] No criminal forfeiture is possible if the government cannot, or chooses not to, prosecute, for whatever reason, including when critical evidence is inadmissible, when the defendant cannot be found, or when the defendant is deceased.[4] Because the focus of criminal proceedings is on punishing the defendant, it is possible to forfeit substitute assets, if the forfeitable property cannot be located or identified, or if it is no longer in the possession of the defendant.[5] Criminal forfeitures can also be slower because the government has no formal deadline to file an indictment after seizing the assets, and because disposal of the property must be delayed while the rest of the criminal process, including trial and any appeal, is pending.[6]

B. Civil Forfeitures

Of greater interest are the procedures for civil forfeiture, as it is far more easily effected, and consequently far more controversial. Unlike criminal forfeitures, civil forfeiture actions are filed in rem; the property itself is the defendant in the case.[7] And until statutory defenses were created in recent years, the innocence of the owner was irrelevant.[8]

Indeed, in some cases civil forfeiture can be used as a substitute for prosecution. If the evidence is insufficient to establish guilt beyond a reasonable doubt, or if the evidence showing guilt is for some reason inadmissible, a successful criminal prosecution will not be possible. However, the government may be able to get "half a loaf" by pursuing a civil forfeiture of key assets of the suspected wrongdoer.[9] The death of the wrongdoer, or inability to find the

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proceeds of the defendant's RICO activity). Property may be subject to forfeiture on a wide variety of grounds under a great many statutes calling for it. *See infra* Part I.B.1; *see also* David Pimentel, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, app. at 18–32 (1998) (listing in Appendix A more than 160 separate federal statutes that have forfeiture provisions).

[3] STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 1-5, at 24–25 (2007) [hereinafter CASSELLA, ASSET FORFEITURE LAW] ("[A] third party challenging a criminal forfeiture on the ground that the property belonged to him, not to the defendant, when the crime occurred does not have to be innocent. He or she must establish *superior* ownership, not *innocent* ownership. Thus, in criminal cases, non-innocent spouses and unindicted co-conspirators who had an interest in the property at the time the crime occurred can recover the forfeited property in the ancillary proceeding.").

[4] *Id.* at 18–19.

[5] *Id.* at 23.

[6] *Id.* at 25–26 (In a criminal forfeiture, the property cannot be disposed of until the criminal process is complete and third parties have had a chance to litigate their claims; in a civil forfeiture, administrative forfeitures can be done in summary fashion if no one files a claim to the property.).

[7] CHARLES DOYLE, CONG. RESEARCH SERV., 97-139 A, CRIME AND FORFEITURE 1 (2007).

[8] *Id.*

[9] *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 214 (1996) (statement of Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dep't of Justice) (Cassella suggested this in his testimony: "Civil forfeiture is particularly important because it allows us to reach assets that cannot be reached any other way . . . .").

wrongdoer, similarly will not interfere with a civil forfeiture, as long as the property can be identified and seized. And because it is not subject to the constitutional safeguards that govern criminal procedure, the process can be straightforward and swift, especially if no one comes forward to contest the forfeiture.[10]

1. What Is Forfeitable?

Justice Stevens once classified forfeitable property in three categories: (1) "pure contraband," (2) "proceeds of criminal activity," and (3) "tools of the criminal's trade."[11] The latter category includes not only property used to commit crimes, but also property used to facilitate their commission. Some of the literature distinguishes between property integral to the commission of the crime and the property that merely "facilitates" it,[12] but the law does not make such a distinction. Both types of property are forfeitable on the same terms, and for purposes of this discussion it is sufficient to lump them together under the label "facilitating property."

These three different types of forfeitures—(1) contraband, (2) proceeds, and (3) facilitating property—should be kept separate when discussing policy because they all come from different sources and are implemented for different reasons.[13] For the most part, however, the procedure for all three types is the same, and it is from this counterproductive similarity of treatment that most of the problems with forfeiture procedure arise.

2. Jurisdiction and Venue (Civil)

Because the civil forfeiture proceeding is in rem, jurisdiction must be established over the property (i.e., the res). This was traditionally done by seizing the property itself, so jurisdiction was solely in the district where the res was located. In the 1990s, however, Congress expanded jurisdiction to include the district "in which any of the acts or omissions giving rise to the forfeiture occurred."[14] Venue rules are permissive as well, allowing the case to proceed (1) in the district in which the forfeiture "accrues" or where "the defendant is found," (2) in the district where the "property is found," or (3) in "any district into which the property is brought."[15]

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[10] People have a variety of reasons for not contesting forfeitures. *See infra* Part III.C.2.

[11] Bennis v. Michigan, 516 U.S. 442, 459 (1996) (Stevens, J., dissenting).

[12] *E.g.*, CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 26-2, at 779 (stating that the phrase "property 'used to commit' an offense," often called " 'instrumentalities' of the crime," and the phrase "property used 'to facilitate' " the commission of an offense relate to two distinct concepts. " '[F]acilitating property' is a broader term referring to any property that makes a crime easier to commit or harder to detect.").

[13] *See infra* Part IV.B.

[14] 28 U.S.C. § 1355(b)(1)(A) (2006).

[15] 28 U.S.C. § 1395 (articulating more specific venue provisions for admiralty forfeitures as well—provisions that can be implemented under FED. R. CIV. P. SUPP. E(3)(a) (amended 1998), which allows for service outside the district, bringing the rules into line with the statutory provision at 28 U.S.C. § 1355(d)); *see* Pimentel, *supra* note 2, at 12.

3. Administrative Forfeitures

When no one contests a civil forfeiture, that forfeiture can be carried out administratively, without involving the court at all. Under this procedure, the government must give owners and others with an interest in the property notice of the forfeiture and an opportunity to contest it.[16] If the claimant responds within the narrow time deadlines and files a claim, the matter becomes a case in federal court.[17] More often, the forfeiture retains its administrative character and is finalized without any judicial proceedings.

The government strongly favors civil administrative forfeiture procedure, which allows it "to obtain clear title to the property that is valid against the entire world—often within a matter of weeks—without the need to have any contact with the judiciary, if all potential claimants are properly notified and no one files a timely claim."[18] The government also need never bring evidence to support an uncontested forfeiture, of course, other than the recitation of facts that support seizing the property in the first place.[19]

The efficiency of the forfeiture is a two-edged sword, however; justice and equity may be casualties of a system that too quickly and too easily extinguishes legitimate property rights. Because a large proportion of federal forfeitures—as much as 80%[20]—are uncontested, and because of the staggering sums claimed by the government in these proceedings over the past two decades, this administrative procedure warrants closer attention.[21]

II. Development of Forfeiture Law: How Did We Get Here?

A. Origins

Although the emphasis on civil forfeitures is relatively new, the concept is exceedingly old, dating back to the British Navigation Acts of the seventeenth century, the common law, and even the Mosaic Law of the Old Testament.[22] Early cases of the United States Supreme Court embraced the doctrine, uphold-

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[16] *See* 19 U.S.C. §§ 1607–08 (2006) (customs); 26 U.S.C. § 7325 (2006) (revenue).

[17] CAFRA relaxed the time deadlines somewhat and eliminated the requirement to post a cost bond. *See infra* Part II.B.6; Dee R. Edgeworth, Asset Forfeiture: Practice and Procedure in State and Federal Courts 59–61 (2004).

[18] Cassella, Asset Forfeiture Law, *supra* note 3, § 4-2, at 132–33.

[19] *See* Fed. R. Civ. P. Supp. G(2)(f) (2010).

[20] Stefan D. Cassella, *The Case for Civil Forfeiture: Why in Rem Proceedings Are an Essential Tool for Recovering the Proceeds of Crime*, 11 J. Money Laundering Control 8, 11 (2008) [hereinafter Cassella, *Civil Forfeiture*], *available at* http://works.bepress.com/stefan_cassella/20.

[21] The problem of uncontested forfeitures, to the extent it can be considered a problem, is discussed *infra* at Part III.C.2.

[22] *See* Doyle, *supra* note 7, at 2–3 (discussing common-law antecedents to modern forfeitures).

ing civil forfeitures[23] in in rem proceedings of ships involved in violation of customs laws, slave-trafficking laws, and war embargoes.[24]

Criminal forfeitures also date back to English common law, specifically the concept of "forfeiture of estate." Under this in personam proceeding, anyone convicted of a felony forfeited all his lands and personal property to the crown, in effect punishing the offender's family for generations to come.[25] Forfeiture of estate was rare in the United States; such extreme punishments were unconstitutional in treason cases,[26] and the very first Congress promptly prohibited their application to other crimes.[27]

A more logical approach to understanding the origins of forfeiture procedure requires breaking them down into categories.

1. Facilitating-Property Forfeitures—Origins

Originally, the concept was that the forfeitable property itself bears guilt; the forfeiture of such property was an appropriate sanction for the guilty property.[28] The Biblical provision was that an ox that gores a man must be destroyed, and its flesh not eaten.[29] The innocence of the owner was immaterial if the guilt of the thing—the guilt of the res—was clear.[30]

a. Admiralty and Maritime Forfeitures

This doctrine behind forfeiture of facilitating property was consistently upheld in nineteenth-century American courts for the seizure of ships involved

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[23] The first Congress passed a law almost immediately, subjecting ships and cargoes that violated customs laws to in rem forfeitures. Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 29, 39, 47 (repealed).

[24] *E.g.*, The Mary, 13 U.S. (9 Cranch) 126 (1815) (involving war embargoes); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682–83 (1974) ("[A]lmost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country.").

[25] *See* DOYLE, *supra* note 7, at 2.

[26] U.S. CONST. art. III, § 3 ("The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.") (The "except during the Life" provision was apparently geared to ensure that future generations were not punished for the sins of their fathers.); *see also Calero-Toledo*, 416 U.S. at 682–83 ("Nor has forfeiture of estates as a consequence of federal criminal conviction been permitted . . . . Forfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor have been sanctioned." (internal citations omitted)).

[27] *See* DOYLE, *supra* note 7, at 2. Remarkably, however, the War on Terror has resurrected the concept in the twenty-first century. *See* discussion of the Patriot Act, *infra* Part II.C.

[28] Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181 (1973); James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 768 (1977); DOYLE, *supra* note 7, at 3.

[29] *Exodus* 21:28 (King James) (An ox that gores a person to death will be stoned "and his flesh shall not be eaten.").

[30] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 2-6, at 39 ("By the 1990s, a long line of cases had firmly established that property used to commit a criminal offense could be forfeited in a civil *in rem* proceeding without regard to the innocence of the actual owner of the property.").

in a variety of customs and maritime offenses, with no notice other than service on the res.[31] The procedure and consequences were draconian.

> Vicarious liability also attached: a sailor's single act could forfeit an entire ship even if committed contrary to the express wishes of master or owner. The claimant bore the burden of proving statutory compliance. In the American colonies, moreover, the shipowner proceeded before newly established vice-admiralty courts, not a jury.[32]

No criminal conviction was necessary to seize the ship.[33] Because "[t]he thing is here primarily considered as the offender,"[34] a forfeiture could be sustained even if the innocence of the owner was fully established.[35]

The origins of facilitating-property forfeitures in customs and maritime law are reflected in procedure even today. The rules governing civil in rem forfeitures are found in the Supplemental Rules for Certain Admiralty and Maritime Claims, appended to the Federal Rules of Civil Procedure.[36]

By the nineteenth century, these forfeitures were justified as a deterrent to negligence, providing property owners with incentives to take care to ensure that their property was not misused.[37] In the 1844 case *The Brig Malek Adhel*, the Supreme Court invoked tort principles, justifying the forfeiture of an innocent owner's ship as "the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."[38] The shift in logic did not create new legal rules for forfeitures, but merely constituted new and more palatable justifications for continuing the time-honored practice of forfeiting property utilized in criminal activity.

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[31] Pimentel, *supra* note 2, at 14 (citing The Mary, 13 U.S. (9 Cranch) 126 (1815), a case in which the ship's forfeiture was upheld due to the owner's failure to timely contest it).

[32] Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C. L. REV. 57, 65 (1983) (citing Mitchell qui tam v. Torup, 145 Eng. Rep. 764 (Ex. 1766)). "The Crown established these new courts to ensure preservation of its Navigation Acts revenue from the 'obstinate resistance of American juries.' " *Id.* at 65 n.71 (quoting C. J. Hendry Co. v. Moore, 318 U.S. 133, 141 (1943)).

[33] The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) (a piracy case).

[34] *Id.* at 14 ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty.").

[35] The Brig Malek Adhel, 43 U.S. (2 How.) 210, 210 (1844).

[36] Pimentel, *supra* note 2, at 13 ("[T]he overwhelming majority of civil forfeitures are carried out under one of two statutes: 18 U.S.C. § 981 and 21 U.S.C. § 881. Both statutes specifically invoke, for process purposes, the 'Supplemental Rules for Certain Admiralty and Maritime Claims,' appended to the Federal Rules of Civil Procedure.").

[37] Reed & Gill, *supra* note 32, at 64 ("Because a remedy for wrongful death never existed at common law, the threat of forfeiture may have established a higher degree of care by exacting a penalty for carelessness."); CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 2-6, at 39 ("to encourage property owners to take greater care lest their property be used for an unlawful purpose").

[38] *The Brig Malek Adhel*, 43 U.S. (2 How.) at 233. Of course, the "suppress-the-offense" rationale certainly overlaps with criminal law principles of deterrence.

b. Prohibition

In the 1920s, application of forfeiture procedure was expanded beyond maritime and customs actions and was used to seize property used to facilitate the production and sale of illegal liquor.[39] Again, such actions were brought in rem based on the legal fiction of a guilty res.

The Supreme Court confronted the doctrine directly in 1921 in *Goldsmith-Grant*.[40] The case involved an automobile, sold to the buyer, in which the seller retained a security interest.[41] The buyer used the car to transport bootleg liquor and the car was forfeited, including the security interest of the seller.[42] Despite the troubling equities of penalizing the seller, who was, after all, entirely without guilt, the Court upheld the forfeiture.[43]

Acknowledging the "formidable" argument that forfeiture was to "punish . . . guilt" and that it was mere superstition to assume the guilt of the res, the Court detailed countervailing considerations, including "the necessities of the government, its revenues and policies, and . . . the necessity of making provision against their violation or evasion and the ways and means of violation or evasion."[44] The Court also drew upon the tort theory of liability articulated in *The Brig Malek Adhel*, citing Blackstone in support: "To the superstitious reason to which the rule was ascribed, Blackstone adds: 'That such misfortunes are in part owing to the negligence of the owner, and therefore, he is properly punishable by such forfeiture.' "[45]

Even as the Court appeared to express doubts about, and acknowledge the possible disingenuousness of, the justifications for the rule allowing the forfeiture of a "guilty" res by an innocent owner, it nonetheless upheld the rule: "[W]hether the reason for [the challenged forfeiture scheme] *be artificial or real*, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[46] This revealed, perhaps, the Court's most compelling motivation: it upheld the forfeiture not because it was persuaded that the practice could be justified on public policy grounds, but only because the doctrine was so old and well-established.[47]

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[39] Jason R. Humke, Note, *Passing The Buck: An Analysis of* State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), and Nebraska's Civil Forfeiture Law*, 83 NEB. L. REV. 1299, 1303 (2005); *see, e.g.*, Van Oster v. Kansas, 272 U.S. 465, 469 (1926).

[40] Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921).

[41] *Id.* at 509.

[42] *Id.*

[43] *Id.* at 513.

[44] *Id.* at 510.

[45] *Id.* at 511 (quoting 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 259 (Thomas McIntyre Cooley & James De Witt Andrews eds., 4th ed. 1899)).

[46] *Id.* (emphasis added).

[47] *Id.* The fact the practice is ancient is hardly a reason it should persist; some of the most odious legal concepts, including slavery, are deeply rooted in history as well. But it is worth noting that other countries that share our common law heritage presently see no role for facilitating-property forfeitures. *See* Angela V.M. Leong, *Assets Recovery Under the Proceeds of Crime Act 2002: The UK Experience*, *in* CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 187, 188 (Simon N.M. Young ed., 2009) (noting in the United Kingdom, forfeitures take place under the Proceeds of Crime Act (2002), and even before that legislation, the law targeted only the proceeds of criminal activity); *see also* Proceeds of Crime Act 1996 (Act No. 30/1996) (Ir.), *available at*

As unsatisfying as this justification is, it apparently remains sufficient to support the constitutionality of extinguishing property rights of an innocent owner. In 1996, the Supreme Court decided *Bennis v. Michigan*, involving a man who used a car for a liaison with a prostitute and whose car was forfeited under the state's public nuisance law.[48] The man's wife, who had a half interest in the car, challenged the forfeiture. She emphasized she had nothing to do with her husband's illicit activity and was in some sense already a victim of his misconduct.[49] The Supreme Court upheld the forfeiture of the wife's share of the car despite the compelling equities in her favor. Reaffirming *Goldsmith-Grant*, the Court stated: "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.'"[50]

2. Proceeds Forfeitures—Origins: The War on Organized Crime

The proceeds of crime constitute an entirely separate category of forfeitable property. The provenance of proceeds forfeitures is independent and unrelated, driven by entirely different policy objectives.

In the 1960s, Congress took particular interest in fighting organized crime, culminating in Senator John L. McClellan's "Corrupt Organizations Act," proposed in 1969.[51] The Department of Justice was plainly concerned at the time about the profitability of organized crime:

> When Attorney General John N. Mitchell first testified before the Senate committee that was considering measures against organized crime, his main point was that as long as the flow of money continued, imprisonment of the leaders of Mafia families stimulated the promotions of new people to take the places of those convicted.[52]

The Act passed in October 1970, its forfeiture provisions contained in its Title IX, otherwise known as the Racketeer Influenced and Corrupt Organizations Act (RICO).[53] Congress was strongly motivated by its belief that RICO's forfeiture provisions would "strike at the profits of organized crime and wipe out its hold on legitimate organizations."[54]

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http://www.irishstatutebook.ie/1996/en/act/pub/0030/sec0001.html (noting Ireland similarly carries out its asset forfeitures under a "Proceeds of Crime Act," which applies only to "property obtained or received at any time . . . by or as a result of or in connection with the commission of an offence"); *see also* Felix J. McKenna & Kate Egan, *Ireland: A Multi-Disciplinary Approach to Proceeds of Crime*, *in* CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME, *supra*, at 55 (explaining that these forfeitures, limited to proceeds of crime, are effected under in rem proceedings).

[48] Bennis v. Michigan, 516 U.S. 442, 443 (1996).

[49] *Id.* at 444.

[50] *Id.* at 453 (quoting *Goldsmith-Grant*, 254 U.S. at 511). This case involved state forfeiture laws, and the U.S. Supreme Court found no constitutional infirmity in the forfeiture of the innocent owner's interest in the car. *Id.*

[51] LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 65–67 (1996). Levy gives a particularly thorough treatment of this history.

[52] *Id.* at 67.

[53] Martin G. Urbina & Sara Kreitzer, *The Practical Utility and Ramifications of RICO: Thirty-Two Years After Its Implementation*, 15 CRIM. JUST. POL'Y REV. 294, 296 (2004) (internal citations omitted).

[54] LEVY, *supra* note 51, at 76.

3. Contraband Forfeitures—Origins

Least controversial, and perhaps least interesting, are contraband forfeitures. These have been around as long as the concept of contraband has been in existence. Whenever possession of something is criminalized, the forfeitability of that property can be assumed. In *United States v. Jeffers*,[55] the Supreme Court considered the status of contraband seized in an illegal search. Although the property belonged to the petitioner, and was seized illegally, the petitioner did not have the right to its return: "[s]ince the evidence illegally seized was contraband the respondent was not entitled to have it returned to him."[56]

We see an example in 21 U.S.C. § 881(f), which specifies that certain controlled substances "shall be deemed contraband and summarily forfeited to the United States."[57] Disposal of contraband does not generate revenue because, regardless of the street value of the contraband, the government will not return it to circulation. Indeed, the government is normally authorized to destroy it.[58]

4. Expansions of Forfeiture Law: The War on Drugs

America's "War on Drugs" had a significant impact on the development of forfeiture law, beginning with the Comprehensive Drug Abuse Prevention and Control Act of 1970[59] and the Nixon Administration's 1973 declaration of an "all-out, global war on the drug menace."[60] Old forfeiture doctrines, useful in maritime actions in the nineteenth century and against bootleggers in the early twentieth century, were revitalized when it was determined that they might be effective in the late twentieth century, serving the compelling public policy of suppressing drug trafficking and use in the United States.[61]

The government did not hold back; all three types of forfeitures were used in the War on Drugs. The 1970 legislation provided for the forfeiture of contraband (all drugs illegally manufactured, distributed, dispensed, or acquired) and all facilitating property associated with the manufacture, transportation and delivery of drugs (raw materials, containers, vehicles, aircraft, etc.).[62] In 1978,

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[55] United States v. Jeffers, 342 U.S. 48 (1951).

[56] *Id.* at 54. The contraband could not, however, be used as evidence in the criminal proceeding because the exclusionary rule bars the use of illegally seized evidence.

[57] 21 U.S.C. § 881(f)(1) (2006) (enacted in 1970 as Pub. L. No. 91-513, sec. 511, 84 Stat. 1236).

[58] *See, e.g.*, *id.* § 881(f)(2) ("The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter . . . .").

[59] Part of this legislation was the Continuing Criminal Enterprise Act, which applied criminal forfeiture provisions similar to RICO's against "drug kingpins." LEVY, *supra* note 51, at 78–79.

[60] Reorganization Plan No. 2 of 1973, 38 Fed. Reg. 15932 (March 28, 1973), *reprinted in* 5 U.S.C. app. at 215 (2006), *and in* 87 Stat. 1091 (1973) (message from the President of the United States transmitting Reorganization Plan No. 2 of 1973, establishing a Drug Enforcement Administration).

[61] *See* Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1638–39 (2002); *see also* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44 (1998) (suggesting seizure of capital and the means of production as a method for shutting down trafficking).

[62] H.R. REP. NO. 106-192, at 3 (1999).

that legislation was amended to provide for civil in rem forfeiture both of proceeds traceable to drug crimes and of property used or usable for facilitating such crimes.[63] In 1984, the Act was amended again to include real property that can be classified as facilitating property for drug crimes.[64] In 1986, Congress authorized the criminal forfeiture of substitute assets if the original forfeitable property was no longer available.[65] Within a few years, one senator estimated that drug cases accounted for 98% of forfeitures.[66]

By the end of the 1980s, the War on Drugs had kicked into high gear, and the Department of Justice became increasingly active and aggressive in pursuing civil forfeitures in drug cases.[67] By the mid-1990s, the dramatic increase in forfeiture filings had attracted attention, generating criticism of the concept both from conservatives, who lamented the assault on private-property rights,[68] and from liberals, who questioned overreaching by law enforcement officials.[69]

One example of the harshness of federal civil forfeiture as a tool in the War on Drugs is the case of Joseph Lopes. He had retired after forty-nine years of work on Hawaii's sugar plantations and had purchased a modest home for himself, his wife, and their 28-year-old mentally disturbed son, Thomas.[70] At some point, Thomas planted marijuana in the backyard of the family home and threatened suicide whenever the parents tried to remove it. Arrested in 1987, Thomas pled guilty to this first offense, and was sentenced to probation and weekly psychotherapy. The family thought the episode was behind them until four years later, when government agents arrived to inform the Lopeses that the

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[63] Psychotropic Substances Act of 1978, Pub. L. No. 95-633, sec. 301(a), § 511, 92 Stat. 3768; *see* LEVY, *supra* note 51, at 80; H.R. REP. NO. 106-192, at 3–4.

[64] Act of Oct. 12, 1984, Pub. L. No. 98-473, sec. 306, § 511(7), 98 Stat. 1837; H.R. REP. NO. 106-192, at 4.

[65] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207–13. The substitute assets provisions apply to RICO forfeitures as well, and appear to go beyond mere proceeds and allow forfeiture of substitute assets for instrumentalities of these crimes. 18 U.S.C. § 1963(m) (2006); 21 U.S.C. § 853(p) (2006).

[66] 146 CONG. REC. 3647, 3657 (2000) (the estimate was made in the year 2000).

[67] *See* Blumenson & Nilsen, *supra* note 61, at 37 (noting that record numbers of federal drug prosecutions between 1980 and 1992 produced record numbers of drug seizures). Deposits into the Department of Justice's Asset Forfeiture Fund rose more than twentyfold, from $27 million in 1985 to $556 million in 1993. H.R. REP. No. 106-192, at 4. And the growth has continued; asset forfeiture recoveries by U.S. Attorneys rose from $285 million in 1989 to $1.787 billion in 2010. *Value of Asset Forfeiture Recoveries by U.S. Attorneys*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t4452010.pdf (last visited Dec. 19, 2012).

[68] *See, e.g.*, REP. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS *YOUR* PROPERTY SAFE FROM SEIZURE? ix–x (1995). Rep. Hyde was a leading Republican in the House and Chair of the House Judiciary Committee at the time his book was published. *See id.* at x.

[69] *E.g.*, Leading House Democrat Rep. Barney Frank, then a member of the House Judiciary Committee, stated that because a civil forfeiture is necessarily a consequence of criminal activity, a person may have "falsely been accused of a crime and, as a consequence, had his property seized . . . . [N]ot to appoint a lawyer [for him] . . . I think it is inconsistent with . . . the views of this administration on social justice and fairness." *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 251 (1996) (statement of Rep. Barney Frank, Member, Comm. on the Judiciary).

[70] Andrew Schneider & Mary Pat Flaherty, *Government Seizures Victimize Innocent*, PITTSBURGH PRESS, Feb. 27, 1991, *available at* http://www.fear.org/guilty1.html.

government was taking their home.[71] The property had been used to commit a crime and was forfeitable under federal civil forfeiture statutes.[72]

Remarkably, Congress authorized law enforcement, in 1984, to *keep* the assets they seize under federal forfeiture procedure.[73] The Department of Justice has increased the size of the pie and shared the wealth by implementing a program of "equitable sharing" by which state and local law enforcement can participate.[74] In other words, local law enforcement can seize assets, turn them over to federal authorities for forfeiture purposes (taking advantage of the federal procedures which are so straightforward and favorable to law enforcement), and receive a substantial cut of the proceeds.[75] The assets retained by the federal agencies are deposited in an Asset Forfeiture Fund, which these agencies can draw upon to fund other aspects of their operations.[76] Local law enforcement gets the benefit of the favorable federal forfeiture procedure laws, and the federal agency enjoys a cash flow from the law enforcement work done by state and local authorities.

This practice has been criticized as creating a conflict of interest, arguably encouraging a law enforcement strategy of targeting assets rather than stopping crime.[77] Contributing to this concern is the fact that Fourth Amendment protections do not necessarily bar the forfeiture of illegally seized assets.[78] Even

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[71] *Id. But see* United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 740–42 (C.D. Cal. 1994) (holding that forfeiture of the father's home of twenty-two years for the acts of his son was an excessive fine barred by the Eighth Amendment); *see* discussion of Eighth Amendment concerns *infra* Part IV.B.3.a.i.

[72] CAFRA's "innocent-owner" defense, discussed *infra* Part II.B.3, would not have helped the Lopeses because they were fully aware of the criminal activity. However, CAFRA does require a judicial proceeding (not a mere administrative proceeding) for the forfeiture of a primary dwelling. *See* 18 U.S.C. § 983(b)(2)(A) (2006). The legislative history also suggests that Congress intended higher standards to apply to the forfeiture of the owner's home: "In one area in particular, courts have been much too liberal in finding facilitation. An especially high standard should have to be met before we dispossess a person or family of their home." 146 CONG. REC. 5221, 5231 (2000) (floor statement of Rep. Henry Hyde regarding H.R. 1658 (2000)). However, the final language of the statute uses the same standard for primary residences, preponderance of the evidence, as for any other forfeiture. *See* 18 U.S.C. § 983(c).

[73] Blumenson & Nilsen, *supra* note 61, at 40; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, sec. 310, 98 Stat. 2052, codified at 28 U.S.C. § 524(c).

[74] John L. Worrall, *The Civil Asset Forfeiture Reform Act of 2000: A Sheep in Wolf's Clothing?*, 27 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 220, 220 (2004).

[75] U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 3 (2009) ("Any state or local law enforcement agency that directly participates in an investigation or prosecution that results in a federal forfeiture may request an equitable share of the net proceeds of the forfeiture."), *available at* http://www.justice.gov/usao/ri/projects/esguidelines.pdf. Local law enforcement can receive up to 80% of the net assets realized, after deductions for expenses, informant fees, and valid third-party interests. *See id.* at 12–15. The federal agency always gets its expenses covered, plus 20% of the assets that remain, and a substantially larger percentage if the federal authorities played a role in the investigation and seizure. *Id.* at 12, 15.

[76] 21 U.S.C. § 881(e)(2)(A)–(B) (2006).

[77] Worrall, *supra* note 74, at 220; Blumenson & Nilsen, *supra* note 61, at 40.

[78] *See* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 10.05[6] (2012) [hereinafter SMITH, PROSECUTION AND DEFENSE] ("Just as an illegal arrest of a criminal defendant is not a bar to prosecution, an illegal seizure of the res that is the defendant in a civil forfeiture action does not bar the suit or deprive the court of jurisdiction to hear it, at

though the evidence obtained in an illegal search will be suppressed, the forfeiture of property seized in that same operation will stand, as long as there is independent cause to believe the property is forfeitable.[79] The message, and the incentives, for law enforcement are troubling.

B. Civil Asset Forfeiture Reform Act of 2000

Concern over such cavalier treatment of property rights in forfeiture cases, both by the Department of Justice and by the courts, spurred Congress to take up the issue, with a proposed bill and hearings in 1996 and with renewed activity in 1999, ultimately leading to the passage of CAFRA in 2000. CAFRA, which adjusted burdens of proof and bolstered the rights of property owners, including innocent owners, in federal civil forfeitures was "the first significant reform of civil forfeiture procedure since the dawn of the Republic."[80]

CAFRA may have been "significant," but it was not comprehensive.[81] Indeed, the whole bill smacks of patchwork, adjusting standards and overturning the doctrines responsible for the worst injustices, but neither reexamining the foundations of forfeiture law nor establishing a sound policy rationale for forfeiture procedure overall.[82] It was a compromise bill with terms negotiated and tweaked until it could muster unanimous approval from the Senate Judiciary Committee, a necessary precondition to getting it passed in an election year.[83] As one commentator put it:

> The Act is not comprehensive. It is not a revision of forfeiture law based on first principles. It is, rather, a series of practical "fixes" of specific problems that have arisen that either the reformers or the government wanted to fix and with which the other side could agree, or at least tolerate.[84]

Even post-CAFRA, forfeitures continue to attract criticism.[85] Perhaps the problem is that the "first principles" still await a thorough examination.

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least in federal court. . . . [This rule] is now codified in Rule G(8)(a) ('Suppression does not affect forfeiture of the property based on independently derived evidence.'). While evidence obtained as the result of an illegal search or seizure may be suppressed, the government can still attempt to forfeit the property on the basis of evidence that is not tainted by the illegality.").

[79] *Id.*

[80] David B. Smith, *An Insider's View of the Civil Asset Forfeiture Reform Act of 2000*, CHAMPION, June 24, 2000, at 28. [hereinafter Smith, *An Insider's View*] ("Talk about reform being 'overdue' was an understatement.").

[81] *Id.* at 28–29.

[82] *Id.* at 28. The legislative history provides some policy background with respect to civil forfeiture legislation proposed in the previous Congress. *See, e.g.*, *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the H. Comm. on the Judiciary*, 105th Cong. 105, 115, 117 (1997) (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice), but this discussion did not make it into the final legislation.

[83] *See* Smith, *An Insider's View*, *supra* note 80, at 28.

[84] *Id.* at 29.

[85] *See, e.g.*, John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent with Guilty*, WALL ST. J., Aug. 22, 2011, at A1; Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES (June 8, 2011), http://www.forbes.com/2011/06/08/property-civil-forfeiture.html ("Civil forfeiture laws represent one of the most serious assaults on private property rights in the nation today. Under civil forfeiture, police and prosecutors can seize your car or other property, sell it and use the proceeds to fund

Most of the criticisms of federal forfeiture have focused on the civil side; indeed, the reform legislation in 2000 was directed almost exclusively at civil forfeitures.[86] The procedures before CAFRA were exceedingly generous to the government, requiring only a showing of probable cause, after which the burden of proof shifted to the property owner to establish that the property was *not* subject to forfeiture.[87] But CAFRA made important changes to this requirement and to others deemed too hostile to property owners, particularly innocent ones. Key innovations from CAFRA are summarized below.

1. Burdens of Proof

The House Committee on the Judiciary noted that the probable-cause standard was too low, particularly since the government was not required to "produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence."[88] The Committee concluded that "[t]his result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable."[89]

The House version of CAFRA would have imposed on the government the clear-and-convincing-evidence standard for a civil forfeiture,[90] but the Justice Department and some senators opposed adoption of that standard.[91] Those opponents argued the standard should be the same as in all other civil cases—preponderance of the evidence—and the version of CAFRA that passed the Senate, and that President Clinton ultimately signed into law, adopted that less demanding standard.[92] Nonetheless, the burden of proof now rests with the government and not with the property owner.

If the forfeiture goes uncontested, however, CAFRA still allows forfeiture without an evidentiary showing.[93] The impact of the new burden of proof

agency budgets—all without so much as charging you with a crime."). *See also infra* Part III.

[86] There is a provision in CAFRA that expands the availability of criminal forfeitures, but that was motivated entirely by a desire to limit the use of civil forfeitures, and to use criminal forfeitures instead, wherever possible. *See* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, sec. 16, 114 Stat. 202 (codified at 28 U.S.C. § 2461(c) (2006)); *see infra* Part II.B.8.a.

[87] Pre-CAFRA requirements are more thoroughly explained in my 1998 overview of federal forfeiture procedure. Pimentel, *supra* note 2, at 5–9 (giving a thorough explanation of pre-CAFRA requirements in an overview of federal forfeiture procedure).

[88] H.R. REP. NO. 106-192, at 12 (1999) (quoting United States v. $12,390, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting)).

[89] *Id.*

[90] 146 CONG. REC. H2049, H2049–52 (2000) (Floor Statement of Henry Hyde regarding H.R. 1658). Rep. Hyde cautioned that "Congress remains extremely dubious as to the probative value of certain types of evidence in meeting this standard," giving examples from cases: carrying large quantities of cash, purchasing airline tickets with cash, dog-alerts on cash (absent evidence how or when the cash became tainted with drugs), and matching a drug courier profile. *Id.* at H2049–50.

[91] H.R. REP. NO. 106-192, at 34.

[92] 18 U.S.C. § 983(c) (2006).

[93] *See* the discussion of the Willie Jones case, *infra* Part III.B, where $9,000 in cash was forfeited based on the fact that the government thought it was suspicious Mr. Jones was traveling with so much cash and bought his plane ticket with cash, coupled with a sniffing dog's "alert" on the cash itself as containing some residue of illegal drugs. Although Mr.

therefore is limited to the relatively small portion of forfeitures that are challenged in court.[94]

a. Claimant's Burdens—Affirmative Defenses

The property owner is still required to prove affirmative defenses, most notably the "innocent-owner" defense introduced by CAFRA.[95] For these defenses, the owner must meet the preponderance-of-the-evidence standard.[96]

b. Claimant's Burdens—The USA PATRIOT Act's Exception to CAFRA

Just one year after the passage of CAFRA, the USA PATRIOT Act (the "Patriot Act") created an exception to this new burden of proof, reverting to the much-criticized pre-CAFRA standard, even for a contested forfeiture.[97] The provisions of the Patriot Act, as the federal law is more commonly known, are discussed in more detail below.[98]

2. Appointment of Counsel

Under CAFRA, indigent claimants in a civil forfeiture proceeding are entitled to counsel at public expense if (1) they are already represented by court-appointed counsel in related criminal proceedings or (2) the property at issue is the person's primary residence.[99] The House Report noted the "punitive nature" of civil forfeiture as a justification for the provision.[100]

3. Uniform "Innocent-Owner" Defense

CAFRA formally created a uniform and comprehensive affirmative defense for innocent owners. The House Committee believed it was "required by fundamental fairness."[101] A variety of statutes and cases had recognized

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Jones opted to contest this forfeiture, his failure to do so would have resulted in the seizure of his cash without more than probable cause. In Rep. Hyde's earlier forfeiture reform bill, very similar to CAFRA, introduced in the previous Congress but never passed, the House Report specifically stated that uncontested forfeitures would still be allowed to go forward on nothing more than probable cause. H.R. REP. NO. 105-358, pt. 1, at 28 (1997). Rule G(2)(f) of the Supplemental Rules for Certain Admiralty and Maritime Claims requires little more, only a recitation of "sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." FED. R. CIV. P. SUPP. G(2)(f).

[94] Only 20% of civil forfeitures are contested. *See* Cassella, *Civil Forfeiture*, *supra* note 20, at 5.

[95] *See infra* Part II.B.3 (discussing innocent owner defense).

[96] 18 U.S.C. § 983(d).

[97] USA PATRIOT Act of 2001, Pub. L. No. 107-56, sec. 316(a), 115 Stat. 272 (2001).

[98] *See infra* Part II.C.

[99] 18 U.S.C. §§ 983(b)(1)(A) & (2)(A).

[100] H.R. REP. 106-192, at 14 (1999); *see also* H.R. REP. NO. 105-358, pt. 2, at 29 (1997). ("This Committee believes that given the punitive, quasi-criminal nature of civil forfeiture proceedings, legal representation should be provided for those who are indigent in appropriate circumstance."). If, as suggested here, the purposes of forfeiture are punitive, then determinate sentencing principles may play a role in assessing the fairness of such punishments. *See infra* Part IV.B.3.a.

[101] H.R. REP. NO. 105-358, at 31.

"innocent-owner" defenses in certain circumstances,[102] but an earlier Committee Report noted those defenses were not uniform and had been inconsistently interpreted by the federal courts.[103]

The definition of an "innocent owner" includes "one who, at the time he acquired the interest in the property, was a bona fide purchaser or seller for value and [was] reasonably without cause to believe that the property was subject to forfeiture."[104] The provision does not, for the most part, protect innocent donees.[105] Otherwise, criminals could shield their property from forfeiture through transfers to relatives.[106]

4. Hardship Provision

Recognizing that hardship may result from the government's seizure of property pending resolution of disputed issues, CAFRA also created a provision to protect property owners in such circumstances. Operating much like preliminary injunctions, the statute calls for a balancing of hardships, taking into account "the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding[s]."[107] The upshot is that an owner who faces "substantial hardship" in being deprived of the property may be able to keep the property pending a final determination on forfeiture.[108]

5. Compensation, with Interest, for Damage to Property While in the Government's Possession

CAFRA also amended the Federal Tort Claims Act to permit tort claims against the government to recover the value of property damaged or destroyed

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[102] Although the CAFRA innocent owner defense is comprehensive, applying to all federal civil forfeitures, it created a narrower defense for innocent owners than was already available under some other statutes. *See* Smith, *An Insider's View*, *supra* note 80, at 29; *see also infra* pp. 26–27 and note 171.

[103] H.R. REP. NO. 105-358, at 31.

[104] H.R. REP. NO. 106-192, at 16.

[105] There is a separate provision which covers innocent owners who acquired their interest through inheritance, divorce, etc. 18 U.S.C. § 983(d)(3)(B)(i)–(iv). For such claimants to prevail, however, all of the following must be true: (1) the property must be the primary residence of the claimant; (2) depriving the claimant of the property would deprive the claimant (and his/her dependents) of reasonable shelter; (3) the property must not be traceable to the proceeds of any criminal offense; (4) the claimant must have acquired interest in the property through marriage, divorce, legal separation, inheritance, or probate. *Id.*

[106] H.R. REP. NO. 106-192, at 16 (citing United States v. 92 Buena Vista Ave., 507 U.S. 111, 139 (1993) (Kennedy, J., dissenting) ("[C]riminals would then be allowed to shield their property from forfeiture through transfers to relatives.")). Innocent owner status may be accorded, however, to those who acquire property interests through probate or inheritance, or through marriage dissolution proceedings, as long as the recipient did not have cause to believe the property was subject to forfeiture. 18 U.S.C. § 983(d)(3)(A)–(B) (2006). The risk of fraud here is slight, the Committee concluded, and the injustice is great if the heir is called upon to defend the forfeiture later because it will be difficult to present evidence as to what was in the mind of the deceased at the time. H.R. REP. NO. 106-192, at 16.

[107] 18 U.S.C. § 983(f)(1)(D) (2006).

[108] Of course, this provision does not apply to contraband. *Id.* § 983(f)(8)(A). Nor does it apply to property that is "suited for use in illegal activities; or is likely to be used to commit additional criminal acts if returned to the claimant." *Id.* § 983(f)(8)(C)–(D).

while in the possession of any law enforcement officer if the property was seized for the purposes of civil forfeiture.[109] Of course, such claims cannot stand if the forfeiture is ultimately upheld.[110]

The House Report included the testimony of Billy Munnerlyn, the owner and operator of an air charter service, whose plane was seized in 1989 after he unwittingly transported a client who was carrying drug money.[111] Mr. Munnerlyn spent $85,000 on legal fees, selling his three other planes to fund the litigation to get his plane back.[112] When the plane was finally returned to him, Mr. Munnerlyn found that the government had done $100,000 worth of damage to it, presumably in their search for drugs or other evidence. The government's sovereign immunity barred any claim for the damage to the plane, so Mr. Munnerlyn had little choice but to declare personal bankruptcy and give up his business.[113] No doubt this story motivated Congress to include the provisions for government liability for damage to seized property.

Prior to CAFRA, the government paid no interest for the time it held the property before being ordered to return it to a prevailing owner. The House Committee on the Judiciary had earlier expressed concern that this was "manifestly unfair."[114] Accordingly, CAFRA includes provisions entitling a successful claimant to interest on the assets seized for the time the government retained them, and if the court finds no reasonable cause for the seizure, the claimant can get costs and attorney fees as well.[115]

6. Elimination of the Cost Bond

Prior to the passage of CAFRA, a claimant was required to post a cost bond to "defray the government's cost of storing the property and to cover government litigation costs."[116] The bond requirement also was intended to deter frivolous claims.[117]

The House Committee on the Judiciary concluded that the cost bond deprived indigent claimants access to the courts and was likely unconstitutional.[118] Even for non-indigent claimants, the Committee determined that the cost bond added an unnecessary deterrent to contesting forfeitures.[119] At least one Senator agreed, suggesting that the cost bond "offend[ed] the fundamental principle of equal and open access to the courts."[120] Instead of a bond, CAFRA

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[109] Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, sec. 3(a), 114 Stat. 202 (codified as amended at 28 U.S.C. § 2680(c) (2000)). This provision of CAFRA was clearly intended to address situations like the one cited.

[110] *Id.*

[111] H.R. REP. NO. 106-192, at 8.

[112] *Id.*

[113] *Id.* at 9. Apparently, Mr. Munnerlyn ended up driving a truck for a living after the government's failed attempt to forfeit his plane destroyed his business and his credit.

[114] *Id.* at 19.

[115] Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, sec. 4(b), 114 Stat. 202 (codified as amended at 28 U.S.C. § 2465 (2000)).

[116] Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 90 (2001).

[117] 146 CONG. REC. S1761 (2000).

[118] H.R. REP. NO. 105-358, pt. 6, at 34 (1997).

[119] *Id.*

[120] 146 CONG. REC. S1761 (statement of Sen. Patrick Leahy).

discourages meritless claims by imposing a civil fine if the court finds a claimant's challenge to be frivolous.[121]

7. Notice and Adequate Time to Contest Forfeiture

CAFRA imposed requirements for the government to move more expeditiously, imposing a sixty-day time limit after the seizure to send notice to potential claimants.[122] Prior to CAFRA, a potential challenger to forfeiture often had an "exceedingly short" time to file a claim after such notice, as little as ten days, although these time frames varied under the sundry statutes that provided for forfeiture.[123] CAFRA remedied that by implementing a uniform and slightly more generous time period of thirty days to file a claim.[124]

8. Additional Reforms

a. Expanded Availability of Criminal Forfeiture

CAFRA encourages the use of criminal forfeiture by including a provision that amends 18 U.S.C. § 2461 to authorize use of criminal forfeiture any time civil forfeiture is authorized.[125] This change reflects a congressional preference for criminal forfeitures, which enjoy far stronger due process protections and are therefore far less likely to infringe on the legitimate property rights of citizens, innocent or not.[126]

b. Requiring a "Substantial Connection" Between the Property and the Offense

CAFRA clarified the nexus that must be established between the offense prompting the forfeiture and the property forfeited. Case law had been inconsistent on this point,[127] and the legislation resolved the dispute in favor of the more demanding standard of a *substantial connection*.[128] Under CAFRA's

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[121] 18 U.S.C. § 983(h)(1) (2006).

[122] *Id.* § 938(a)(1)(A)(i); Smith, *An Insider's View*, *supra* note 80, at 29 ("The government is no longer given the power to delay the commencement of proceedings as long is [sic] it likes after seizing someone's property.").

[123] H.R. REP. NO. 106-192, at 19 (1999) (quoting DAVID SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES, § 9.03[1], at 9-45 (1998)); Pimentel, *supra* note 2, at 15 (explaining how in 1998 the Supplemental Rules were amended for non-admiralty forfeitures to allow twenty days to file a claim, instead of the previous ten days, which still applied to admiralty forfeitures, but cautioning: "Even as amended, however, the time to respond is short. Because the property rights of innocent third parties are at stake, the adequacy of notice and time to respond deserve particular attention.").

[124] *See* 18 U.S.C. § 983(a)(4)(A) (2006).

[125] 28 U.S.C. § 2461(c) (2006).

[126] *See* discussion *infra* note 202 regarding the congressional preference for criminal over civil forfeitures.

[127] *See* Blumenson & Nilsen, *supra* note 61, at 45–46 n.44 (1998) (discussing the conflicting case law on this issue).

[128] As Senator Henry Hyde explained in his statement on the issue:

> H.R. 1658 provides that the substantial connection test should be used whenever facilitating property is subject to civil forfeiture under the U.S. Code. And the test is intended to mean something, it is intended to require that facilitating property have a connection to the underlying crime significantly greater than just "incidental or fortuitous."
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> . . .

standard, the government must prove that facilitating property's connection to the criminal offense was "substantial" and not merely incidental or fortuitous.[129]

c. *Forfeitability of Proceeds of Most Crimes*

Originally, forfeiture of the proceeds of crime was available only for violations of RICO and for violations of some money laundering statutes.[130] By 1978, proceeds forfeitures were available for a number of drug crimes.[131] By the 1990s, civil forfeiture authority had been extended to cover most federal crimes.[132] Then, in 2000, CAFRA expanded section 981(a)(1)(C) to include the proceeds of more than two hundred different state and federal crimes as defined under 18 U.S.C. § 1956(c)(7) or a conspiracy to commit any one of those offenses.[133]

C. The Patriot Act and the War on Terror: Two Steps Forward, One Step Back

Eighteen months after CAFRA was signed into law by President Clinton, President Bush signed into law the Patriot Act.[134] It is not surprising that forfeitures were implicated in this opening salvo in the War on Terror, as they had been for Prohibition, the War on Organized Crime, and the War on Drugs.

> Under H.R. 1658's substantial connection test, in order for an entire bank account composed of both tainted and untainted funds to be forfeitable, a primary purpose of its establishment or maintenance must be to disguise a money laundering scheme. This rule should also apply when the government seeks to forfeit an entire business because tainted funds were laundered in a firm bank account. For the business to be forfeitable, a primary purpose for the establishment or maintenance of the entire business must be to disguise a money laundering scheme.

146 CONG. REC. 5231–32 (2000) (statement of Sen. Henry Hyde).

[129] *See* 18 U.S.C. § 983(c)(3) (2006); *see also* CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 26-1, at 776.

[130] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 938 (1970) (codified at 18 U.S.C. § 1963) (Enacting the Racketeer Influenced and Corrupt Organizations Act (RICO)); *see also* 18 U.S.C. §§ 981, 982, 1963 (current statutes addressing civil forfeitures (enacted in 1986), criminal forfeitures (enacted in 1986), and other criminal penalties (enacted in 1970) respectively).

[131] *See supra* text accompanying note 63.

[132] Stefan D. Cassella, *An Overview of Asset Forfeiture in the United States*, *in* CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME, *supra* note 47, at 23, 28.

[133] 18 U.S.C. § 981(a)(1)(C); CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 1-3(a), at 5; Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, 55 U.S.A. BULL. 59, 62 (2007), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5506.pdf; *see also* 18 U.S.C. § 1956 (incorporating crimes defined in 18 U.S.C. § 1961(1), a laundry list of offenses against foreign nations (including drug crimes, violent crimes, fraud by or against a foreign bank, bribery of a public official, or embezzlement of public funds)).

[134] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered titles and sections of the United States Code), signed into law on October 26, 2001, eighteen months and one day after April 25, 2000, when President Clinton signed CAFRA. The unwieldy title of the act, apparently manipulated to produce an appealing acronym, is the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001."

1. Burden of Proof

As already noted, the Patriot Act brought back, for terrorism cases at least, the pre-CAFRA standards of proof for civil forfeitures:

> Under section 316 of the Patriot Act, if the case goes to trial under § 981(a)(1)(G), and the property involves the assets of "suspected international terrorists," the normal burden of proof is reversed: once the [g]overnment makes its initial showing of probable cause, the claimant has the burden of proving, by a preponderance of the evidence, that his property is *not* subject to confiscation.[135]

Thus, some of the very problems that Congress tried to fix with CAFRA have been reintroduced for cases of suspected terrorism. This is important when considering the policies underlying forfeitures. Forfeiture procedure inevitably involves striking a balance between citizens' property rights and the government's interest in combatting crime. Any time the government's interest is elevated to the status of a "War on" something, it can be expected that the new policy priority will result in re-striking that balance in favor of the government and to the detriment of the property rights of its citizens.

2. Forfeiture of Estate

The Patriot Act also revived the concept of forfeiture of estate by providing for forfeiture of all assets without any proof of any nexus between the assets and the terrorism offense.[136] Already unconstitutional for treason,[137] forfeiture of estate had been barred by statute for other crimes since 1790.[138] It is truly a remarkable development to see a long discredited doctrine, a doctrine that had been relegated to the dustbin of history for more than 210 years, revived and re-enacted. As codified in Title 18, the Patriot Act permits the forfeiture of "[a]ll assets, foreign or domestic—of any individual . . . engaged in planning or perpetrating any . . . Federal crime of terrorism."[139] It appears that this provision has only rarely, if ever, been invoked,[140] possibly because the Department of Justice is reluctant to litigate its constitutionality. Certainly if the Constitution explicitly forbids forfeiture of estate for treason, there is at least a question as to the constitutionality of forfeiture of estate for acts of (or in support of) terrorism against the state.

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[135] Stefan D. Cassella, *Forfeiture of Terrorist Assets Under the USA PATRIOT Act of 2001*, 34 LAW & POL'Y INT'L BUS. 7, 9–10 (2002).

[136] *Id.* at 7–8 ("[O]nce the [g]overnment establishes that a person, entity, or organization is engaged in terrorism against the United States, . . . the [g]overnment can seize and ultimately mandate forfeiture of *all assets*, foreign or domestic, of the terrorist entity, whether those assets are connected to terrorism or not.") *Id.* at 8.

[137] U.S. CONST. art. III, § 3.

[138] Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("[N]o conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate.").

[139] 18 U.S.C. § 981(a)(1)(G)(i) (2006); *see also* 50 U.S.C. § 1702(a)(1)(C) (2006).

[140] DOYLE, *supra* note 7, at 3–4 n.16 ("At least to date [May 9, 2007], this authority has rarely, if ever, been used.").

III. Continuing Criticism and Concerns

Notwithstanding the reforms that came with CAFRA, the problems persist and the criticisms continue.[141] Much of the criticism comes in the form of a parade of horribles, detailing injustices of individual cases.[142] The cases of Mrs. Bennis and the Lopes family remain potent examples; CAFRA probably would not have helped either one of them.[143] Anecdotes like these aside, the criticism tends to fall into a few general categories, summarized below.

A. The Failure to Justify Forfeitures in Terms of Public Policy

As already suggested, the articulated policy justifications for forfeiture procedure are unsatisfying, with even the Supreme Court upholding them simply because they have been around so long.[144] Other justifications that have been proffered, particularly for facilitating-property forfeitures,[145] appear to be ad hoc afterthoughts, attempts to justify existing practice. Thus, we have a practice and procedure in search of a policy, rather than a practice and procedure that is driven by and tailored to serve compelling policy objectives.

So are there policy objectives compelling enough to warrant this problematic procedure? If so, what are they? Closer analysis of the different types of forfeitures yields very different answers for each, both in terms of what policy drives them and whether it is sufficient to justify them.

Today, forfeitures are justified on a variety of policy bases. Courts occasionally cite various purposes to be served,[146] but the closest thing to a comprehensive statement comes from Stefan Cassella of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice's Criminal Division. In testimony before the House Committee on the Judiciary in 1997, he said that forfeiture exists to (1) seize contraband, (2) take the property that facilitates crime out of circulation, (3) seize the proceeds of crime, (4) return the proceeds of crime to victims, (5) deter crime, and (6) punish criminals.[147]

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[141] *See* Mellor, *supra* note 85.

[142] *See, e.g.*, Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 Ariz. L. Rev. 777, 779 (2009); Barclay Thomas Johnson, Note, *Restoring Civility—the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 Ind. L. Rev. 1045, 1045 (2002); David Benjamin Ross, Note, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 Regent U. L. Rev. 259, 259 (2000).

[143] Mrs. Bennis lost her car under the laws of the state of Michigan, so CAFRA's innocent owner defense would not have been available to her. The Lopeses were aware of the marijuana patch their son had planted in their backyard and therefore could not have asserted CAFRA's innocent owner defense in any case.

[144] *See supra* Part II.A.1.

[145] *See supra* Part II.A.1.a.

[146] In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974), for example, the Supreme Court characterized the policy in terms of "punitive and deterrent purposes."

[147] *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the H. Comm. on the Judiciary*, 105th Cong. 112 (1997) (statement of Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice); this language is also reflected in H.R. Rep. No. 106-192, at 5 (1999).

The six purposes articulated here are remarkably unsatisfying as justifications for the forfeitures.[148] The first three are mutually exclusive; these are three different types of forfeitures and no forfeiture accomplishes more than one of them. Moreover, these reasons largely beg the question: the public policy purpose behind proceeds forfeitures cannot be merely to "seize the proceeds." This circular justification, reduced to a tautology, betrays the thinness of the underlying policy. More substantive policy is needed to justify the procedure with respect to each of the three types of forfeitures. A more careful examination of each is set forth below in Section IV.B.

The fourth purpose, returning the proceeds of crime to victims, is a laudatory objective,[149] but perhaps a misleading one; historically, very little of the assets seized in federal forfeitures was ever returned to victims.[150] The overwhelming majority of forfeited property is kept by and shared among law enforcement agencies to fund law enforcement activities.[151]

The final two purposes, to deter crime and punish criminals, are the most compelling reasons and may underlie all the others. The Supreme Court lent support to this in *Calero-Toledo*, characterizing the policy to be served in terms of "punitive and deterrent purposes."[152] But these are largely duplicative of the purposes of criminal law, raising questions as to whether and why it is necessary to pursue criminal law objectives with forfeitures. The likely answers—for example, that it allows the government to punish people without proving their guilt—may prove to be a better argument against the forfeitures than in favor of them.

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[148] Mr. Cassella was not attempting to justify forfeitures in this statement as much as describe their functions. The concern here is that there has been so little discussion of the actual justification for forfeitures.

[149] It was a justification for forfeiture cited by the Supreme Court back in 1844, when the forfeiture of a ship was upheld as a "means of . . . insuring an indemnity to the injured party." The Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844).

[150] In 2010, the Department of Justice took in almost $1.8 billion in asset forfeitures, and returned $237 million (just over 13%) to victims. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR U.S. ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 31 (2010), *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf. This 13% reflects a new emphasis on victim restitution in the last four or five years. *See generally* U.S. DEP'T OF JUSTICE ASSET FORFEITURE PROGRAM, NATIONAL ASSET FORFEITURE STRATEGIC PLAN 2008–12, at 3, 11, 42 (2008) (highlighting victim restitution as a key element of the plan).

[151] *See, e.g.*, *Value of Asset Forfeiture Recoveries by U.S. Attorneys*, *supra* note 67 ("The funds are used for purposes such as equipment, training, investigative expenses, purchase of evidence, and drug and gang awareness programs."). Cassella, in his testimony before Congress, identified that as the primary use of seized assets:

> [T]hat money is used to support the operation of law enforcement itself. . . .
>
> There is poetic justice in this, Mr. Chairman. Forfeiture not only lets us take the profit out of crime; it provides support for the law enforcement agencies who catch the criminals and put them in jail.

Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104th Cong. 214 (1996) (statement of Stefan D. Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice).

[152] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974).

B. The Government's Burden of Proof Is Still Too Low

CAFRA attempted to address the problem of burdens of proof and succeeded in shifting the burden to the government to prove that the property is forfeitable. But, the government need only establish such forfeitability by a preponderance of the evidence; the House's efforts to set the standard at clear and convincing evidence failed in the Senate.[153] Although an innocent owner can assert her innocence under CAFRA, she still bears the burden of proving her innocence.[154] These factors have prompted critics to argue that the allocation of burdens still tips the scales too heavily in favor of the government.[155] The problem is not just the language of the statute, but the interpretation the courts have chosen to give it. "David B. Smith, author of the [treatise] *Prosecution and Defense of Forfeiture Cases*, says the courts have been steadily mitigating the 2000 bill's impact, both by narrowly interpreting the protections it grants defendants and by being overly deferential to prosecutors when determining if they've met the new evidentiary standard."[156]

Illustrative is one of the horror stories told to the House Judiciary Committee and included in its report on CAFRA. In 1991, Willie Jones, who operated a landscaping business in Tennessee, attempted to fly to Houston to purchase nursery stock, carrying $9,000 in cash with him.[157] He testified that he knew it would be easier to make his purchase with cash, especially since he was from out of town. As he put it, "[T]he nursery business is kind of like the cattle business. You can always do better with cash money."[158] After buying his ticket with cash, Mr. Jones was approached by officers who accused him of dealing drugs.[159] They did a background check on him, and found him to be "clean," but drug-sniffing dogs "hit" on the money, so the officers let Mr. Jones go but they kept his money.[160] The officers refused to count the money or issue a receipt for it.[161] In the litigation that followed, Mr. Jones, who is African American, asserted his belief that the seizure was racially motivated, a product of law enforcement's racial profiling of drug dealers.[162]

Congress attempted to address this problem with its heightened standard of proof, but nothing in CAFRA itself would prevent this type of seizure from

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[153] 146 CONG. REC. H2049 (2000) (Congressional Budget Office cost estimate entered into the record by Sen. Henry Hyde) ("H.R. 1658, as amended by the Senate, reduced the standard of proof the government has to meet in civil asset forfeiture cases from clear and convincing evidence to a preponderance of the evidence.").

[154] *See infra* Part III.C.1.

[155] *See, e.g.*, Moores, *supra* note 142, at 797–98 ("Congress should increase the government's burden of proof from 'preponderance of the evidence' to 'clear and convincing evidence,' which would make it more difficult for the government to prevail with flimsy evidence."); Johnson, *supra* note 142, at 1075–76 (arguing that the changes in the burden of proof under CAFRA "do not go far enough," and that "a higher standard of proof is appropriate.").

[156] Radley Balko, *Forfeiture Folly: Cover Your Assets*, REASON.COM (Apr. 2008), http://reason.com/archives/2008/03/07/forfeiture-folly.

[157] H.R. REP. NO. 106-192, at 6 (1999).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 6–7.

[161] *Id.* at 7.

[162] *Id.*

happening again. Law enforcement can still seize money based on probable cause, and although it is doubtful that carrying large amounts of cash "while black" constitutes probable cause, the dogs' "hit" on the money may be enough to satisfy the federal courts of at least nine U.S. states and two U.S. territories.[163] In 2001, the Ninth Circuit upheld a forfeiture on similar facts, relying heavily on the dog alert despite prior rulings by other circuits seriously impugning the probative value of dog alerts on currency.[164] Since 2001, the impugnation has continued in other circuits and in a Supreme Court justice's dissent.[165]

Because probable cause may be sufficient for the initial seizure, CAFRA's new burden of proof for the government is relevant only if the forfeiture is contested.[166] Unless it is contested, the forfeiture is completed administratively, based on nothing more than the original cause to seize the property.[167] Only if the claimant contests the forfeiture—and hiring counsel to help here may be difficult since the government has seized his property—is the government actually called upon to prove forfeitability by a preponderance of the evidence. And as for Mr. Jones's innocence, as explained below, he bears the burden of proving that.

C. Due Process for Owners, Especially Third-Party Owners

1. Inadequacy of the Innocent-Owner Defense

Although some forfeiture statutes, in addition to CAFRA, have imposed separate owner consent or owner knowledge requirements as necessary conditions for the forfeiture,[168] the courts have not always been generous to nonconsenting, unaware, or "innocent" owners in the interpretation of these restrictions. Some have held that the "lack-of-consent" defense requires proof

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[163] Those jurisdictions are Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands, which constitute the Ninth Circuit. *See Court Locator*, U.S. COURTS, http://www.uscourts.gov/court_locator.aspx (last visited Dec. 20, 2012).

[164] *See e.g.*, United States v. $22,474, 246 F.3d 1212, 1214, 1217 (9th Cir. 2001) (involving facts similar to those of Willie Jones, finding that there *was* probable cause to seize the cash, based in large part on the dog's alert on a large quantity of cash); *but see* United States v. $242,484, 351 F.3d 499, 510–11 (11th Cir. 2003) (a drug dog's sniff of cash is "of little value" in determining whether the currency is presently being used for narcotics trafficking because as much as 80% of all cash in circulation contains drug residue); Humke, *supra* note 39, at 1300 n.2 (listing cases that discount the value of dog alerts on cash).

[165] *See* Humke, *supra* note 39, at 1300 n.2.

[166] *See infra* Part III.C.2 for a discussion of why forfeitures may not be contested.

[167] *See supra* Part II.B.1.

[168] *E.g.*, 18 U.S.C. § 981(a)(2) (1994) (amended 2000) (In money laundering cases, "[n]o property shall be forfeited . . . to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without [his or her] knowledge."); 21 U.S.C. § 881(a)(4) (1994) (amended 2000) (In controlled substance cases, vehicles and vessels are not forfeitable if operated by an innocent common carrier, or if the actions prompting forfeiture were without "the knowledge, consent or willful blindness of the owner."); *Id.* at § 881(a)(7) (In controlled substance cases, "no [real] property shall be forfeited . . . 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 [his or her] knowledge or consent.").

that the owner did everything reasonably within his or her power to prevent the proscribed use,[169] or that the lack-of-knowledge defense is unavailable if the owner "should have known" of the criminal use of the property.[170] CAFRA's innocent owner defense is only slightly better:

> [CAFRA] creates a *narrower* defense for innocent owners than is currently found in 21 U.S.C. § 881(a) and 18 U.S.C. § 981(a)(2). With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, "innocent owner" means an owner who did not know of the conduct giving rise to forfeiture or who, upon learning of such conduct, did all that reasonably could be expected under the circumstances to terminate such use of the property.[171]

Applying this standard to the *Lopes* case shows how the problem persists. The Lopeses certainly knew of the marijuana patch their son had planted in the backyard, and they probably did not do "all that reasonably could be expected" to remove it. Indeed, they were intimidated by his threats of suicide. Moreover, CAFRA places the burden on property owners such as the Lopeses to *prove their innocence*, so inconclusive evidence on the question of innocence will not be sufficient to protect such owners from forfeiture.

2. The Problem of Uncontested Forfeitures

The overwhelming majority of forfeitures under current procedure, both civil and criminal, go uncontested.[172] As many as 80% of these forfeitures in federal court, representing 71% of the total amount forfeited, comes in through uncontested proceedings.[173] Prior to CAFRA, the DEA estimated that 85% of drug case forfeitures went uncontested.[174] Although both the Justice and Treasury Departments feared that the passage of CAFRA would dramatically increase the number of forfeiture challenges,[175] most seizing agencies report

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[169] *See, e.g.*, United States v. 785 St. Nicholas Ave., 983 F.2d 396, 404 (2d Cir. 1993) ("[C]laimants have failed to prove by a preponderance of the evidence that they took all the precautions reasonably within their power to prevent drug sales from occurring on their property. Once a claimant acquires knowledge that his or her property is being used for drug-related purposes, that individual must take reasonable steps to prevent this illicit use of the premises in order to show a lack of consent to such use.").

[170] *E.g.*, United States v. 755 Forest Rd., 985 F.2d 70, 72 (2d Cir. 1993) (defense is unavailable to the willfully blind); *but see* United States v. 6960 Miraflores Ave., 995 F.2d 1558, 1561 (11th Cir. 1993) (defense is available if the claimant can prove absence of "actual knowledge").

[171] Smith, *An Insider's View*, *supra* note 80, at 29 (emphasis added).

[172] Cassella, *Civil Forfeiture*, *supra* note 20, at 10.

[173] *Id.*

[174] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 1-4(a), at 10 n.22.

[175] *See, e.g.*, *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 54 (1999) (Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dept. of Justice, testified "[T]here is a real potential for an increase in the number of claims . . . if a person . . . had the ability to get a lawyer appointed for them, [and] did not have to post a bond. . . . [T]he potential for the filing of frivolous claims really raises pretty dramatically."); *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 238 (1996) (Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Dept. of Treasury, stated with regard to the version of CAFRA proposed in the previous Congress: "[I]t is our belief that [the bill] would greatly increase the number of cases on an already crowded docket of the Federal courts. Waiver of the cost bond coupled with the appointment

the percentage of uncontested forfeitures remains reasonably steady.[176] Although the Department of Justice appreciates the ease and efficiency of these forfeitures,[177] the high rate of uncontested forfeitures may be indicative of widespread, or at least significant, compromises of due process.

a. Adequacy of Notice

The high number of uncontested forfeitures may be a product, at least in part, of failures of notice.[178] CAFRA requires that:

> [I]n any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice *shall be sent in a manner to achieve proper notice* as soon as practicable, and in no case more than 60 days after the date of the seizure.[179]

The rule governing most civil forfeitures provides for public notice of the action "in a newspaper generally circulated in the district."[180] Absent actual notice, the third-party owner could lose his or her property on a mere showing of probable cause and without any other hearing.[181] To the extent that constructive notice by publication is considered legally adequate,[182] the end result may be a forfeiture that is never heard on its merits,[183] and never justified, even under CAFRA's preponderance-of-the-evidence standard.[184]

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and compensation of counsel could serve to encourage litigation of even the most plainly forfeitable property interests.").

[176] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 1-4(a), at 10 n.22 (stating that since CAFRA, 80% of forfeitures in DEA drug cases were uncontested, and other seizing agencies were reporting similar figures).

[177] *See* Cassella, *Civil Forfeiture*, *supra* note 20, at 11.

[178] *See* Johnson, *supra* note 142, at 1052–54 (2002) (noting that seizures of real property can no longer be done without notice to the owner, but that personal property can still be seized without notice). Johnson's examples address only the initial seizure, however, not the ultimate forfeiture.

[179] 18 U.S.C. § 983(a)(1)(A)(i) (2006) (emphasis added).

[180] FED. R. CIV. P. SUPP. G(4)(a)(iv).

[181] *See* 18 U.S.C. § 985(d)(1) (permitting seizure of real property prior to the entry of a forfeiture order if the court determines there is probable cause and exigent circumstances for the government to seize the property).

[182] The Supreme Court held that in the context of a ship forfeiture, service on the res was sufficient. The Mary, 13 U.S. (9 Cranch) 126, 144 (1815). Notice for modern forfeitures is, as of 2009, governed by Rule G(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which for the first time includes specifics on the timing, content, and placement of publication, and when publication is required at all. It also calls for direct notice to anyone the government knows to be a potential claimant. So although service on the res may be sufficient for due process purposes, it falls short of the minimum standards now established by rule. *See* FED. R. CIV. P. SUPP. G.

[183] 18 U.S.C. § 983(e) does allow a post hoc challenge to an administrative forfeiture on the grounds of failure of notice, but the courts have been reluctant to exercise jurisdiction to consider the merits of the forfeitures challenged under this statute. *See infra* note 308.

[184] FED. R. CIV. P. SUPP. G(2)(f) specifies that the government's complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial," but if no claimant emerges to contest that forfeiture, the government never actually has to carry that burden.

b. Owner Reluctance to File a Claim

Due process concerns also arise for the owner who does receive actual, timely notice, but who chooses not to appear and contest the forfeiture because of fears of prosecution. Once a seizure has occurred, it is obvious that the authorities are actively pursuing an investigation, and anyone even tangentially connected with the property at issue has a strong incentive to lie low. Coming forward to contest the forfeiture is certain to attract the attention of, and even antagonize, law enforcement at the precise moment that the potential claimant wants to appear uninvolved, cooperative, or both.

Filing a claim also can potentially compromise rights against self-incrimination. Consider, for example, Jane and Carl, who share a joint bank account and jointly acquire a boat with money they have earned legally and saved over the years. Later, Jane is investigated on suspicion of insider trading, although there is no evidence that Carl was ever aware of her inside information or that Jane was acting on it. The government seizes the boat based on evidence that the boat was paid for out of the same account where Jane had deposited the proceeds of her insider trading activity. Jane and Carl's best defense to the forfeiture may well be that her insider trading activity did not begin until after the boat was purchased and paid off. They may have witness testimony, including their own, that could substantiate the date upon which Jane's involvement in insider trading began.

If the government seizes the boat in a proceeds forfeiture, however, Jane and Carl are unlikely to contest it. The evidence that will clearly vindicate their claim to the property will simultaneously convict Jane of the underlying offense. Even if Jane and Carl's evidence does not incriminate them directly, it may well be interpreted as a waiver of some or all of their rights against self-incrimination, opening them up to cross-examination in that hearing and in any subsequent trial regarding potentially incriminating matters.[185]

Section 981(g)(2) of Title 18 attempts to address this problem by allowing the court to stay the forfeiture proceeding upon motion by a claimant, if (1) "the claimant is the subject of a related criminal investigation" and (2) "continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination" in the criminal proceedings.[186] The statutory provision may provide small comfort, however, for a variety of reasons. First, a claimant, such as Carl, may not be a subject of criminal investigation himself and therefore not entitled to the stay. Second, Carl may be motivated by concerns about incriminating Jane rather than concerns about incriminating himself, so the stay is not necessary to protect Carl's right against *self*-incrimination. Third, Carl may be distrustful of the courts' willingness or ability to protect him, given popular perception that the courts usually side with law enforcement.

The gambit, therefore, allows the government to use the threat of criminal prosecution to intimidate property owners into waiving their rights to a hearing on the forfeitability of their property. Procedural due process, of course, is an

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[185] *See* Rogers v. United States, 340 U.S. 367, 372–73 (1951) (a witness's admission of an incriminating fact constitutes a waiver of Fifth Amendment protection with respect to the details surrounding that admission).

[186] 18 U.S.C. § 981(g) (2006).

important right shared by the guilty and innocent alike; denial of a fair hearing cannot be excused on the grounds that the defendant would not have prevailed on her claim anyway.[187] Moreover, there is no reason to assume that the claims that owners are waiving are meritless. Even if the claimant is guilty of a criminal offense, the property may not be forfeitable: the property may not actually bear a substantial connection to the crime or may be the proceeds of the criminal's legal business activities. Regardless of the issue of guilt, property owners will be victimized by a procedure that seizes such property, circumventing the due process guarantees by extorting waivers of those rights.

The example of Jane and Carl is a proceeds forfeiture, but the problem of waiving Fifth Amendment rights extends to the other types of forfeiture as well. In contraband cases, the owner may wish to argue that the seized material is not, in fact, contraband—that the drugs are legitimate over-the-counter medications or that the pornographic material is not obscene—but may be unwilling to come forward and contest the forfeiture. Contesting the forfeiture will likely involve admissions of ownership of the property alleged to be contraband, so filing a claim at all plays into the hands of the criminal investigators. Potential claimants then have powerful incentives to concede the property's status as contraband and allow the forfeiture to proceed uncontested.

Similar concerns will inhibit owners from coming forward in facilitating-property forfeitures as well. Rather than argue that the property had no "substantial connection" to the crime, which would require presenting evidence on how the crime was committed, the owner will likely waive her right to a hearing and let the property be taken. Again, even if there is no substantial connection, the owner may feel compelled to hold back rather than thrust herself into the spotlight of an ongoing criminal investigation.

Stefan Cassella has cited the high rate of uncontested forfeitures as evidence that the system is working efficiently, and that owners are freely conceding the forfeitability of their property.[188] But the uncontested forfeitures just as likely reflect strategic behavior, as described above, of individuals with colorable claims who merely find the risks of asserting such claims to outweigh the value of the property that is arguably improperly seized.

c. Access to Justice

Finally, uncontested forfeitures may be evidence of an access-to-justice problem. If the individual cannot afford an attorney—a common enough situation made even more likely when the defendant's assets have just been seized—or is otherwise intimidated by or unable to navigate the justice system, her legitimate claims may never be asserted.

CAFRA helps to some degree here by ensuring that an indigent person whose home is seized can get an attorney from the Legal Services Corporation appointed to represent her, and by allowing a court-appointed defense lawyer in a criminal case to contest related forfeitures as well.[189] But, CAFRA stops

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[187] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) (students suspended without procedural due process were entitled to nominal damages for the violation of those rights, even if the suspension was fully justified on the merits and would have been imposed in any case).
[188] Cassella, *Civil Forfeitures*, *supra* note 20, at 11.
[189] 18 U.S.C. §§ 983(b)(1)(A) & (2)(A).

short of providing attorneys to every indigent claimant, and even non-indigent claimants contesting their forfeiture can be bankrupted by legal fees, as happened to Mr. Munnerlyn, the air charter service operator cited in the CAFRA House Report.[190] Moreover, if property owners perceive the deck to be stacked against them,[191] they may well choose to forgo meritorious claims rather than incur the expense of bringing them.

For all of these reasons, the high rate of uncontested forfeitures may be evidence of a serious problem in protecting the rights of property owners. Due process may demand more than the current procedural regime provides.

D. Bad Incentives for Law Enforcement

Lucrative forfeiture opportunities can also warp law enforcement priorities.[192] Because forfeiture schemes allow law enforcement to retain seized assets, the law enforcement agencies' financial incentives may distort the policy judgment regarding how to allocate police resources and will exert constant pressure on law enforcement to overreach when pursuing a lucrative forfeiture opportunity.[193] Eric Blumenson and Eva Nilsen have argued that this constitutes a conflict of interest, given "the overwhelmingly dispositive role of discretionary prosecutorial decisions in a system where few cases ever go to trial: in most cases, the integrity of the system depends primarily on the fairness of the law enforcement branch."[194] They conclude that "[o]ne could hardly design an incentive system better calculated to bias law enforcement decisions than the present forfeiture laws."[195] Additionally, the exclusionary rule does not deter overreaching by law enforcement agencies because it will not bar the forfeiture of illegally seized property.[196]

Congress, when it was debating CAFRA, was concerned about these incentives as well. Mark Kappelhoff, Legislative Counsel for the American Civil Liberties Union, testified before the House Committee on the Judiciary in 1996 that evidence suggested that law enforcement was pursuing assets at the expense of pursuing convictions, perverting justice by allowing those with substantial assets to forfeit them as part of their plea negotiations:

> [M]ajor drug dealers are allowed to barter their way out of lengthy prison terms by prosecutors who have become intoxicated with the thought of huge sums of money to be obtained from drug forfeiture assets. Conversely, low level drug users with no

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[190] *See supra* notes 111–14 and accompanying text.

[191] *See supra* Sections III.B and III.C.1; *see also* Moores, *supra* note 142, at 799 ("[T]he increased burden appears to have done little in terms of making civil asset forfeitures more difficult for the government to obtain, as 80% of forfeitures [still] go uncontested.").

[192] Richard Miniter, *Ill-Gotten Gains*, REASON.COM (Aug. 1, 1993, 12:00 AM), http://reason.com/archives/1993/08/01/ill-gotten-gains/.

[193] *See* Chi, *supra* note 61, at 1637, 1665 (suggesting that the financial incentives for law enforcement are the corrupting influence, and that no reform can be meaningful or effective until those incentives are removed by, for example, diverting forfeited assets to public schools rather than to law enforcement).

[194] Blumenson & Nilsen, *supra* note 61, at 62 (1998).

[195] *Id.*

[196] *See* SMITH, PROSECUTION AND DEFENSE, *supra* note 78 and accompanying text.

> assets or no information to swap are exposed to the full wrath of the harsh drug laws—mandatory minimums and nonparoleable sentences.[197]

The suggestion, of course, is that plea bargaining with forfeitures allows criminals to buy off prosecutors, with cash, in return for lighter sentences, and that the financial incentives are so strong that it may be unreasonable to expect law enforcement to resist such temptations. Indeed, a notorious 1990 memo from the Executive Office of the U.S. Attorneys in the Department of Justice is often cited as an example of the depth of the government's financial interest, and how easily it can skew official Department of Justice policy:

> We must significantly increase production to reach our budget target. . . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.[198]

In any case, the powerful financial incentives remain in the post-CAFRA world. That alone threatens to distort process and undermine justice.

IV. Reconceptualizing Forfeiture Procedure

Beyond these criticisms, or perhaps underlying them all, is the problem of ill-defined policy objectives for the forfeiture scheme that is now operating under federal law. As a result, the procedure itself is not properly tailored to further legitimate objectives and therefore yields anomalous and inequitable outcomes like those discussed above.[199] The answer to this problem lies not in tweaking the standards and application, as was done in CAFRA, but in reconceptualizing forfeitures altogether.

A. The Civil–Criminal Distinction

The primary distinction made by the federal forfeiture procedure, between civil and criminal, is not a meaningful one, or at least is not tied to compelling and well-defined public policy. Both are occasioned by illegal conduct, and both serve essentially the same "punitive and deterrent" purposes. But, for idiosyncratic historical reasons, as already noted, they are treated entirely differently as a matter of procedure: criminal jurisdiction is in personam, after

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[197] *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 264 (1996) (statement of Mark Kappelhoff, Legislative Counsel for the A.C.L.U.). Kappelhoff cited the Boston Globe, which reviewed major drug trafficking cases and reported that where $10,000 or more was forfeited, "75 percent of the drug dealers ended up charged with either lesser crimes or were allowed to plead to lower sentences. Some even received no time in jail." *Id.*

[198] *Id.* at 288 (statement of E.E. Edwards, Nat'l Ass'n of Criminal Defense Lawyers) (quoting the Executive Office of the U.S. Attorneys, U.S. Dept. of Justice, 38 U.S.A. Bull. 180 (1990)).

[199] *See* description of the plight of Mrs. Bennis (forfeiture of car husband used with a prostitute), *supra* Part II.A.1.b; of the Lopes family (forfeiture of house when mentally disturbed son cultivates marijuana in the backyard), *supra* Part II.A.4; of Mr. Munnerlyn (forfeiture of air charter plane when client turns out to be a drug lord), *supra* Part II.B.5; and of Mr. Jones (forfeiture of cash because carrying so much of it is part of the profile of drug dealers), *supra* Part III.B.

conviction beyond a reasonable doubt, while civil jurisdiction is in rem, proceeding against the property with much lighter evidentiary burdens.

Neither logic nor good public policy supports the distinction between criminal and civil forfeitures.[200] CAFRA, in its effort to address the worst anomalies in forfeiture procedure, attempted to close the gap a bit. Under CAFRA, prosecutors now enjoy the option of pursuing the same property based on the same offense under either approach, since CAFRA makes criminal forfeiture available everywhere civil forfeiture is already available.[201] Thus, CAFRA attempts to treat the two procedures as virtually interchangeable, pushing Congress's decided preference for criminal forfeitures.[202] However, the theoretical bases of the two approaches are quite independent and arguably inconsistent.

The inconsistency comes from the fact that a civil forfeiture is based on the guilt of the object, and the innocence of the owner was historically deemed to be irrelevant. The criminal forfeiture is based entirely on the guilt of the owner, whose property is confiscated *because* of his guilt. So in the first case, we argue that we are not, in fact, punishing the owner (innocent or not), as in *Bennis*, because the guilt of the property alone is enough to justify the forfei-

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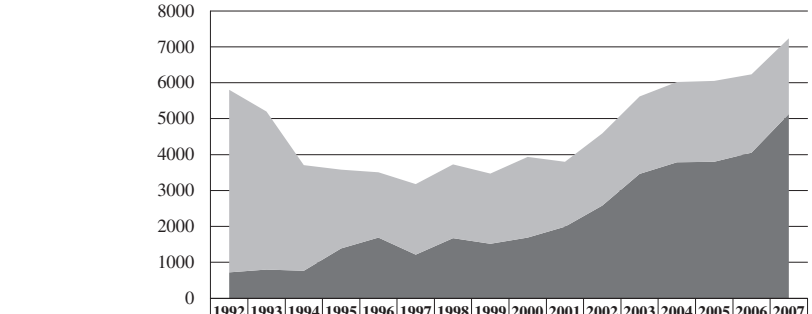
[200] *See* CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-2, at 837 ("If the forfeiture of the instrument used to commit a crime is remedial in a civil case because it achieves some important social purpose, it is equally remedial in a criminal case. The nature of the relationship between the property and the crime, and the social and political objectives of the forfeiture, cannot depend on the procedure by which the forfeiture is accomplished.").

[201] Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, sec. 16, 114 Stat. 202 (2000); 28 U.S.C. § 2461(c) (2006).

[202] Section Sixteen of CAFRA is specifically entitled "Encouraging Use of Criminal Forfeiture as an Alternative to Civil Forfeiture," although the terms of Section Sixteen merely permit the criminal forfeiture rather than encourage it. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, sec. 16. Clearly Congress hoped criminal forfeiture would be used more, in place of civil forfeiture, because there are fewer problems with the criminal procedure. And it appears that Congress may have achieved its objective. Since CAFRA, federal forfeitures have shifted significantly away from civil forfeitures in favor of criminal forfeitures, as shown on the chart below compiled from the UNITED STATES ATTORNEYS' STATISTICAL REPORTS Table 20 (1992–2003) & Table 16 (2004–2007), *available at* http://www.justice.gov/usao/reading_room/foiamanuals.html.

CIVIL AND CRIMINAL ASSET FORFEITURES FILED BY U.S. ATTORNEYS, 1992–2007



	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Civil Forfeitures filed	5083	4399	2941	2193	1818	1964	2053	1954	2246	1807	2009	2156	2235	2251	2181	2105
Criminal Forfeitures Filed	721	799	765	1387	1689	1214	1673	1517	1689	1992	2580	3462	3785	3800	4053	5131

ture. In the second case, we justify the forfeiture only if and precisely because the owner is found guilty.

B. New Distinctions Based on the Nature of the Forfeiture

The more serious problem, however, is not that the law makes distinctions where it should not, but that the law does not make distinctions where it should. To better understand and to better apply the public policy underlying federal forfeitures, the law needs to formally recognize a new taxonomy for forfeitures, distinguishing (1) contraband forfeitures, (2) proceeds forfeitures, and (3) facilitating-property forfeitures from each other.

The anomalies and injustices inherent in modern forfeiture practice can be traced in large measure to the government's use of one procedure to effect forfeitures in sharply dissimilar cases. Procedures for virtually automatic forfeiture that may be appropriate for the seizure of sawed-off shotguns (indisputable contraband), for example, are applied for the forfeiture of the Lopes family home (mere facilitating property, where the owner is not the wrongdoer). In testimony before the House Committee on the Judiciary in 1996, the Department of Justice acknowledged that the one-size-fits-all approach creates a risk of unfairly depriving people of their property:

> It may be that [forfeiture] procedures were adequate when the object of the forfeiture was contraband or something else with no legitimate purpose, but when we move to the forfeiture of peoples' houses, cars, businesses and bank accounts, we need to ensure that the forfeiture is as fair as possible.[203]

Unfortunately, the Committee went no further with this idea, and the terms of CAFRA do not make this critical distinction.

A more promising approach is to adopt separate procedural requirements, including a different burden of proof,[204] for each of the different types of forfeitures, procedures tailored to protect the legitimate interests and public policy unique to each type of forfeitable property. The three categories will be considered in turn.

1. Contraband—Forfeitable to Protect Public Safety and Health

The concept of a contraband forfeiture is summarized succinctly in the Federal Rules Decisions:

> The simplest forfeitures, both conceptually and practically, are forfeitures of contraband, that is, property the mere possession of which is illegal. Justification for this type of forfeiture is self-evident: because the law prohibits the individual from possessing the property in the first place, forfeiture is an essential element of the

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[203] *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 220 (1996) (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice).

[204] The House, clearly troubled by facilitating-property forfeitures, such as Mrs. Bennis's car and Mr. Munnerlyn's charter airplane, sought to require a higher burden of proof: clear and convincing evidence. When members of the Senate Judiciary Committee balked at this high burden, it was perhaps thinking of contraband or proceeds forfeitures, which should be far more straightforward and easier to effect. What no one discussed in this exchange was the possibility of applying a higher standard of proof to facilitating-property forfeitures than to the others.

> remedy. This is particularly true when the contraband is a threat to public health or morals—*e.g.*, obscene material, sawed-off shotguns, adulterated food, or illegal drugs. Seizure of these materials serves the important function of removing them from public circulation where they may do damage. Because there can be no legitimate claim to such property, procedural rights of "owners" in confiscation proceedings are not a significant concern. Contraband seizures typically do not result in significant revenues for the government.[205]

Of course, there is no "innocent-owner" problem with contraband[206] because it is illegal to possess the property in the first place.[207]

Notice and hearing requirements for contraband forfeitures are also far less compelling. Unless the property's status as contraband is at issue, there is no particular need to provide notice or other aspects of procedural due process when seizing such property. On the other hand, there may be a contestable issue as to whether the property is, in fact, contraband (e.g., whether the seized pornographic materials are actually obscene).[208] It is in this respect only that notice and hearing may be important in a contraband forfeiture. But burdens of proof are less important, because the facts should be quite apparent: the seized property is what it is. Contested claims of ownership or innocence are irrelevant, and there is no issue over the source of the property or how strong the nexus is between the property and the crime. In the typical case, the court must simply apply the law to determine whether this property meets the legal definition of forfeitable contraband.

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[205] Pimentel, *supra* note 2, at 6.

[206] It is conceivable that someone could be an "innocent owner" of contraband, in that they acquired it without knowing that it was contraband—if, for example, they acquired the contents of a warehouse without knowing that such contents included contraband. But these innocent owners still cannot assert a legitimate claim to the property. Their innocence (lack of mens rea) may be a defense to criminal penalties for such possession, but it cannot serve to block the forfeiture because they can have no property right in contraband to begin with.

[207] Even CAFRA acknowledges that the innocent-owner defense will not apply to contraband. 18 U.S.C. § 983(d)(4) (2006) ("[N]o person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess."). This provision in CAFRA is a necessary acknowledgement of the profound differences between different types of forfeitures. Innocent-owner defenses are important only for instrumentality forfeitures and, in very limited circumstances, for proceeds forfeitures. But CAFRA's caveat in this respect notwithstanding, all three are typically lumped together under the same procedure.

[208] Obscene materials are not protected by the First Amendment and are illegal in every state. Drawing the line between pornography that is protected by the First Amendment and obscene material that can be legitimately suppressed has been a notoriously difficult business, illustrated most popularly with Justice Potter Stewart's definition of obscenity: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The definition of obscenity and its application are vitally important because they define the limits of First Amendment protection. The implications for contraband forfeitures are obvious. If forfeitures are too easy, and material alleged to be obscene is forfeited without a proper finding that it *is* obscene, the result could easily be a violation of the First Amendment. *Cf.* Alexander v. United States, 509 U.S. 544, 559–60 (1993) (finding no First Amendment violation for the forfeiture of non-obscene pornography *along with material specifically found to be obscene* upon a finding of a RICO violation; four justices—Kennedy, Blackmun, Stevens, and Souter—dissented on the First Amendment issue).

2. Proceeds—Forfeitable as Unjust Enrichment

Consider, next, proceeds of crime. The primary principle here is an entirely different one than that for contraband. It is primarily one of denying the wrongdoer the benefit of ill-gotten gains.

> Congress has also authorized the forfeiture of property generated by illegal activity, in some circumstances. More recently, it has authorized—in the case of criminal forfeiture at least—the forfeiture of substitute assets when the actual proceeds normally subject to confiscation are no longer available. These forfeitures are justified on the principle of avoiding unjust enrichment; the wrongdoer should not be permitted to profit from his crime. This type of forfeiture, first witnessed in RICO, has been aimed primarily at those activities likely to generate a large payoff for the perpetrators.[209]

As already discussed, proceeds forfeitures started with RICO[210] and money-laundering statutes[211] but quickly spread to prosecutions of drug crimes as well. Under CAFRA, proceeds forfeitures are now available for a broad range of criminal activity. Congressional motivation for expanding the availability of proceeds forfeitures is clear: to "depriv[e] criminals of the fruits of their criminal acts."[212] Department of Justice officials have echoed those thoughts to Congress on multiple occasions, including this example from 1997:

> The attractiveness of asset forfeiture and a reason for its growth in the United States is very simple: it takes the profit out of crime. Asset forfeiture is a program that cuts to the heart of most criminal activity, dismantling criminal syndicates in a way that simple incarceration never could.[213]

The Justice Department had made a similar pitch to the previous Congress: "Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence."[214] Accordingly, proceeds forfeitures are important in ensuring that "crime doesn't pay."

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[209] Pimentel, *supra* note 2, at 6 (citing 18 U.S.C. § 981(a)(1)(B)–(F) (2006) as an example of a statute authorizing the forfeiture of proceeds of crime, and 21 U.S.C. § 853(p) (as amended in 1986) as an example of a statute allowing the forfeiture of substituted assets).

[210] 18 U.S.C. § 1963.

[211] 18 U.S.C. §§ 981–982.

[212] H.R. REP. NO. 105-358, at 35 (1997). Although this House Report accompanied an earlier bill, its sentiments were reflected in the comments of other legislators at the time CAFRA was debated and passed. 145 CONG. REC. H4851 (1999) (statement of Rep. Deborah Pryce) ("Few dispute that it is proper for the government to seize the yachts, planes and mansions of convicted drug dealers who finance their possessions with illegal drug money."); 146 CONG. REC. S1759 (2000) (statement of Sen. Orrin Hatch) ("All of us here are committed to depriving criminals of the proceeds of crime.").

[213] *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 237 (1996) (statement of Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Dept. of Treasury).

[214] H.R. REP. NO. 105-358, pt. 1, at 23 (1997) (quoting *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 112 (1996) (statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Dept. of Justice)).

This policy reflects a very unique status because the policy is not punitive in nature but is nonetheless rooted in deterrence.[215] It deters not by threatening punishment but by denying the would-be criminal certain benefits of his or her crime.

Unlike contraband, there is nothing inherently offensive in the property itself, only in the means by which it was acquired. But ill-gotten gains are not, as a matter of equity, something that the property holder is entitled to retain, so forfeiture is appropriate. This "unjust enrichment" policy justification is a compelling one, reinforced and respected by centuries of jurisprudence in legal and equitable restitution.[216]

However, the unjust enrichment policy is compelling only when appropriately limited to depriving a defendant of the *benefits* of his crime. Justice Department strategies undermine this policy foundation in two important ways. First, the government has attempted to define proceeds broadly to include not merely profit, but gross revenues generated from the criminal activity.[217] Second, it has argued for money judgments in forfeiture actions on the basis of joint and several liability,[218] divesting lowly accessories or co-conspirators of

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[215] The fact that proceeds forfeitures are not punitive is extremely important, both in terms of Eighth Amendment "excessive fines" provisions, and in terms of determinate sentencing concerns, both discussed *infra* at Part IV.B.3.a. Most courts find that forfeitures of proceeds from a criminal enterprise are inherently nonpunitive. *See* Amanda Seals Bersinger, Note, *Grossly Disproportional to Whose Offense? Why the (Mis)Application of Constitutional Jurisprudence on Proceeds Forfeiture Matters*, 45 GA. L. REV. 841, 845–46 (2011) (recognizing the Fifth, Seventh, Eighth, and Tenth circuits as holding this view). However, recently the Fourth Circuit joined the Sixth and Eleventh Circuits in finding that forfeiture of proceeds from a criminal enterprise are not per se nonpunitive, and should, therefore, draw Eighth Amendment scrutiny. *See* United States v. Jalaram, Inc., 599 F.3d 347, 354–57 (4th Cir. 2010) (applying the Eighth Amendment Excessive Fines prohibition analysis to proceeds forfeiture); United States v. Corrado, 227 F.3d 543, 552 (6th Cir. 2000) (stating that courts can reduce forfeiture of illegal proceeds to make the forfeiture proportional to the seriousness of the offense so as not to violate the Eighth Amendment's prohibition against excessive fines); United States v. Browne, 505 F.3d 1229, 1281–82 (11th Cir. 2007) (applying Eighth Amendment analysis to proceeds forfeiture in a RICO case).

[216] RUSSELL L. WEAVER, ELAINE W. SHOBEN & MICHAEL B. KELLY, PRINCIPLES OF REMEDIES LAW 110 (2007).

[217] *See* SMITH, PROSECUTION AND DEFENSE, *supra* note 78, § 4.03 n.185 ("The government generally urges the courts to interpret 'proceeds' to mean gross receipts."). The Department of Justice position appears to be disingenuously taken, testifying to Congress in CAFRA proceedings that proceeds forfeitures are to deny a criminal the benefit of his crime, and then in turn arguing to courts that proceeds include gross receipts (which clearly exceed the "benefit" of a crime). *See also infra* p. 38 and note 221.

[218] *See* Bersinger, *supra* note 215, at 867 (noting that where cases involve co-conspirators, courts may impose joint and several liability). Originally, joint and several liability was permitted with respect to proceed forfeitures when the government could not determine exactly how benefits of a crime had been allocated to co-conspirators. *See* United States v. Caporale, 806 F.2d 1487, 1508 (11th Cir. 1986) ("If the government were required to determine the precise allocation of racketeering proceeds between two offenders before the court could impose forfeiture, the effectiveness of the remedy would be impaired substantially. The offenders would simply have to mask the allocation of the proceeds to avoid forfeiting them altogether. If the government can prove the amount of the proceeds and identify a finite group of people receiving the proceeds, it defeats the purpose of the provision to hold that the proceeds cannot be forfeited because the government cannot prove exactly which defendant received how much of the pot."). However, the Fourth Circuit extended this rationale

proceeds far in excess of their profit from or involvement in the criminal enterprise.[219] These arguments are inconsistent not only with the Department's statements to Congress that these forfeitures are about taking the profitability out of crime,[220] but also with the Department's arguments before other courts that because proceeds forfeitures are "remedial" and not punitive, the Eighth Amendment does not apply. As David B. Smith observes:

> Whether proceeds forfeiture is truly a remedial measure depends on how "proceeds" is defined. If it means the gross receipts from the criminal activity, as opposed to net receipts, then it can be harshly punitive. The government generally urges the courts to interpret "proceeds" to mean gross receipts. At the same time, and without acknowledging any contradiction, the government contends that proceeds forfeiture is inherently a remedial measure that merely deprives criminals of their ill-gotten gains. The government cannot have it both ways.[221]

Whether the government's position on this issue is disingenuous or merely the product of "too many cooks" is beside the point. When the government seizes proceeds in excess of the wrongdoer's profit, the forfeiture goes beyond ill-gotten gains and operates as a punitive fine, which is inconsistent with the policy foundation for proceeds forfeitures. The better argument, more consistent with the legislative history of both RICO and CAFRA, is that proceeds forfeitures should be limited to ill-gotten gains, on what is essentially a theory of unjust enrichment.[222] Indeed, the failure to articulate this policy foundation more clearly and enforce it more transparently is a large part of the present problem with proceeds forfeitures; it has enabled the government to extract punitive fines—or extract guilty pleas with threats of crippling, life-long, non-dischargeable debt—under a proceeds forfeiture regime that was never intended to do anything other than deny the criminal the benefit of his crime.

In 2008, the Supreme Court faced the question of how to define "proceeds" under a money-laundering statute in *United States v. Santos*, and inter-

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and permitted disgorgement of drug proceeds from a defendant whom the prosecution knew was in excess of the amount he received from the conspiracy. *See* United States v. McHan, 101 F.3d 1027, 1041–43 (4th Cir. 1996). In an attempt to confine government overreaching under the *McHan* decision, the Fourth Circuit determined it would use the Excessive Fines Clause to prevent abuse of prosecutorial discretion. *Jalaram, Inc.*, 599 F.3d at 355.

[219] *See, e.g.*, United States v. Levesque, 546 F.3d 78, 80 (1st Cir. 2008) (a single, unemployed mother acted as a drug runner for a marijuana conspiracy, earning only $37,284, but was subjected to a $3 million judgment for the full amount of the gross proceeds obtained by all the conspirators).

[220] *See supra* notes 212–214 and accompanying text.

[221] SMITH, PROSECUTION AND DEFENSE, *supra* note 78, § 4.03 n.185 ("In the negotiations over the CAFRA, Senator Leahy pointed this out [that the government cannot have it both ways] to the DoJ when he persuaded it to yield to his proposed definition of the key term "proceeds" in 18 U.S.C. § 981(a)(2)."). On the issue of excessive fines, Smith also observes that "Because a forfeiture order based on the theory of joint and several liability cannot be characterized as purely remedial in nature, it is subject to scrutiny under the Excessive Fines Clause." *Id.* § 13.02[5].

[222] *See, e.g.*, United States v. $152,160, 680 F. Supp. 354, 356–57 (D. Colo. 1988) (discussing the legislative history of the Comprehensive Crime Control Act of 1984 showing congressional intent that the "purpose[ ] of § 881 civil forfeiture proceedings include 'removing the incentive to engage in the drug trade by denying drug dealers the proceeds of ill[-]gotten gains.' " (quoting United States v. 2639 Meetinghouse Rd., 633 F. Supp. 979, 994 (E.D. Pa. 1986))).

preted it to mean "profits."[223] "Proceeds" was undefined in the statute and, consistent with the rule of lenity, the Court declined to interpret the term broadly to mean "receipts."[224] The government had argued that limiting "proceeds" to "profits" (i.e., to actual unjust enrichment) would unnecessarily burden the government with a complicated accounting exercise in order to prove money-laundering.[225] Justice Scalia was dismissive of these concerns:

> It is true that the "profits" interpretation demands more from the Government than the "receipts" interpretation. Not so much more, however, as to render such a disposition inconceivable—as proved by the fact that Congress has imposed similar proof burdens upon the prosecution elsewhere. . . . It is untrue that the added burdens "serve no discernible purpose." They ensure that the severe money-laundering penalties will be imposed only for the removal of profits from criminal activity . . . .[226]

At the urging of the Department of Justice, Congress responded to *Santos* by amending the statute in question to define proceeds as gross receipts for purposes of money laundering,[227] but there remains considerable inconsistency in the statutory definitions of "proceeds" for purposes of asset forfeiture, including Section 981(a)(2) under Title 18, which specifically limits it to profits in subsection (B),[228] but which states that it is "not limited to the net gain or profit" in subsection (A).[229] The conflict, however, is not a mere technicality. It reflects the core policy justification for proceeds forfeitures in the first place: the broader definition of proceeds can be justified only if those forfeitures are meant to be punitive, which was apparently never the original intention.

Characterizing proceeds forfeitures as "unjust enrichment" actions highlights that the underlying policy is not confined to deterrence or to actions against a wrongdoer. Indeed, the traditional basis for unjust enrichment actions

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[223] United States v. Santos, 553 U.S. 507, 513–14 (2008).

[224] *Id.*

[225] *Id.* at 519. Indeed, these same concerns were sufficient to persuade Congress to amend the money-laundering statute to reverse *Santos.* Richard C. Alexander, *"Cost Savings" as Proceeds of Crime: A Comparative Study of the United States and the United Kingdom*, 45 INT'L LAW. 749, 763 (2011) ("U.S. law enforcement . . . viewed with horror the prospect of having to undertake a complex accounting exercise in each and every money laundering prosecution, [and] . . . Congress amended section 1956 the following year . . . .").

[226] *Santos*, 553 U.S. at 519–20 (some citations omitted) (citing 18 U.S.C. § 1963(a) (criminal forfeiture provision requiring determination of "gross profits or other proceeds"); and 21 U.S.C. § 853(a) (same)).

[227] Alexander, *supra* note 225, at 785.

[228] 18 U.S.C. § 981(a)(2)(B) (2006) ("In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.").

[229] *See* 18 U.S.C. § 981(a)(2)(A) ("In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense."); 18 U.S.C. § 1956(c)(9) (Supp. 2010) ("[T]he term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.").

is not necessarily the guilt of the defendant. Equitable restitution is appropriate also when the defendant is entirely innocent, enriched by someone else's mistake or through the wrongdoing of another. If a homeowner finds stolen cash hidden in her tool shed, stashed there by a thief, she is not entitled to keep it. Similarly, if there is a "bank error in your favor," you have no legal right to retain the mistakenly conferred benefit, the assumptions of Parker Bros.' Monopoly notwithstanding.[230] Either of these scenarios would result in "unjust enrichment," and equity, if not law, will require restitution from these innocent beneficiaries every bit as much as it would require restitution from the person who committed the crime or the error.[231]

Thus, the policy for proceeds forfeitures strongly suggests a limitation on the rights of innocent donees of forfeitable property. Their receipt of wrongfully obtained property is an unjust enrichment, quite regardless of their innocence, so the property should be forfeitable, notwithstanding the donative transfer.[232] In other words, innocent owners of criminal proceeds who gave no value for the forfeitable property should *not* be protected by an innocent-owner defense. If they are bona fide purchasers for value, an innocent-owner defense should protect them, but whatever "value" they gave for the property should be forfeitable as traceable proceeds or, alternatively, as substitute assets.

With respect to the procedure for a proceeds forfeiture, the critical issue to be decided by the court is whether the property is indeed the product of criminal activity. The parties need an adequate opportunity to contest and litigate that factual question, which may be a very difficult one; it may involve tracing funds through commingled accounts and proving what funds were used for what purposes. Given the range of factual questions that must be resolved in these cases, therefore, procedural due process, in terms of meaningful notice and hearing requirements, is far more important in proceeds forfeitures than it would be in contraband cases.[233]

As already noted, the policy rationale behind proceeds forfeitures creates a compelling case for allowing the forfeiture of substitute assets. Again, this is a sharp contrast with contraband forfeitures, where the public policy is to remove the contraband from circulation to protect public health and safety. Forfeiture of substitute assets, the money received when the contraband was sold, for example, does nothing to serve that purpose. On the other hand, for proceeds

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[230] The Monopoly board game includes a Community Chest card that states: "Bank error in your favor[.] Collect $200[.]" Under the rules of the game, the player who draws that card is permitted to retain the windfall, even though equity, if not law, would afford the bank a remedy.

[231] DAN B. DOBBS, LAW OF REMEDIES 373 (2d ed. 1993) ("*Benefits to defendant from money or services without misconduct* . . . Restitution is . . . appropriate when the plaintiff mistakenly delivers the wrong goods or delivers the right goods to the wrong person.").

[232] Portions of CAFRA actually run contrary to this, since the innocent owner defense appears to apply to donative transferees of proceeds forfeitures, under certain conditions. *See* discussion of the bona-fide-purchaser-for-value rule *supra* note 104 and accompanying text. This provision makes no distinction between facilitating-property forfeitures and proceeds forfeitures. Applying the principles advocated in this article, it may be warranted for the former but not for the latter.

[233] Contraband forfeitures, as suggested above in Part IV.B.1, are unlikely to raise factual issues, only the straightforward legal issue as to whether the property itself is, in fact, contraband.

forfeitures, the public policy in undoing any unjust enrichment would be entirely defeated if the property holder could avoid forfeiture by transferring the property to family members or exchanging it for other property of value.

3. Facilitating Property

Still different is the property used to facilitate crime, which is forfeited for entirely different reasons: (a) punishment, (b) deterrence, (c) an incentive for property owners to take care, and (d) removal of the means of crime from circulation. The most compelling and oft-cited of these rationales, the second and third, have been articulated elsewhere:

> Property used in the commission of a crime may also be subject to forfeiture. Vehicles are often confiscated under these provisions, as well as real property used for the manufacture or cultivation of illegal narcotics. This type of forfeiture has been justified on two separate grounds: (1) it provides greater deterrence for the wrongdoer by prescribing an additional penalty for the crime, and (2) it provides an incentive to the property owner to take precautions that prevent others from using his property for criminal activity.[234]

Seizure of the car used for a liaison with a prostitute in *Bennis v. Michigan* was justified on this "facilitating property" theory.[235] There is nothing inherently bad about the automobile (as there is in the case of contraband), and there is nothing unseemly about how it was acquired (as there is in the case of proceeds).[236] This is legitimate property acquired in a legitimate way. The forfeiture is allowed only because the property has been misused.[237]

The justification for this type of forfeiture is easily the weakest, and certainly the most problematic. The Supreme Court in *Calero-Toledo* acknowledged that forfeitures of facilitating property serve "punitive and deterrent purposes" sufficient to uphold them against constitutional challenge even against the innocent owners.[238] As to the latter, punishment certainly does not apply, but "confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[239] Finally, facilitating-property forfeitures may serve public policy by removing the tools of crime from circulation, where they might otherwise be used for future criminal activity.[240]

So there are four policy rationales for forfeitures of facilitating property: (a) punishment, (b) deterrence, (c) incentives to greater care, and (d) removal of facilitating property from circulation. The first two apply only to the wrongdoer's property, the third applies only to the property of third-party owners, and the fourth has no such limitation. Each will be considered in turn.

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234 Pimentel, *supra* note 2, at 6.

235 Bennis v. Michigan, 516 U.S. 442 (1996).

236 One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).

237 *Bennis*, 516 U.S. at 443, 447.

238 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974).

239 *Id.* at 688.

240 *Id.* at 679.

a. Punishment and the Attendant Problems of Proportionality and Uniformity

The Supreme Court in *Austin v. United States*, specifically recognized that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."[241] The punishment rationale appears to be straightforward, but it can raise serious questions of proportionality and uniformity in criminal punishment.

i. Proportionality—Excessive Fines Under the Eighth Amendment

The proportionality problem comes from two sources. First, the forfeiture is "extra" punishment, over and above the prescribed criminal penalty for the offense. The second is that the amount of the forfeiture, which must be characterized as a "fine" in the context of punishment, is almost entirely unrelated to the severity or seriousness of the offense.[242] If sentencing guidelines are carefully calibrated to apply an appropriate level of punishment to each crime according to its seriousness, the wild-card forfeiture factor has the potential to disrupt the entire regime. Someone who completes a drug deal in his own $20,000 car will suffer the criminal penalty plus an additional $20,000 "fine" in the form of the forfeiture of the car. The person who completes the same drug deal in the back of a taxi gets the same criminal penalty, but without the $20,000 fine.[243] This disparity in punishment is difficult, if not impossible, to justify.[244]

This compelling problem of proportionality is illustrated by the case *United States v. Bajakajian*, involving a man who attempted to take a large sum of cash out of the United States without properly declaring it on the customs

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[241] Austin v. United States, 509 U.S. 602, 618 (1993).

[242] The word "proportionality" is commonly used to denote Eighth Amendment issues. In this article the term is used in a more general sense. Proportionality is an important first principle in criminal punishment. Egregious breaches of that principle may constitute cruel and unusual punishment violative of Eighth Amendment guarantees, but the principle of proportionality is neither defined by nor confined to Eighth Amendment thresholds. *See* Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("We explained 'that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment.") (alteration in original) (citation omitted) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[243] Although the perpetrator of the crime would not suffer the $20,000 fine, the taxi owner, who would normally not be subject to criminal penalties for a crime that occurs in her cab, could be "fined" $20,000 for a crime she did not commit, if and when her taxi is subjected to civil forfeiture.

[244] One rationale might be if there were a public policy to encourage people who commit crimes to use others' property or public property to do so. Perhaps they will be easier to catch and police if they are forced out of their own homes and their own cars to engage in criminal activity. On the other hand, criminal activity conducted in the privacy of one's own car or home creates less opportunity for accidental or collateral victimization. Mr. Bennis, when he engaged the prostitute, could have avoided forfeiture of his car if he had exited the car and engaged her in a public place, or if he had trespassed into the property of another for purposes of the liaison. Neither of these seem like actions the law should be encouraging.

forms.[245] His failure to so declare was found to be based on "cultural differences"—he was a member of the Armenian minority in Syria and had a profound distrust of government.[246] Moreover, there was never a suggestion that the cash was improperly held or connected in any way with illegal activity. The sole violation was a failure to disclose.[247]

The Supreme Court had already recognized in *Austin* that the Excessive Fines Clause would apply to civil in rem forfeitures, precisely because those forfeitures are, at least in part, punishment.[248] Consistent with this, the Supreme Court ultimately held that forfeiture of the full amount Mr. Bajakajian failed to disclose—more than $350,000—for such a minor offense would constitute an "excessive fine" in violation of the Eighth Amendment.[249] Instead, the Court upheld a forfeiture of a much smaller amount, $15,000, in a virtually arbitrary assessment made by the district court.[250] Although the refusal to allow the full $350,000 to be forfeited is a salutary recognition of the proportionality problem inherent in forfeitures of facilitating property,[251] the Eighth Amendment is a very blunt instrument for ensuring proportionality. The lesson learned from the *Bajakajian* case is that $350,000 is an excessive fine for this particular offense, and that $15,000 is not an excessive fine for the same offense.[252] This gives very little guidance to courts as to what the permissible limits for forfeitures are for this offense, much less for other offenses.[253]

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[245] United States v. Bajakajian, 524 U.S. 321, 324 (1998).

[246] *Id.* at 326 ("The District Court further found that respondent had failed to report that he was taking the currency out of the United States because of fear stemming from 'cultural differences': Respondent, who had grown up as a member of the Armenian minority in Syria, had a 'distrust for the Government.' ").

[247] *Id.*

[248] *Austin*, 509 U.S. at 621–22.

[249] *Bajakajian*, 524 U.S. at 337.

[250] *Id.* at 348 (Kennedy, J., dissenting) ("By affirming, the majority in effect approves a . . . $15,000 forfeiture."). The majority did not specifically assess the appropriateness of the $15,000 forfeiture because the defendant failed to appeal that aspect of the district court's ruling. *Id.* at 337 n.11.

[251] Technically speaking, the money in *Bajakajian* does not meet the definition of an "instrumentality." The Court recognized that because it was not the "actual means" of committing the crime of "failure to disclose." *Id.* at 334 n.9. However, the Court noted that this was not an in rem civil proceeding but a criminal proceeding against the individual, with forfeiture prescribed in the statute. Moreover, the Court noted that "It is . . . irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination." *Id.* at 333–34. For the analytical purposes of this paper, this forfeiture is functionally equivalent to "instrumentality" forfeitures because (1) the property forfeited may be legally owned and has legitimate value (unlike contraband), and (2) the property was earned and acquired legally, with full and untainted title prior to the infraction (unlike proceeds). As long as instrumentality forfeitures are punitive, even in part, the Excessive Fines Clause will apply. *Id.* at 331 n.6 (citing *Austin*, 509 U.S. at 621–22).

[252] The Supreme Court did not rule on the appropriateness of the $15,000 forfeiture, but allowed the district court holding to stand. *Id*. at 337 n.11.

[253] In a discussion of *Bajakajian* and the Eighth Amendment, Cassella notes:

> Because it believed that the Eighth Amendment applied only to punitive forfeitures, the Court concluded that the Excessive Fines Clause applied to all criminal forfeitures and to some, but not all, civil forfeitures.

CAFRA formally codified *Bajakajian*,[254] allowing claimants to petition for a determination of whether the forfeiture is constitutionally excessive.[255] Under the statute, the claimant has a burden of proving, by a preponderance of the evidence, that the forfeiture is "grossly disproportional."[256] Therefore, the statute acknowledges the proportionality problem but does little to address it, leaving the courts no guidance on how to assess the proportionality of a forfeiture.[257]

It is important to note that the entire excessive-fines analysis applies strictly to forfeitures of facilitating property. Cassella has observed that "courts appear to be unanimous in holding that the forfeiture of the proceeds of the offense can *never* be considered disproportional. To the contrary, the courts view the forfeiture of proceeds as precisely calibrated to the gravity of the

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> This distinction never made much sense. If the forfeiture of the instrument used to commit a crime is remedial in a civil case because it achieves some important social purpose, it is equally remedial in a criminal case. The nature of the relationship between the property and the crime, and the social and political objectives of the forfeiture, cannot depend on the procedure by which the forfeiture is accomplished.

CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-2, at 836–37.

[254] 146 CONG. REC. 5221, 5232 (2000) (statement of Rep. Henry J. Hyde); *see also* CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-2, at 839 ("[T]he proper focus of the Eighth Amendment inquiry in civil forfeiture cases is not whether the Eighth Amendment applies at all, but whether the forfeiture of a given category of property, such as the proceeds of the offense or the instruments used to commit it, is 'grossly disproportional' to the crime. That, of course, is the same analysis that the Supreme Court made applicable to criminal forfeitures in *Bajakajian*.").

[255] 18 U.S.C. § 983(g)(1) (2006).

[256] *Id.* § 983(g)(3). What the statute does not address is whether Section 983(g) applies to remedial civil forfeitures or only to punitive forfeitures. Cassella comments:

> Because it believed that the Eight Amendment applied only to punitive forfeitures, the Court concluded that the Excessive Fines Clause applied to all criminal forfeitures and to some, but not all, civil forfeitures.
>
> This distinction never made much sense. If the forfeiture of the instrument used to commit a crime is remedial in a civil case because it achieves some important social purpose, it is equally remedial in a criminal case. The nature of the relationship between the property and the crime, and the social and political objectives of the forfeiture, cannot depend on the procedure by which the forfeiture is accomplished.

CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-2 at 836–37.

[257] Complicating matters further, Justice Scalia's concurring opinion in *Austin* argues that proportionality is not a function of comparing the extent of the "fine" to the severity of the offense, but rather an inquiry as to how closely related the property is to the offense. Austin v. United States, 509 U.S. 602, 627–28 (1993) (Scalia, J., concurring). The majority opinion, however, declined to embrace Justice Scalia's view, or to endorse a "multifactor test" as had been suggested by the petitioner, leaving the entire matter in the hands of the lower courts to sort out. *Id.* at 622. The majority wrote:

> Justice SCALIA suggests that the sole measure of an *in rem* forfeiture's excessiveness is the relationship between the forfeited property and the offense. We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive.

Id. at 623 n.15 (citations omitted). Nonetheless, Cassella interprets the case law to suggest that "the stronger the connection between the property and the offense, the greater the imbalance between the property and the offense can be in economic terms without being considered unconstitutionally excessive." CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-6(a), at 852.

offense giving rise to the forfeiture."[258] In *United States v. Betancourt* the Fifth Circuit held "the Eighth Amendment has no application to forfeiture of property acquired with . . . proceeds."[259] As long as the proceeds forfeiture is limited to the actual benefit, or unjust enrichment, of the owner, this will continue to be true. With the exception of a few cases in a few courts, where the government is seeking proceeds forfeitures far in excess of that particular owner's enrichment,[260] a proceeds forfeiture should always survive an Eighth Amendment challenge.[261]

ii. Uniformity—Public Policy Behind Determinate Sentencing

In an era of carefully controlled determinate sentencing, it is difficult, if not impossible, to justify a rule that imposes additional fines in such an unpredictable and arbitrary way. The assessment and the amount of the fine in an instrumentality case are in no way tied to the wrongdoer's degree of culpability. The holding in *Bajakajian*, as codified in CAFRA, gives judges discretion to impose a forfeiture penalty in an amount up to the value of the property used in the commission of the crime, as long as the amount is not "excessive" according to that judge's interpretation of the Eighth Amendment.[262]

Perhaps most surprising and disturbing is the degree to which this development disregards principles of determinate sentencing, which Congress has made a public policy priority and devoted enormous resources to since 1984. When Congress created the U.S. Sentencing Commission and the system of federal sentencing guidelines,[263] it was very much concerned with the lack of uniformity in sentencing:

> Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute . . . [but] more importantly, of similar relationships between sentences and real conduct . . . .[264]

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[258] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-3, at 839.
[259] United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005).
[260] *See supra* notes 214–216 and accompanying text.
[261] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-3, at 840.
[262] United States v. Bajakajian, 524 U.S. 321, 339 n.14, 342–44. Although the wild-card element—the forfeiture "fine" that may be imposed in some cases but not others—frustrates consistent and uniform sentencing, it does not violate the determinate sentencing goal of reining in judges' discretion, *except* under *Bajakajian*. If the judge were required to award the forfeiture of the instrumentalities of crime regardless of the amount, the penalties for the crime would be objectively determinable and not subject to the whims and sympathies of judges. But *Bajakajian* upheld a discretionary $15,000 forfeiture, on the basis that the forfeiture of the full $350,000 would have been unconstitutional. The Constitution did not dictate the $15,000 forfeiture award, an amount determined by the unfettered discretion of the court; it merely barred a $350,000 forfeiture award, which was objectively established as the value of the property in question. *Id.* at 337 n.11.
[263] 28 U.S.C. § 994(a) (2006). "The Comprehensive Crime Control Act of 1984 foresees [sentencing] guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender." UNITED STATES SENTENCING GUIDELINES MANUAL 1.1(A)(2) (1987).
[264] United States v. Booker, 543 U.S. 220, 253–54 (2005) (citing 28 U.S.C. §§ 991(b)(1)(B), 994(f)).

The federal courts have grappled with these issues in a series of cases, trying hard to ensure that individually appropriate fact-based sentencing can be carried out consistently with the congressional goal of uniformity in sentencing.[265]

The sentencing guidelines are intended to ensure that no one is under-punished and no one is over-punished, and that some measure of consistency prevails. Facilitating-property forfeitures pose a serious threat to these very principles. Neither contraband forfeitures nor proceeds forfeitures applied within the limits of unjust enrichment theory pose this threat, because neither of those is a punishment per se. But, facilitating-property forfeitures—confiscating property legally acquired and lawfully held—for the purpose of punishing a wrongdoer, do pose this threat.

b. Deterrence: The Problem of Arbitrariness

Although deterrence is cited as a reason for forfeitures, the deterrence generated by the threat of forfeiture is sui generis. It is not like tort law, where the first policy priority is compensation for victims and the quantum of deterrence depends on the potential liability for actual harm.[266] Nor is the threat of forfeiture calibrated to ensure an appropriate or effective level of deterrence, as happens in criminal law, particularly as required by principles of determinate sentencing discussed above. Rather, the deterrence associated with the threat of forfeiture has an arbitrary quality about it.

i. Tort Theories and Deterrence

Deterrence in tort is based on the idea that the risk of tort liability will encourage an appropriate exercise of care to prevent undesirable outcomes.[267] But if that duty of care is breached in some way, the penalty is calculated largely without reference to the severity of the breach. The extent of tort liability is calculated not in terms of how bad the defendant's conduct was but in terms of how much harm it proximately caused.[268] Thus, a minor lapse of judgment or care can result in a large award of compensatory damages for the harm actually caused.[269]

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[265] *See, e.g.*, *id.* at 244, 246; Rita v. United States, 551 U.S. 338, 349 (2007); Gall v. United States, 552 U.S. 38, 70 (2007); Kimbrough v. United States, 552 U.S. 85, 111 (2007).

[266] J. Clark Kelso, *Sixty Years of Torts: Lessons for the Future*, 29 TORT & INS. L.J. 1, 6 (1993) ("[C]ourts identified two instrumental goals for the law of torts, compensation and deterrence, but tended to emphasize compensation over deterrence . . . .").

[267] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 25 (5th ed. 1984) ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. . . . When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. . . . [O]ne reason for imposing liability is the deliberate purpose of providing that incentive.").

[268] The exception here is, of course, punitive damages, which exist precisely *because* compensatory damages may not reflect the egregiousness of the conduct and provide inadequate deterrence: "One of the major purposes [of punitive damages] is to provide an appropriate incentive for acceptable behavior in cases where compensatory damages . . . are not likely to do so." DOBBS, *supra* note 231, at 212.

[269] *See, e.g.*, Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1172–73 (2011) (The court upheld a jury award of $475,298 against a defendant who had parked his truck on the dirt shoulder of the highway in an "Emergency Parking Only" zone. The action was brought by

In this sense—concerning the disconnect between the egregiousness of the behavior and the penalty assessed—facilitating-property forfeitures are more like tort damages than like criminal fines. But even in negligence cases, tort law provides *some* element of proportionality. Defendants are held accountable only for the harm proximately caused by their breach of duty (i.e., for the actual harm inflicted upon a foreseeable plaintiff).[270] Defendants will not be held responsible for more remote and unforeseeable harms. Moreover, to some degree, and in certain circumstances, a breach of duty that is likely to result in great harm *is* more egregious precisely because it disregards that great harm. And in those cases where the quantum of harm falls seriously short of the liability that would generate appropriate deterrence, the system compensates for the discrepancy with punitive damages.

Forfeitures of facilitating property, however, cannot be justified on the same terms as tort awards. The amount of the forfeiture typically bears no connection to issues of foreseeability, proximate cause, or the harm caused to victims. The forfeiture is effected even if there is no harm, and even if there is no victim.[271] None of these concepts behind tort damages contribute to the policy foundation for facilitating-property forfeitures. Rather, the deterrence rationale for facilitating-property forfeitures consists only of (1) a general deterrence embodied in the threat of a genuinely arbitrary penalty, unrelated to the wrongfulness of the conduct or the extent of the harm, or (2) the specific deterrence that once the instrument of the crime is forfeited, it cannot be used to commit further crimes.[272]

Note, in contrast, that for proceeds forfeitures, the threat of forfeiture produces a perfectly appropriate quantum of deterrence.[273] The threat of a proceeds forfeiture promises the would-be criminal no profit from his crime. Because any and all financial benefit from the crime is forfeitable—no more and no less—the degree of deterrence is neither random nor arbitrary. Rather, it is calibrated precisely to deny the wrongdoer any and all benefit from his crime, and no more.[274]

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the widow of a driver who fell asleep at the wheel and went off the highway into the parked truck killing himself in the process. The jury found total wrongful death damages approaching $5 million and allocated 90% of the fault to the decedent and 10% of the fault—and hence 10% of the damages—to the defendant.).

[270] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99–101 (N.Y. 1928).

[271] *See* Bennis v. Michigan, 516 U.S. 442, 443 (1996) (This case, again, presents a compelling example. It may be difficult to identify who is victimized by an illicit rendezvous with a prostitute. Arguably, the primary victim of this breach of moral decency is the innocent wife. Far from compensating her for the wrong (as might have been done, if the husband's half-share of the car had been forfeited and then awarded to his wife), she was actually penalized for it.).

[272] Such specific deterrence is discussed *infra* Part IV.B.3.d.

[273] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-3, at 839 ("[T]he courts view the forfeiture of proceeds as precisely calibrated to the gravity of the offense giving rise to the forfeiture."); *but see* the discussion of government overreaching with proceeds forfeitures, claiming revenues and not just profits and claiming joint and several liability against lowly co-conspirators, *supra* notes 217–215 and accompanying text.

[274] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-3, at 839.

Similarly, contraband forfeitures deprive the owner of only what he or she was never entitled to have in the first place. There can be nothing disproportionate about that.

ii. Criminal Theories and Deterrence

In criminal law, of course, the severity of the penalty and consequently the quantum of deterrence are tied directly to the reprehensibility of the criminal act. The Constitution requires this, rejecting disproportionate penalties as cruel and unusual[275] and rejecting arbitrary penalties as violations of due process.[276] The facilitating-property forfeiture flies in the face of these principles. Unless an owner is entirely innocent, and able to carry the burden of proof under CAFRA's "innocent-owner" affirmative defense, he or she is subject to forfeiture of the full amount of the owner's property used as an instrumentality.[277] An owner who should have known better or who failed to be sufficiently proactive in discovering or terminating the illegal use of his or her property can face enormous consequences for that relatively minor lapse.

Thus the "penalty" assessed a less-than-innocent owner has nothing to do with the degree of mens rea of that owner or the egregiousness of his or her conduct. The arbitrariness of the punishments is precisely what prompts public outrage at cases like that of the Lopeses.[278] They knew their son was growing marijuana, so they were not fully "innocent owners." But the penalty—having their home taken away from them—bears no proportionate resemblance to the severity of any lapse on their part. Doling out punishments in such an arbitrary way violates fundamental principles of both justice and equity.

For proceeds forfeitures, in contrast, no problem of disproportionality exists when the defendant is forced to disgorge only the *benefit* he obtained from the crime. The forfeiture is not punishment per se but denial of the benefit of the crime. For both proceeds and contraband forfeitures, the amount forfeited is precisely what the property holder was never legally entitled to have in the first place.[279]

c. Incentives for Property Owners to Ensure Against Others' Misuse of Their Property

For third-party owners, the justification for forfeitures of facilitating property has little to do with punishment or deterrence; indeed, the third party who loses his or her property in such a forfeiture is not necessarily a wrongdoer. These forfeitures cannot truly be justified as punitive, but are defended as

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[275] *See supra* Part IV.B.3.a.i (discussing the Eighth Amendment).

[276] *See* Chapman v. United States, 500 U.S. 453, 465 (1991) (stating that a penalty based on an arbitrary distinction would violate the Due Process Clause of the Fifth Amendment, but holding that affixing punishments for drug crimes according to the weight of the drugs involved, including the weight of blotter paper that is the vehicle for delivering LSD, is not arbitrary).

[277] Of course, the Eighth Amendment will apply to any such forfeiture that is, at least in part, punitive. *See* Austin v. United States, 509 U.S. 602, 619, 621–22 (1993).

[278] *See supra* Part II.A.4.

[279] CASSELLA, ASSET FORFEITURE LAW, *supra* note 3, § 28-3, at 839 ("[T]he courts view the forfeiture of proceeds as precisely calibrated to the gravity of the offense giving rise to the forfeiture.").

remedial, justified as a way to provide proper incentives to property owners.[280] This policy rationale applies only to forfeitures of third-party owners and only in civil forfeitures.[281]

The characterization of these forfeitures as "remedial" rather than "punitive" has some compelling implications. The first is that property could be and, throughout history, has been forfeited by entirely innocent owners. CAFRA has changed that, though, by creating an "innocent-owner" defense.[282] So if property can be forfeited only by owners who fail to qualify as "innocent" under CAFRA, then forfeitures are reserved only for those who share some level of guilt. In that sense, even a "remedial" forfeiture may take on some of the attributes of punishment.[283] The second implication is that the Eighth Amendment does not apply to purely remedial forfeitures since they cannot be characterized as "fines."[284]

The result of this is remarkable and counterintuitive. The amount of the forfeiture is subject to constitutional scrutiny, and Eighth Amendment limitations, only if the owner is being punished for his or her own wrongdoing. It may be unconstitutional to punish a wrongdoer too severely with an excessive forfeiture. But, for those who are *not* being punished, there is no limit to the amount of property that can be forfeited. The Constitution, therefore, allows much harsher measures against those who are *not* being punished than against those who are.

The theory of these remedial forfeitures is that threat of a facilitating-property forfeiture gives owners incentives to ensure that their property is not misused. This shifts some of the responsibility for policing wrongdoing from law enforcement to property owners. In *Goldsmith-Grant*, perhaps the leading case on the forfeiture liability of third-party owners, the Supreme Court acknowledged this remedial purpose of facilitating-property forfeitures:

> In breaches of revenue [i.e., bootlegging] provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.[285]

In other words, the Supreme Court validated a Congressional purpose of enlisting the vigilance of property owners to ensure that their property was not facilitating crime. That assistance is secured through threat of forfeiture. In order to avoid that risk, owners of real property, for example, may need to hire private

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[280] "[T]he risk of forfeiture encourages owners to exercise care in entrusting their property to others . . . ." Bennis v. Michigan, 516 U.S. 442, 469 (1996) (Stevens, J., dissenting) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974)).

[281] Criminal forfeitures permit the seizing of the property of the defendant, but not of any third party, whether the third-party owner is innocent or not. *See supra* Part I.A.

[282] H.R. REP. NO. 106-192, at 11 (1999).

[283] *Id.* at 12–13; *see also* Austin v. United States, 509 U.S. 602, 619, 621–22 (1993) ("In light of the historical understanding of forfeiture as punishment, the clear focus of [the instant forfeiture provisions] on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under [the provisions] serves solely a remedial purpose.").

[284] *Austin*, 509 U.S. at 621–22.

[285] Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510 (1921).

security services to police their land and buildings to ensure that criminal activity is not carried out there.

Although the Supreme Court did not have a problem with foisting law enforcement responsibilities onto property owners, Congress apparently did. The CAFRA House Report recounts a circumstance in 1998 when a motel in Houston was seized by the U.S. Attorney's Office because the "management had failed to implement all of the 'security measures' dictated by law enforcement officials, such as raising room rates."[286] The House Report quotes at length, and with approval, a Houston Chronicle editorial:

> More than due to shortcomings of the motel owners, this situation appears to be the result of ineffective police work . . . .
>
> The prosecution's action in this case is contrary not only to the reasonable exercise of government, but it contradicts government-supported enticements to businesses that locate in areas where high crime rates have thwarted development. Good people should not have to fear property seizure because they operate business[es] in high crime areas. Nor should they forfeit their property because they have failed to do the work of law enforcement.[287]

For personal property, the impact of the forfeiture risk is harder to conceive. The threat of forfeiture could, theoretically at least, dissuade someone from lending his car to an obviously intoxicated person, or from lending his gun to an enraged person, although in neither of these cases is the threat of government seizure of the loaned property likely to make a difference. Property owners already have incentives to decline to lend their property in these circumstances and to take steps to keep their assets secured so they cannot be "borrowed" by a wrongdoer. Conscientious property owners do so out of concern for the lives and safety of potential crime victims and out of fear of loss or destruction of their property.[288] Against these incentives, which already exist, it seems unlikely that the risk of a government forfeiture of such property would play a serious role in prompting owners to take precautions or to augment the precautions they are already taking.

d. Removing the Property Used to Facilitate Crime from Circulation

There is one additional policy basis for facilitating-property forfeitures, and that is the public interest in removing the instruments of crime from circulation,[289] out of the reach of the criminal element who might otherwise use

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[286] H.R. Rep. No. 106-192, at 10.

[287] *Id.* (quoting *U.S. Attorney Here Overstepped Bounds in Motel Seizure*, HOUSTON CHRON., Mar. 12, 1998).

[288] For example, one might be reluctant to lend a car to a drunk friend because of fear that the friend or car might be lost in an accident. These—the threat of grave physical harm or the destruction of the vehicle—are powerful incentives for the owner to be cautious.

[289] *See* United States v. $145,139, 18 F.3d 73, 79–80 (2d Cir. 1994). In this case, Judge Kearse, in her dissenting opinion, argued against the reasoning of the lower court, upheld by the majority in the Second Circuit, that "removal from circulation" was an appropriate policy justification for instrumentality forfeitures:

> The third civil purpose, correction or prevention of an undesirable condition, was essentially the purpose relied on by the district court, which characterized transported unreported funds as a crime "instrumentality" that the government could properly, as a civil matter, remove from gen-

them for future criminal activity.[290] This is not so much a deterrence argument as a purely practical one. After an arrest for running liquor across state lines, returning the vehicle to the owner merely facilitates future bootlegging activity. The vehicle is confiscated not as a punishment, or as an example to deter others from attempting such crimes, but as a remedial effort to suppress the wrongdoing by removing the means of such criminal activity from the wrongdoer's control, and perhaps even from the public sphere altogether.[291]

Although this rationale works well for facilitating property whose primary uses are related to criminal activity, such as automatic weapons[292] or equipment to outfit a meth lab,[293] the procedure is more commonly used to seize property vital to people's lives and livelihoods, such as homes, cash, and cars.[294] As the Supreme Court observed in *One 1958 Plymouth Sedan*: "There is nothing even remotely criminal in possessing an automobile."[295]

> eral circulation. I disagree with this characterization. The traditional approval of the government's removal of "instrumentalities" of crime "spring[s] from the historic fiction . . . that "an instrument of harm is itself culpable."

Id. (Kearse, J., dissenting) (alteration in original) (citation omitted).

[290] United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (interpreting the congressional purpose for the forfeiture provision to be "removing from circulation firearms that have been used or intended for use outside regulated channels of commerce").

[291] Whether the asset is removed from the public sphere altogether will depend on what law enforcement does with the seized assets. If such property is sold at a police auction, then the means of crime are placed right back in circulation.

[292] *See, e.g.*, *One Assortment of 89 Firearms*, 465 U.S. at 364.

[293] *See Meth Lab Seized in Kincheloe Last Week*, SOO EVENING NEWS (Oct. 1, 2012, 12:02 PM), http://www.sooeveningnews.com/article/20121001/NEWS/121009984; *see also supra* text accompanying notes 1–6 (discussion of criminal forfeitures).

[294] Studies have suggested that the most commonly seized assets are real property and monetary instruments. *See, e.g.*, John L. Worrall, *Asset Forfeiture*, (U.S. Dept. of Justice, Office of Community Oriented Policing Services), Nov. 2008, at 4.

[295] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965), *quoted in* Austin v. United States, 509 U.S. 602, 621 (1993). Dee Edgeworth offers some compelling examples, presumably from his vast experience in carrying out these forfeitures—offering both a house example and a car example—when a facilitating-property forfeiture may be justified on this basis:

> [1] What would you do with a house that was modified to cultivate indoor marijuana? Thousands of plants, and finished marijuana are found within the premises. Every room is filled with marijuana plants, grow lights, and vents. No one lives at the house. The entire house is an indoor marijuana grow house. There is a tunnel that leads from under the house where the growers take the trash and dispose of the refuse in a public area. The windows are covered. The house was purchased with legitimate funds BUT the absentee owner is knowingly allowing the premises to be used to cultivate marijuana. The house is not contraband. No proceeds were used to purchase the property. Neighbors complain that the house is an eyesore and is depreciating property values.
>
> [2] Officers make a valid traffic stop on a vehicle and obtain consent to search the vehicle. They find a concealed compartment that has been specifically built into the vehicle which contains a large quantity of drugs. The registered owner is a "mule" who admits driving drugs from Mexico to the US and takes currency back to Mexico inside the concealed compartment. The vehicle makes regular runs between Mexico and the US. CBP documents numerous entries by this vehicle into the US over the past six months. The vehicle is not contraband. There is no evidence that the vehicle was purchased with drug proceeds.

E-mail from Dee Edgeworth, Attorney-Advisor, Organized Crime Drug Enforcement Task Force, U.S. Dep't of Justice, to David Pimentel (Feb. 22, 2012, 16:12 EST) (on file with author). These are certainly compelling circumstances when a facilitating-property forfeiture

Government seizures of cash and real property do not remove them from circulation in the economy in any case; those assets are merely reallocated within the economy.[296] Moreover, forcing people into desperate circumstances by depriving them of their homes or of their means of support, such as Mr. Munnerlyn's loss of aircraft essential to his air charter business, is hardly a compelling strategy for combating crime or otherwise promoting societal welfare.

V. Toward a New Procedural Approach

Despite the due process concerns cited above, constitutional safeguards have not, to date, been sufficient to bring rationality to the administration of forfeitures in our federal system. In *Bennis v. Michigan*, the Supreme Court found no constitutional infirmity with seizing the property of a wholly innocent person.[297] Although the Supreme Court found an excessive-fines violation in *Bajakajian*, it gave little guidance or structure for addressing such issues in the future.[298]

A. What the Courts Can Do: Drawing on Policy for a More Principled Application of Forfeiture Procedure

1. Tailoring the Application of Forfeiture Procedure to Serve Its Policy Objectives

In an effort to address these problems, the federal courts can begin by formally recognizing the unique policy foundation for each type of forfeiture. For proceeds forfeitures, for example, courts should focus on the principle of unjust enrichment, depriving the wrongdoer of the profit from his or her crime. Courts should be skeptical of the government's attempts to seize assets in excess of the benefit received by the wrongdoer in such cases for several reasons. First, the legislative history of forfeiture statutes suggests that the purpose of these provisions was limited to taking the profit out of crime, not to adding punitive fines to the punishments already prescribed for criminal conduct.[299]

would serve legitimate public policy in combatting vice. The circumstances that justify the forfeiture in these cases are not merely that the property facilitated crime, but that they show a substantial likelihood of facilitating crime in the future. Certainly if facilitating-property forfeitures are retained in law enforcement's toolkit, it might be appropriate to limit their application to cases where the government can show a substantial likelihood that absent forfeiture the property will be used for criminal activity in the future. That showing would be easy to make in the factual scenarios posited by Mr. Edgeworth. And more importantly, they would be justified in terms of a compelling public policy priority, a showing not presently required for facilitating-property forfeitures.

[296] Forfeited real property is resold to others who might use it for illegal purposes, and forfeited cash is spent. Vehicles, on the other hand, are often kept and used by law enforcement itself. *See* U.S. Attorneys' Manual §§ 9-111.600, 9-115.000 (2009); *see also* U.S. Marshals Service, *What is Sold*, Dep't of Justice, http://publications.usa.gov/epublications/fedsales/doj.htm (last visited Dec. 21, 2012); *see generally* Dick Thornburgh, Attorney General, A*ttorney General's Guidelines on Seized and Forfeited Property*, Criminal Resource Manual (1990).

[297] Bennis v. Michigan, 516 U.S. 442, 443 (1996).

[298] *See supra* notes 251–253 and accompanying text.

[299] H.R. Rep. 106-192, at 5 (1999).

Second, because proceeds forfeitures in excess of actual enrichment are necessarily punitive, they bring with them almost all of the problems generated by forfeitures of facilitating property: they constitute fines that are arbitrary and potentially excessive under the Eighth Amendment, and they disrupt principles of uniformity and proportionality in sentencing.[300] Therefore, any deterrent effect that otherwise might justify such fines is not calibrated to the seriousness of the crime. Third, law enforcement directly profits from these forfeitures, presenting a moral hazard[301] if not an outright conflict of interest that is not presented by contraband forfeitures, which cannot enrich law enforcement authorities.

At the same time, courts need to be sensitive to the lack of a compelling policy basis for forfeitures of facilitating property. The Supreme Court has upheld civil in rem forfeitures on the basis that they are deeply rooted in our jurisprudence, so the concept itself is not unconstitutional.[302] But the latitude the government is given to carry them out can and should be tailored to serve the legitimate public interest in effecting the forfeiture without intruding unduly on citizens' legitimate interests in their own legal, and legally acquired, property. The thinness of the public policy justifications for forfeitures of facilitating property suggests that the benefit of the doubt almost always should be given to the property owner.[303] Because facilitating-property forfeitures may involve high-value assets, such as real estate and vehicles, there is a moral hazard problem that should also prompt extra scrutiny from the courts.

2. Establishing Standards for Assessing When Forfeitures Constitute Excessive Fines

In the application of constitutional safeguards, including the Excessive Fines Clause, the courts should also consider adopting more concrete guidelines or thresholds to give guidance to the government as to what forfeitures will be considered unconstitutionally excessive. The Supreme Court's willingness to articulate such guidelines in *State Farm v. Campbell*, suggesting a ratio

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[300] *Cf.* United States v. Bajakajian, 524 U.S. 321, 344 (1998) (excessive fines); United States v. Booker, 543 U.S. 220, 246 (2005) (uniformity in sentencing).

[301] "Moral hazard" is a concept in economic theory that has wide application, dealing mostly with situations when individuals make choices or take risks that are self-serving, knowing that any harm from such actions will be borne by others. OECD GLOSSARY OF STATISTICAL TERMS, http://stats.oecd.org/glossary/detail.asp?ID=1689 (last visited Dec. 21, 2012). Although it is usually associated with risk-based behavior (such as an insured's failure to exercise care, knowing that insurance shields him from liability for any resulting harm), it has application here as well. Overreaching in a forfeiture action will directly benefit law enforcement at the expense of the property owner, but the government faces very little, if any, downside if the overreaching is challenged or exposed.

[302] Austin v. United States, 509 U.S. 602, 610–11 (1993).

[303] Exceptions may include those situations where the property is particularly suited to criminal activity, in which case there may be a public interest in removing it from circulation. For example, the forfeiture of lab equipment used to make crystal methamphetamine might be more easily justified because there is compelling public interest in curtailing production of that substance. Forfeitures of cars and real property, on the other hand, are far more difficult to justify in terms of public policy.

in punitive damages cases, sets a good precedent.[304] This should not be difficult to do for forfeiture cases, given that *any* forfeiture is premised upon criminal conduct. The severity of the criminal penalty prescribed for such conduct is a sound and reliable starting point for evaluating the "fine" for excessiveness. The courts might declare that a crime punishable by no more than one year, for example, cannot justify a forfeiture of more than a certain dollar figure.[305] A mathematical formula or ratio, such as that set forth in *Campbell*, might be easily derived to support this.[306]

An even more compelling application of such an excessive-fines formula would address the problem of forfeitures by owners who are not the actual wrongdoers. The Lopeses, for example, were aware that their son was growing marijuana in the backyard, so they would not be entitled to the innocent-owner defense provided in CAFRA. But under an excessive-fines formula, which could be adopted judicially without legislative involvement, the Lopeses' "fine" would have to be justified with respect to the criminal penalties they, the parents, could face for their conduct. Such an approach would go a long way toward addressing the most disproportionate of facilitating-property forfeitures.

B. What Congress Can Do: Procedural Reform

Although a number of the problems with federal forfeiture procedure can be addressed by the judicial branch, as suggested above, legislative action will be necessary to address some of the more serious and persistent problems. At the outset, it would help enormously if Congress enacted a single forfeiture

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[304] The Supreme Court, although "reluctant to identify concrete constitutional limits," suggested that few punitive damage awards "exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–25 (2003).

[305] The actual numbers to be used in the formula would be up to the courts, but considerable guidance can be found elsewhere in the law. It is noteworthy, for example, that Title 18 prescribes that fines for Class B and C misdemeanors cannot exceed $5000. 18 U.S.C. § 3571(b)(6) (2006). A felony, no matter how serious, cannot result in a fine against an individual of more than $250,000. *Id.* at § 3571(b)(3). These reflect a congressional view as to what types of penalties may be appropriate for different types of crimes.

[306] It might be appropriate to suggest, for example, that a facilitating-property forfeiture is presumptively excessive under the Eighth Amendment if it exceeds a threshold calculated by multiplying $1000 times the number of months imprisonment that can be given for the offense the *owner* has committed. For example, if a crime is punishable by twenty years, the presumptive limit for the forfeiture would be $240,000 (240 months x $1000). For a crime punishable by only six months, the forfeiture of a used car valued at $6000 may be presumed to fall within permissible constitutional bounds, but a forfeiture in excess of that would be constitutionally suspect. Although it may seem strange for constitutional thresholds to be tied to legislatively enacted limits, this is precisely what the Supreme Court did in the context of punitive damages: "Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides [another] . . . indicium of excessiveness." BMW of North Am., Inc. v. Gore, 517 U.S. 559, 583 (1996). Whether the forfeiture could be granted *in addition to* the assessment of a fine under Title 18 is a separate question. Certainly, whether a fine has been imposed as well should be an important criterion in the courts' determination whether a forfeiture based on the same offense is constitutionally excessive.

statute generally applicable to all crimes. The myriad statutes that provide forfeiture remedies are hopelessly scattered and inconsistent.[307]

Administrative forfeitures, for example, where due process may be particularly at risk, are not judicial proceedings in any case, so the propriety of those forfeitures appears only rarely on the dockets of federal courts.[308] The litigants who voluntarily waive their rights to contest a forfeiture because they fear more serious consequences in a criminal investigation or prosecution will not be in a position to appeal the issue, as the waiver would not result in an appealable order. Adequate safeguards for justice and equity in the law of forfeitures are therefore unlikely to come from purely judicial sources. The solutions, if they are to be had, will need to come from statutory sources.

As suggested throughout this Article, a re-examination of first principles in the law of forfeitures exposes the weakness of the civil–criminal distinction. Logic and fairness will come only if the procedure is defined in terms of the type of forfeiture being pursued: (1) contraband, (2) proceeds, or (3) facilitating property. A procedural approach to each type of forfeiture is proffered below, prompted by each type's respective policy concerns. However, given the particular problems associated with forfeitures of facilitating property, and the weak policy foundations for those forfeitures, it is doubtful that they can be justified under *any* procedural regime.

1. Procedure for Contraband Forfeitures

As discussed above, contraband forfeitures have the most straightforward and compelling policy justification. Public health and safety require that these assets be removed from circulation. Moreover, the risk of infringing the legitimate rights of property owners is small because no one can legally assert rights to contraband in the first place.

Accordingly, summary procedures are entirely appropriate, and the government's burden of proof can be low. Indeed, probable cause may be enough in these cases because, where contraband is involved, the presumption should be in favor of the forfeiture. Notice and hearing requirements can be minimal. There is unlikely to be a genuine question of fact or law in the typical seizure of contraband.

The one exception here may be with forfeitures of obscene material. If contraband forfeitures are too easily done, without a hearing or a judicial determination that the material *is* obscene, then First Amendment rights may be

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[307] *See, e.g.*, Pimentel, *supra* note 2, at 18–32 (listing in Appendix A over 160 separate federal statutes that contain forfeiture provisions).

[308] There is a provision that allows a claimant to challenge an administrative forfeiture after the fact based on a failure of notice. 18 U.S.C. § 983(e) (2006). Several of these challenges have been raised in recent years, but the courts have generally dismissed them, finding that because the challenges to the administrative forfeitures are untimely or otherwise procedurally deficient, the court lacks jurisdiction to consider the merits of the forfeiture. *See, e.g.*, *In re* Seizure of $143,265.78, 616 F. Supp. 2d 699, 705 (E.D. Mich. 2009) (rejecting a lender's § 983 challenge to an administrative forfeiture of a borrower's funds it retained a security interest in; the disputed notice was deemed adequate and the challenge untimely, depriving the court of jurisdiction to consider the merits of the lender's claims); Mohammad v. United States, 2006 WL 462478, *1 (7th Cir. 2006).

jeopardized by the procedure.[309] Accordingly, it may be important to adopt a rule, similar to CAFRA's rule for real property, that obscenity forfeitures are always judicial, as opposed to administrative proceedings.

2. Procedure for Proceeds Forfeitures

Proceeds forfeitures are also compelling in terms of public policy. It would be unconscionable for society to allow criminals to profit from their crimes even as we attempt to punish them. The risk of infringing the rights of legitimate property holders is somewhat greater than in contraband forfeitures, however, because the sometimes difficult factual question must be settled as to which property was acquired by criminal activity. The downside of getting it wrong and erroneously applying the forfeiture is greater here as well, so a higher standard of proof is appropriate. It is appropriate, therefore, for the government to carry the burden by a preponderance of the evidence.

The problems associated with proceeds forfeitures have typically involved the seizure of cash, either because (1) a person who carries too much of it or uses it to buy plane tickets is presumed by law enforcement to be a drug dealer[310] or (2) because drug-sniffing dogs alert to the existence of illegal drugs *on* the cash.[311] Courts have become increasingly hostile to seizures on such bases in recent years,[312] however, and hopefully the courts' hostility will rein in law enforcement efforts to seize such assets on such flimsy grounds.

Minimizing the financial incentives for law enforcement to overreach in proceeds forfeitures, which unlike contraband typically involve cash, or valuable assets traceable to that cash, should also go a long way toward curbing abuse. Requiring that seized funds go into the general treasury, or to schools, rather than into the coffers of the law enforcement agencies who are solely and directly responsible for recovering such cash, may remove this temptation.[313] The arguments for this approach have been made effectively by other authors, and need not be reiterated here.[314] It bears repeating, however, that such reforms appear to be essential to curbing abuse of proceeds forfeitures by law enforcement. Absent such changes, the temptations and incentives for government overreaching may be simply too great to contain.

Notice and hearing requirements should be more stringent for proceeds forfeitures than for contraband forfeitures. Not only do the seizures of cash

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[309] *See* discussion of First Amendment concerns *supra* note 208.

[310] The House Report on CAFRA cited a case in which police had seized $500,000 in cash from a pizzeria in Chicago:

> The court found the need to remind a U.S. Attorney that "the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity."

H.R. REP. NO. 106-192, at 9–10 (1999) (citing United States v. $506,231, 125 F.3d 442, 454 (7th Cir. 1997)).

[311] *See supra* Part III.B.

[312] *E.g.*, *$506,231*, 125 F.3d at 454; Humke, *supra* note 39, at 1300 n.2 (listing cases that discount the value of dog alerts on cash).

[313] *See* Chi, *supra* note 61, at 1668 (suggesting the public schools as an appropriate beneficiary of forfeited property).

[314] *Id.* at 1636; Blumenson & Nilsen, *supra* note 61, at 109.

need judicial scrutiny, but difficult factual issues—involving the sources of funds and commingled accounts—are likely to arise and will need to be resolved.

3. Procedure for Facilitating-Property Forfeitures

Facilitating-property forfeitures are the problem child. As demonstrated above, the policy justifications for facilitating-property forfeitures are weak, even dubious. For the wrongdoer, they offer additional punishment and deterrence for conduct that is already subject to appropriate criminal sanctions. For the third-party owner, they provide additional incentives to take care to avoid misuse of their property, incentives that are arguably both unnecessary and ineffective. Owners already have incentives to keep their property from being used in illegal activity,[315] and it is unlikely that they are heavily influenced by the threat of forfeiture, as draconian and disproportionate as that consequence may be.

At the same time, most of the worst examples of misuse of forfeitures by overzealous law enforcement, or of injustices resulting from the application of forfeiture law and procedure, come in the context of facilitating-property forfeitures. The downside of getting this wrong and erroneously forcing forfeiture of the property is particularly grave because it involves depriving individuals of their hard-earned and legally acquired property.[316] Moreover, a successful forfeiture may easily end up over-punishing the wrongdoer, who is already subject to an appropriate measure of criminal punishment supported by our systems of determinate sentencing.

With facilitating property, therefore, in contrast to contraband, one should err on the side of *not* forfeiting the property. There is relatively little downside risk if the forfeiture is erroneously quashed: the wrongdoer is subject to appropriate criminal sanctions in any case. With this in mind, the government's burden of proof should be very high. The original language of CAFRA called for "clear and convincing evidence,"[317] but a more appropriate standard would be "beyond a reasonable doubt."[318] The fact that the proceeding has been a civil one historically, in rem, cannot change the fact that such forfeitures function in a punitive way in the fight against criminal conduct. The beyond-a-reasonable-doubt standard has been consistently applied in these contexts.

At the same time, and for the same reasons, notice and hearing requirements for forfeitures of facilitating-property should be especially demanding. It

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[315] The property owner already faces criminal liability for conspiracy if the prosecution can show that the owner knew about the criminal activity and if the jury can infer agreement from the owner's failure to stop it. Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975) ("The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case."). The owner is also likely to be motivated by the desire to protect the property from damage, and to protect himself and others from harm due to criminal use of his property. Any negligence in controlling dangerous property may also subject the owner to tort liability (for lending a car to an intoxicated person, for example).

[316] This contrasts sharply with contraband forfeitures and proceeds forfeitures, where the property seized is something the property holder never had a legal right to in the first place.

[317] *Supra* text accompanying note 90.

[318] The states of Nebraska and Wisconsin employ a beyond-a-reasonable-doubt standard for forfeitures under state law. Mellor, *supra* note 85.

is typically in facilitating-property forfeitures that third-party owners lose their property, not due to their own wrongdoing but due to another's use of their property. Third-party owners are more likely to want to contest the forfeiture than wrongdoers; third-party owners may have claims of innocence and are less likely to risk self-incrimination by litigating the issue. Failure of notice or inability to get a hearing, however, will extinguish those rights without giving the claims a fair hearing.

Owners of facilitating property have the strongest claim to their property; as stated above, "[t]here is nothing inherently bad about the property (as there is in the case of contraband), and there is nothing unseemly about how it was acquired (as there is in the case of proceeds). This is legitimate property acquired in a legitimate way."[319] Private-property rights of law-abiding citizens are held sacred in American society. The Fifth Amendment provides that "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."[320] With such deeply rooted principles and core American values at stake, it is not surprising to see public outrage at anything that resembles a cavalier seizure of such lawfully held private property by government. Accordingly, to satisfy the requirements of due process and the sensibilities of the American public, the procedural due process required for a facilitating-property forfeiture must be substantial and rigorously applied.

4. The Case Against Facilitating-Property Forfeitures Altogether

Given the dubious policies behind forfeitures of facilitating property, and the due process problems inherent in carrying them out, the more potent question is whether facilitating-property forfeitures should be allowed at all. If the taking of such property is to be justified, or even tolerated, it must be for the most compelling public policy purposes, none of which can be demonstrated for facilitating-property forfeitures.

The Supreme Court has upheld forfeitures of facilitating property since the *Palmyra* case in 1831 and through the *Bennis* case in 1996 on the ground that the practice of in rem civil forfeiture is strongly entrenched in our legal history. Notably, however, the United Kingdom, which shares our legal history and tradition, abandoned the concept of facilitating-property forfeitures long ago.[321] Absent compelling policy reasons to support the practice, it presumably fell of its own weight in British courts. Among common law nations, only the United States continues to pursue this practice with such intensity and zeal. As a result, only Americans are subjected to the self-serving overreaching of law enforcement, which never has to defend its seizures in the overwhelming majority of cases[322] and which is able to support these activities with the spoils of the practice.

In light of all of this, Congress should go back to first principles and eliminate facilitating-property forfeitures altogether. The primary public policy justi-

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[319] *See supra* Part IV.B.3.
[320] U.S. CONST. amend. V.
[321] *See* discussion *supra* note 47.
[322] *See supra* Part III.C.2. on the problem of uncontested forfeitures.

fications for this type of forfeiture—duplicative deterrence and punishment for wrongdoers, and incentives for third parties to undertake precautions and policing—are the weakest of the policy justifications for the various types of forfeitures, and the countervailing private-property interests are the strongest. Facilitating-property forfeiture appears to be a concept that has long outlived whatever remedial purposes it might have had in the past.

Conclusion

Concerns about fundamental unfairness in federal forfeitures, as practiced in the 1980s and 1990s, drove Congress to propose and pass CAFRA, bringing long-overdue relief from some outrageous abuses of government power—but the problems with forfeitures persist. It is a procedure vulnerable to abuse, with an ignominious history of overreaching whenever American society is fighting something it fears.

Indeed, the War on Terror has brought back some of the most oppressive aspects of forfeitures, retreating from the modest progress embodied by CAFRA, and even from the ban on "forfeiture of estate" that dates back to 1790. The financial incentives that forfeitures provide to law enforcement also encourage overreaching with the procedure. Many property owners are reluctant to contest forfeitures because they perceive the deck to be stacked against them and because they fear they might incriminate themselves in the process. That reluctance enables the government to seize large amounts of property administratively, without having to either defend the seizure in a hearing or otherwise carry its burden of proof.

Because Congress's effort to address these problems was a patchwork job, succumbing to the pressures to achieve political compromise in an election year, CAFRA fell far short of the comprehensive re-examination of principles that was called for. As a result, the law still tries to lump all civil forfeitures together—contraband forfeitures, proceeds forfeitures, and facilitating-property forfeitures—despite the fact that these three types of forfeitures are categorically different from each other, pursue different policy objectives, and pose very different risks to justice and equity.

The federal courts can do much to address these problems by recognizing the policy basis behind the different types of forfeiture and applying existing procedures with reference to such policies. A principled approach to forfeitures, narrowly tailoring them to serve legitimate public interests while minimizing the violence they do to private-property rights, can help keep the process in check. In addition, the courts can adopt mechanisms for excessive-fines analysis that can similarly guide and rein in government overreaching in this area.

But judicial action will not be enough. Congress, in promulgating a new and comprehensive forfeiture statute, must also undertake a thorough re-examination of these doctrines and devise a new approach, with separate procedures, including distinct burdens of proof, for each type of forfeiture in the new taxonomy of forfeitures. And in the case of facilitating-property forfeitures, the appropriate procedure may well be no procedure at all.