

1991

Comment, Scorched Earth: How the Doctrine of Civil Forfeiture Has Laid Waste to Due Process

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45 U. Miami L. Rev. 911 (1991).

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Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process

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In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.¹

Might and right do differ frightfully from hour to hour; but give them centuries to try it in, they are found to be identical.²

I. INTRODUCTION

On October 25, 1985, Miguel Alvarez was arrested and charged with possession of cocaine with intent to distribute.³ Three days later Alvarez appeared before a federal magistrate for a bond hearing.⁴ Present at this hearing was a representative from American Bankers Insurance Company, a bonding company. The magistrate set bond at

1. THE FEDERALIST NO. 51, at 265 (A. Hamilton) (M. Beloff ed. 1948) (2d ed. 1987).

2. T. CARLYLE, CHARTISM 8 (1839).

3. See *United States v. One Single Family Residence (“Alvarez”)*, 683 F. Supp. 783, 785 (S.D. Fla. 1988).

4. *Id.*

fifty thousand dollars.⁵ In accordance with the magistrate's findings,⁶ American Bankers issued Alvarez the fifty thousand dollar bond in return for a contingent promissory note from him and a mortgage for the same amount on his home.⁷

Approximately six months after Alvarez's arrest, and before his scheduled trial, the government instituted separate, but parallel, civil forfeiture proceedings against Alvarez's home,⁸ pursuant to 21 U.S.C. § 881(a)(7) (1988),⁹ the same home that the magistrate had determined Alvarez could offer as security for his bond, and in which American Bankers had taken its security interest. Under the statute,

5. *Id.*

6. "The Magistrate set a \$50,000 corporate surety bond. She also determined that Alvarez had about \$50,000 equity in his home, and that a hearing pursuant to *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966), was unnecessary." *Alvarez*, 683 F. Supp. at 785. This fact is significant because the purpose of a *Nebbia* hearing is to determine whether or not the source of the defendant's bond suggests that he has sufficient interest in the security that the risk of flight is actually decreased by its posting. *Nebbia*, 357 F.2d at 304. The establishment of ownership and the threat of losing one's home meets this level of reliability.

American Bankers tried to argue that the government was equitably estopped from bringing the forfeiture action because American Bankers had relied on the magistrate's finding that the house would be acceptable security for the bond and further, that an Assistant United States Attorney had "affirmatively assured it that Alvarez' house would not be subject to forfeiture." *Alvarez*, 683 F. Supp. at 789. The court rejected these arguments, stating that, at the outset, "[e]quitable estoppel cannot be asserted against the United States regarding actions it takes in its sovereign capacity." *Id.* at 789-90. Furthermore, it found that "[e]ven if such an assurance was made, this conversation took place *after* the United States had filed the instant forfeiture action." *Id.* at 790.

Neither of these responses adequately addresses the question of whether or not American Bankers' reliance on the magistrate's finding was reasonable in the absence of any collusion between American Bankers and Alvarez. The invocation of sovereign immunity does not provide a justification for the government's actions. Rather, it represents the government taking the position that it declines to justify its actions because it does not have to do so.

7. *Alvarez*, 683 F. Supp. at 790.

8. *Id.* at 785.

9. Section 881(a)(7) states:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, *which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment*, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(7) (1988) (emphasis added) (The clause following the italicized portion of the statute is the "innocent owner" exception to the provision.). The Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-743, 98 Stat. 1837, 2040-57, added this section, which consolidated the civil and criminal forfeiture statutes for drug-related violations and significantly expanded the categories of forfeitable property.

the presence of cocaine in the house¹⁰ rendered it forfeitable to the government.¹¹

On June 9, 1986, Alvarez failed to appear for his scheduled hearing.¹² Consequently, American Bankers paid the fifty thousand dollar bond to the government.¹³ The bonding company then intervened in the forfeiture proceeding to claim its interest in Alvarez's house.¹⁴ The district court in the forfeiture proceeding denied American Bankers's claim, holding that the company should have known when it took the house as security that it was subject to forfeiture,¹⁵ and

10. Presumably, the cocaine was found in Alvarez's closet as a result of a search conducted under a warrant. At least one hopes so. The case does not address this question. There is some precedent, however, that even evidence which is illegally, or at least questionably, obtained will be admissible for purposes of civil forfeiture, where it would not be in a criminal prosecution. See, e.g., *Dodge v. United States*, 272 U.S. 530 (1926) (noting that forfeiture seizures may be made by persons unauthorized to seize the property if the government "adopts" the seizure by later instituting forfeiture proceedings); *LaChance v. Drug Enforcement Admin.*, 672 F. Supp. 76 (E.D.N.Y. 1987) (upholding forfeiture of \$49,000 in cash where DEA agents' probable cause to seize cash was established after the fact of seizure by a drug sensitive dog's reaction to the cash).

11. See *supra* note 9. The exact manner in which the statute calls for forfeiture of the house may not be immediately obvious. While certainly the house may be instrumental in concealing a large amount of cocaine and thus is "used . . . to facilitate the commission" of a violation pursuant to section 881, the house is presumably also where Alvarez lived. The cocaine's presence there may have been as much a matter of convenience as necessity. It is not necessary to the government's theory that the house play any truly instrumental role in facilitating the crime; rather the civil forfeiture provision is based on a theory that the house is "tainted" by the presence of contraband. See *infra* notes 26-30 & 192-97 and accompanying text.

12. *Alvarez*, 683 F. Supp. at 785.

13. *Id.*

14. *Id.*

15. *Id.* at 789. In a civil forfeiture action, once the government has established probable cause for forfeiture (which in this case was established by the presence of the cocaine), the burden shifts to the claimant to prove that he is an "innocent owner." *United States v. A Single Family Residence ("Heidi")*, 803 F.2d 625, 629 (11th Cir. 1986) (stating that "[o]nce the government demonstrates that probable cause exists, the burden of proof in a civil forfeiture proceeding shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture"); see also *United States v. Trotter*, 912 F.2d 964, 965 (8th Cir. 1990) (discussing the burden shifting in civil forfeiture cases).

Section 881 defines an "innocent owner" as one who neither consented to nor was aware of the illegal use of his property. 21 U.S.C. § 881(a)(7) (1988); see *supra* note 9. This definition is generally applied to a person who already owns the property when the alleged illegal use takes place. American Bankers could not claim innocent owner status because its interest arose *after* the illegal use of the property. In addition, it was aware of the possibility of this use by virtue of the charges against Alvarez. Therefore, American Bankers tried to qualify as a bona fide purchaser for value, a category of innocent owner not explicitly provided for in the civil forfeiture statute, but one which is found in the criminal forfeiture statutes. See 21 U.S.C. § 853(n)(6)(B) (1988); 18 U.S.C. § 1963(l)(6)(B) (1988). In spite of the absence of an explicit protection for bona fide purchasers for value, the court found that "the innocent owner exception . . . also protects bona fide purchasers for value." *Alvarez*, 683 F. Supp. at 788. It then went on, though, to conflate the bona fide purchaser exception with the innocent owner

granted summary judgment for the government. As a result of this ruling, the government gained both the fifty thousand dollars from the bond and the house.¹⁶ The court rationalized that the government's double recovery was justified because, otherwise, "the criminal defendant . . . [would] get something for nothing, as the property he offers as security may already be independently owed to the government due to the forfeiture statutes."¹⁷

This statement is disturbing at several levels. First, as a practical

exception, and held that a bona fide purchaser must *also* prove that he has done everything possible to prevent his property from being used for an illegal purpose. *Id.* This makes no sense. It is illogical to require a bona fide purchaser to show that he took measures to prevent an illegal use that occurred before he acquired the property.

16. The government probably received only the fifty thousand dollars of equity that Alvarez had in the house, because typically in these cases, the government pays off the lender who holds the mortgage. It is important to note that it is not required to do so by the statute. Even a mortgage lender's security interest may be invalidated if the government takes the position that the lender "should have known" that the borrower was a drug dealer. See *United States v. One Single Family Residence ("Republic Bank")*, 731 F. Supp. 1563, 1573 (S.D. Fla. 1990) (holding the bank's \$800,000 lien invalid because the evidence suggested complicity with the drug dealer borrower on the part of the bank). The *Miami Herald*, in reporting on the *Republic Bank* case, predicted that the ruling would "redefine the 'standard of conduct' for banks in making loans to customers they suspect are drug dealers." *Republic Bank Loses Interest in Drug House*, *Miami Herald*, Mar. 9, 1990, at C1, col. 4., continued at C3, col. 3. That statement is inexplicable because Republic Bank's conduct in making the loan was not in accord with generally accepted banking practice. See *Republic Bank*, 731 F. Supp. at 1571. Therefore, theoretically, the court's holding should have no impact on banking practices. However, insofar as the power to exact civil forfeiture is so plenary, bankers may fear that even adhering to normal banking procedures will not protect their security interests. They may, therefore, be encouraged either to do extensive background checks on prospective borrowers, or to refuse to grant loans to persons on the grounds of mere suspicion. The first option is costly and the second raises the specter of a denial of equal protection should banks discriminate on the basis of race or ethnic background. See Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 480-81 (1976) (describing problems for lenders in screening borrowers).

The determination of whether a particular claimant "should have known" he was dealing with a drug trafficker turns out to be, as a practical matter, one of prosecutorial discretion, despite the fact that it may appear to be an objective, "reasonableness" standard. If a prosecutor thinks the owner in question should have known about the drugs, a forfeiture action will be brought. If he does not, it is likely that a release of the property will be negotiated. Given that the question of whether someone "should have known" can be a subjective one, the standard allows the prosecutors an enormous amount of flexibility in its application. By bringing a forfeiture action in a borderline case, a prosecutor essentially shifts the burden onto a claimant to prove a negative (lack of knowledge) by a preponderance of the evidence. If the owner did not know of an illegal use, it is difficult to know what sort of proof he can offer, other than his testimony, that he did not know. However, if a court determines that a claimant has failed to meet his burden of proof he can expect no mercy. The United States Court of Appeals for the Eleventh Circuit has stated its position as follows: "[T]hose who knowingly do business with drug dealers do so at their own risk." *United States v. Four Million Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 905 (11th Cir. 1985), cert. denied, 474 U.S. 1056 (1986).

17. *Alvarez*, 683 F. Supp. at 789.

matter, how is the government's goal of preventing criminal defendants from "getting something for nothing" advanced by imposing what amounts to a fifty thousand dollar fine on American Bankers? Alvarez already had obtained the benefit of ownership of the house in that he had used it to post the bond and then taken the opportunity the bond afforded him to flee. The court's ruling in this case did not "prevent" Alvarez from getting anything. There was no issue of American Bankers colluding in some manner with Alvarez. Denial of American Bankers's claim, under the circumstances, is rather like closing the barn door after the horse has gone.

If the court meant to suggest that in the future, persons charged with drug violations should not be able to obtain bond, this statement is even more troublesome.¹⁸ How is a court to determine at the bond stage whether a defendant's assets are forfeitable if this determination depends upon a finding on the very crime with which the defendant is charged? Alvarez had not been convicted of anything when the government instituted civil forfeiture proceedings. Yet, the court apparently did not have any hesitation in finding that his house was "independently owed to the government."¹⁹ There is something fundamentally wrong with this ruling. Section 881 allows the government to seek forfeiture of property "used, or intended to be used" to commit "violation[s] . . . punishable by more than one year's imprisonment."²⁰ Thus, in spite of the "civil" label, forfeiture under section 881 looks like punishment for a crime. How can the government obtain forfeiture from someone under this statute without proving that they committed "a violation"? Worse, how is it that, through

18. It may be that the court means to advance the government's goal by making it impossible for people accused of drug violations to post bond. If, as the court wrote, a "reasonable" bonding company "would have fully apprised itself of the allegations against Alvarez," *id.* presumably leading it to decline to issue the bond, the court is suggesting that any person charged with a drug violation should not be able to obtain bond from a "reasonable" bonding company. That would mean that persons, otherwise able to obtain a bond, would be punished merely for being charged with drug violations. Such a practice smacks of a determination of guilt before conviction. The government has a legitimate interest in seeing that criminals do not use ill-gotten gains to post bond and then flee—as Alvarez did. That interest, however, is in direct conflict with the accused's constitutional rights. This case poses precisely the same dilemma presented by the relation-back provision of the criminal forfeiture statutes which serves to deprive those accused under these statutes of their counsel of choice. See *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2670 n.7 (1989) (Blackmun, J., dissenting) (describing stripping of economic power prior to conviction as "constitutionally suspect"); Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765 (1989).

19. *Alvarez*, 683 F. Supp. at 789.

20. See *supra* note 9.

this statute, forfeiture may be imposed upon American Bankers, a party not even charged with the commission of any offense?

The answers to these questions are complex and require the explanation of two threshold concepts: the *in rem* proceeding and the "taint" doctrine. First, because a civil forfeiture is an action *in rem*—that is, an action against a thing, not a person—the government need not prove that the owner committed the violation which supposedly justifies the forfeiture.²¹ The *property* is the defendant.²² "It . . . is proceeded against, . . . held guilty and condemned as though it were conscious instead of inanimate and insentient."²³ This "personification fiction"²⁴ is the central concept that informs the *in rem* aspect of civil forfeiture. Because the property, and not its owner, is the "defendant," it is *only* the property's "guilt" that is at issue and "[j]udicial inquiry into the guilt or innocence of the owner [can] be dispensed with."²⁵ Since an inanimate object cannot "commit" a

21. "[I]t is this historic characterization [as actions *in rem*] which permits admiralty forfeitures, and civil forfeitures in general, to escape the stricture of the due process provisions of the fifth amendment." *United States v. Veon*, 538 F. Supp. 237, 242 n.2 (E.D. Cal. 1982) (distinguishing civil from criminal forfeiture); *see also* *United States v. Long*, 654 F.2d 911, 916 (3rd Cir. 1981).

22. The practice of personifying the property to be forfeited as the defendant results in humorous and cumbersome case styles. *See, e.g.*, *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972); *In re Various Items of Personal Property*, 282 U.S. 577 (1931); *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814); *United States v. One 1983 Homemade Vessel Named Barracuda*, 858 F.2d 643 (11th Cir. 1988); *United States v. Eighteen Thousand Three Hundred and Fifty Dollars*, 758 F.2d 553 (11th Cir. 1985); *United States v. One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865 (S.D. Fla. 1986); *United States v. 3,210 Crusted Sides of Caiman Crocodilus Yacare*, 636 F. Supp. 1281 (S.D. Fla. 1986); *United States v. One Black Horse*, 129 F. 167 (D. Me. 1904); *United States v. One Condominium Apartment*, 636 F. Supp. 457 (S.D. Fla. 1986). This list presents a most improbable collection of "defendants."

When shortened, some of these case styles become at best confusing, and at worst indistinguishable. Therefore, throughout this Comment, I have given cases a short name where a reference to the case name would not be helpful. For example, there are at least three separate cases discussed in this Comment that could be reduced to *United States v. One Single Family Residence*. *E.g.*, *United States v. One Single Family Residence* ("Aguilera"), 894 F.2d 1511 (11th Cir. 1990); *United States v. A Single Family Residence* ("Heidi"), 803 F.2d 625 (11th Cir. 1986); *United States v. One Single Family Residence* ("Alvarez"), 683 F. Supp. 783 (S.D. Fla. 1988).

23. *Various Items of Personal Property*, 282 U.S. at 581. The *in rem* characterization of a civil forfeiture proceeding is a legal fiction that "ascrib[es] to the property a certain personality, a power of complicity and guilt in the wrong." *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921).

24. At least one commentator has described the procedural posture of a civil forfeiture proceeding as the "personification fiction." Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768 (1977). As the term is particularly apt, this comment uses it throughout.

25. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974). With the codification of the innocent owner defense, this statement is not strictly true. *See supra* note 9 (text of § 881(a)(7)). However, because the burden is on the owner to prove his innocence, the

“violation” of any laws, the fiction which describes the procedural posture of the case merely begs the question. How does one go about finding a property “guilty”?

Normally, in a civil forfeiture action, the property’s “guilt” is determined by the presence of some illegal substance that makes it “tainted.” The paradigmatic case is a car found to contain illegal drugs.²⁶ Under subsection (h) of section 881,²⁷ title to forfeitable property vests “in the United States upon commission of the act giving rise to forfeiture.”²⁸ This subsection is the codification of the common law doctrine of relation-back.²⁹ The theory of relation-back is that the property has been “tainted” by an illegal act, thereby transferring ownership to the government.³⁰ In the example above of a car containing illegal drugs, the “illegal act” usually alleged is transportation of, and perhaps also intent to distribute, illegal drugs.

The civil posture of a forfeiture action is nothing more than a procedural fiction. Inanimate objects do not commit acts, legal or otherwise. And the “taint” doctrine sounds uncomfortably like a theory of demonic possession.³¹ Nevertheless, as a result of these fictions, the government is free to exact forfeiture, not only from the

guilt or innocence of the owner may be dispensed with as a matter of what the government is required to plead and prove. Furthermore, this Comment argues that the innocent owner defense is more hypothetical than real and that it is this vision of the owner’s conduct or motives as irrelevant that still informs civil forfeiture doctrine. *See infra* notes 247-65 and accompanying text.

26. *See, e.g.*, *United States v. One 1985 Chevrolet Corvette*, 914 F.2d 804 (6th Cir. 1990); *United States v. One 1982 Oldsmobile Cutlass*, 709 F. Supp. 1542 (W.D. Okla. 1989); *United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280 (E.D. Pa. 1986); *United States v. One Blue Lobster Vessel Named Tony, Jr.*, 639 F. Supp. 865 (S.D. Fla. 1986); *United States v. One 1977 36 Foot Cigarette Ocean Racer*, 624 F. Supp. 290 (S.D. Fla. 1985); *United States v. One 1981 Cadillac Eldorado*, 535 F. Supp. 65 (N.D. Ill. 1982).

27. 21 U.S.C. § 881(h) (1988) (“All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.”).

28. *Id.*

29. *See* *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2653 (1989).

30. *Id.* As long ago as 1814, Justice Story, dissenting in *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), stated about the relation-back doctrine:

If the principle . . . be admitted in its full extent; *it will be found very difficult to bound it.* A bale of goods which is once contaminated . . . will retain its noxious quality through every successive transfer. . . . Yet such a position would strike us as monstrous. [T]he innocent purchaser would sink under the pressure of frauds which he could never know, nor by diligence avert

Id. at 416 (emphasis added).

31. In a manner of speaking, by seeking forfeiture, the government is “exorcising” the “guilty” property. Upon forfeiture, the property is immediately cleansed of its “taint” and is free to be sold to the public—the government, of course, retaining the proceeds from the sale as its just compensation for performing this valuable public service. The exception to this practice is forfeiture of what constitutes contraband *per se*, that is, drugs, spoiled food, and the

accused, but also from his family³² and other innocent third parties, without an adjudication of guilt, and no cry will be heard that this action violates due process. By layering one legal fiction on top of another, the court in *Alvarez* treated American Bankers' security as if it never existed, even though American Bankers had committed no crime. Astonishingly enough, the *Alvarez* court found this result to be only "arguably harsh."³³

If the entire civil forfeiture construct sounds anachronistic,³⁴ it is with good reason. The personification fiction is a legal device many hundreds, if not thousands, of years old.³⁵ Its survival is something of

like. Usually these items are destroyed. This is the only area in which the notion of "guilty" property can be said to have any conceptual validity and symmetry.

32. There is a limited exception to the statement that the government may exact forfeiture from innocent family members of a wrong-doer. Recently, the United States Court of Appeals for the Eleventh Circuit affirmed a lower court's ruling that the government is not entitled to forfeiture of property that is held as tenants by the entireties with an innocent spouse. *United States v. One Single Family Residence ("Aguilera")*, 894 F.2d 1511 (11th Cir. 1990); *see also United States v. Marks*, 703 F. Supp. 623 (E.D. Mich. 1988) (noting that a wife who owns by virtue of entireties is not subject to forfeiture). Although this ruling clearly represents a victory for those unjustly punished by the operation of the forfeiture statutes, it is too limited to inspire much rejoicing. Even if all the other circuits adopt this holding, it will only apply in those states that recognize estates by the entireties. "The tenancy by the entirety exists today in somewhat less than half the states." J. DUKEMINIER & J. KRIER, *PROPERTY* 281 (1988). Unfortunately, the analysis focuses formalistically on the form in which the property is held, rather than on the propriety of visiting forfeiture on those accused of no crime. Furthermore, because innocence is also a component, although not the determinative factor alone, it places the burden on the claimant spouse to prove his innocence. How difficult is it to prove that one did not know of the illegal activities of one's spouse? If the burden of proof reflects an assumption that spouses are unlikely to be innocent, should not the government have to indict and convict them too before inflicting a punishment on them?

33. *United States v. One Single Family Residence ("Alvarez")*, 683 F. sup. 783, 789 (S.D. Fla. 1988) (emphasis added).

34. Civil forfeiture doctrine not only sounds absurd, but it also leads to absurd results. In an action in rem, the court is presumed to have jurisdiction only when the property is within the jurisdiction. Thus, in one case, the government brought civil forfeiture proceedings against a plane in one jurisdiction, subsequently moved the plane to another jurisdiction for storage, and then successfully argued, over vigorous dissents, that the claimant's appeal of the forfeiture be dismissed for lack of jurisdiction. *See United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988). The majority in *One Lear Jet Aircraft* ignored the question of whether it had in personam jurisdiction over the claimant, despite the in rem nature of the initial proceeding. One of the dissenting judges referred to this reasoning as "dated jurisdictional jetsam." *Id.* at 1580 (Vance, J., dissenting). He also noted that "[t]he United States instigated the action. Having submitted itself to the jurisdiction of the court, the government should not be allowed to escape 'through its subsequent jurisdictional exceptions' to claimants' appeal." *Id.* at 1579. It is important to point out that the government did not challenge jurisdiction because it had made a mistake in bringing the action, but rather because it had *itself* destroyed that jurisdiction. It is easy to see how this precedent could lead to uncommonly silly results if the government could seek forfeiture and then frustrate claimants by moving the property around the country. So far, there is no evidence that the government is regularly attempting to take such a tack.

35. The idea that the notion of a "guilty" res is an ancient one is oft repeated and usually

a legal "curiosity."³⁶ It has been variously described as "repugnant,"³⁷ a "perversion,"³⁸ and "superstitious."³⁹ In spite of these criticisms, courts persist in invoking the fiction, principally on the grounds of tradition.⁴⁰ Tradition alone, however, is a weak justification indeed for retaining this much criticized form of action that would appear to run afoul of our most basic principle of criminal justice—the presumption of innocence. Not surprisingly, therefore, the courts have struggled to identify "new reasons more fitted to the time[s],"⁴¹ for this remnant of "the 'blind days' of feudalism."⁴²

attributed to the following biblical quotation: "If an ox gore a man that he [shall] die, the ox shall be stoned, and his flesh shall not be eaten." EXODUS 21:28-30, cited in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974). For a criticism of the reliance on this biblical quotation as support for the personification fiction, see Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973).

36. Finkelstein, *supra* note 35, at 170 (quoting C. ALLEN, LAW IN THE MAKING 330 (7th ed. 1964). The reference in the text is to the fiction as employed in the English common law action of deodand. Deodand is often cited, somewhat erroneously, as the precursor to civil forfeiture as applied today in the United States. See, e.g., *Calero-Toledo*, 416 U.S. at 680-82; *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971); *United States v. Sandini*, 816 F.2d 869, 872 (3rd Cir. 1987); *United States v. Schmalfeldt*, 657 F. Supp. 385, 387-88 (W.D. Mich. 1987). For a discussion of the tenuous relationship of deodand to the modern civil forfeiture action, see *infra* notes 73-108 and accompanying text.

37. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 515, 188 S.W. 54, 55 (1916) (referring to deodand and the personification fiction).

38. W. SEAGLE, THE QUEST FOR LAW 126 (1941) (referring to deodand).

39. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (citing 1 W. BLACKSTONE, COMMENTARIES *300). In the quotation in the text, Blackstone was calling "superstitious" the "purpose" of deodand, not the personification fiction. He described this purpose as being to use the funds collected through deodand to say masses for the souls of those "snatched away by sudden death." 1 W. BLACKSTONE, COMMENTARIES *301. However, it seems sufficiently analogous to retain the reference.

40. See *Beaudry v. United States*, 79 F.2d 650, 650 (5th Cir. 1935) ("[I]n view of the ancient and widespread application of the principle of a guilty res, [civil forfeiture is] not thought to deny due process."); *United States v. Veon*, 538 F. Supp. 237, 242 n.2 (E.D. Cal. 1982) (the historic characterization of civil forfeiture as in rem permits procedural escape from the strictures of the fifth amendment); see also *Calero-Toledo*, 416 U.S. at 686; *Goldsmith-Grant*, 254 U.S. at 511.

41. O.W. HOLMES, THE COMMON LAW 36 (1881).

42. *United States v. United States Coin & Currency*, 401 U.S. 715, 721 (1971). The quote in the text is often cited without the additional single quotes as it appears here. The Court is citing 1 W. BLACKSTONE, COMMENTARIES *300. The exact quote is "the blind days of popery," and appears in the same paragraph as the quotation cited in *supra* note 39. Given the English Reformation, and the subsequent attempts to suppress English Catholicism, the substitution of "feudalism" for "popery" may distort the meaning somewhat for the modern reader. The word "feudalism" is more suggestive of a political and economic system, one characterized by the absolute power of the feudal lord, than of a religious practice. Blackstone was criticizing the Catholic practice of paying for masses to be said "as an expiation" for the souls of those who died a sudden death unshriven. In Blackstone's England, the term "popery" had acquired some of the same negative associations the word "communism" has in modern America. Nevertheless, the substitution has an ironic appropriateness, one that the

These struggles have, however, been largely unproductive. Modern rationales are also unpersuasive and tend to "reduce to the tautology that civil cases are not criminal."⁴³ Thus, the question is squarely posed: May the government avoid the procedural protections afforded to a defendant in a criminal proceeding merely by labeling an action "civil," when its purposes and structure are clearly penal?

There is little doubt that the principal purpose of civil forfeitures in general, and section 881 in particular, is crime deterrence and punishment.⁴⁴ As such, they represent essentially penal sanctions, no matter how they are labeled.⁴⁵ Nevertheless, as to American Bankers and other innocent owners, the civil forfeiture statute acts as a form of criminal strict liability. Given that most of our criminal law is based on the concept of fault, to be established in an adversarial proceeding and with a presumption of innocence prior to conviction, this sort of liability is "contrary to natural justice."⁴⁶

Long ago, in *Boyd v. United States*,⁴⁷ the United States Supreme

Court may not have intended, in suggesting a comparison to the feudal system of absolute power in the lord. The right of the government to exact civil forfeitures in an arbitrary and high-handed fashion looks much more like the practice of feudal lords than that of a modern, democratic government. For a more complete discussion of the tie between the action of civil forfeiture and the exercise of sovereignty, see generally Finkelstein, *supra* note 35.

43. Clark, *supra* note 16, at 395 n.49.

44. The legislative history contains the following statements: "Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. *Forfeiture is the mechanism through which such an attack may be made.*" S. REP. NO. 225, 98th Cong., 1st Sess. 194-97 (1982), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374 (emphasis added). This sentence does not distinguish between civil and criminal forfeiture. Indeed, it is clear from a complete reading of the text that the word "forfeiture" in the quoted sentence is meant to encompass both types. "It was hoped that through the use of current criminal and civil forfeiture provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering." *Id.* at 194, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3377 (emphasis added).

45. *See infra* notes 150-54 and accompanying text.

46. *Beaudry v. United States*, 79 F.2d 650, 650 (5th Cir. 1935). There is no doubt that the boundary between the civil and criminal area is blurred in many respects. *See generally* Note, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930). In part, this blurring parallels the difficulty in distinguishing the public from the private sphere; the value of autonomy versus the utilitarian notion of legitimate government interference for the "common good." It is beyond the scope of this Comment to draw that line. Nevertheless, as long as we acknowledge that there is some limit—i.e., the government cannot put to death carriers of a dreaded disease in the name of the "common good"—forfeiture, unconnected to any culpability for a crime, oversteps the line of legitimate government action. For an interesting philosophical discussion on the relevance of culpability to the infliction of punishment, see Spjut, *The Relevance of Culpability to the Punishment and Prevention of Crime*, 19 AKRON L.J. 197 (1985). For an exploration of the blurring of this notion of culpability in the tort context, see Zwier, "Cause in Fact" in *Tort Law—A Philosophical and Historical Examination*, 31 DE PAUL L. REV. 769 (1982).

47. 116 U.S. 616 (1886).

Court held that the fourth amendment protection from unreasonable searches and seizures applied to a civil forfeiture information brought under the tariff laws because "[t]he information, *though technically a civil proceeding, is in substance and effect a criminal one.*"⁴⁸ It further noted, "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."⁴⁹ In spite of the *Boyd* Court's admonition, the courts have, for the most part, long abandoned this duty with respect to civil forfeitures.

The *Alvarez* case is but one of a number of examples of how the doctrine of civil forfeiture has turned into a legal juggernaut, crushing every due process claim thrown in its path: the privilege against self-incrimination,⁵⁰ the prohibition against cruel and unusual punish-

48. *Id.* at 634 (emphasis added). The Court cited its decision in *Coffey v. United States*, 116 U.S. 436 (1886), as support for this proposition. In *Coffey*, the Court held that an acquittal on a criminal charge acted as a bar to a civil forfeiture arising out of the same acts. *Id.* at 442. Justice Blatchford, writing for the Court, reasoned that the judgment of acquittal in the criminal case acted as a determination "that the facts which were the basis of that proceeding, and are the basis of this one . . . did not exist . . . [T]he facts cannot be again litigated . . . as the basis of any statutory punishment denounced as a consequence of the existence of the facts." *Id.* at 444-45. In a later tax case the Court held the reverse; the acquittal on charges of tax fraud did not bar the imposition of a punitive, 50%, civil penalty based on the same operative set of facts because civil and criminal actions are distinct. *Helvering v. Mitchell*, 303 U.S. 391 (1938). While *Helvering* did not specifically overrule *Coffey*, the two cases are in hopeless conflict. More recently the Court has said, "The time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. To the extent that *Coffey v. United States* suggests otherwise, it is hereby disapproved." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). For a complete discussion of this conflict and its ramifications, see Clark, *supra* note 46, at 381-97 (1976).

49. *Boyd*, 116 U.S. at 635.

50. U.S. CONST. amend. 5, cl. 3 ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."). Of course, by its label, civil forfeiture is not criminal. However, this Comment argues that forfeiture is essentially a criminal action, no matter the label put on it. Furthermore, civil forfeitures often overlap with criminal proceedings. See, e.g., *United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 468 (7th Cir. 1980) ("[O]rdinarily forfeiture proceedings are instituted in connection with criminal prosecutions arising out of the same transactions . . ."); *United States v. Real Property & Residence at 3097 S.W. 111th Ave.*, 699 F. Supp. 287 (S.D. Fla. 1988) (civil forfeiture action brought after arrest on drug trafficking charges, but before conviction) See generally Comment, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 397 (1988). As in *Alvarez*, a defendant in a criminal proceeding is often forced to choose between remaining silent in a parallel civil forfeiture proceeding, thereby losing his property because the burden of proof is on the claimant, or testifying and risking waiver of his right to remain silent in the criminal trial. See *United States v. Property Located at 15 Black Ledge Drive*, 897 F.2d 97 (2d Cir. 1990) (suggesting that adverse inference from claimant's invocation of fifth amendment privilege, normally permissible in civil context, may not be permissible in forfeiture context). If a defendant testifies in the civil forfeiture proceeding, he runs the risk that, for purposes of a future criminal proceeding, the court will deem his right to remain silent waived, since both actions are essentially based on the same set of facts. *United States v. United States Currency*,

ment,⁵¹ the right to trial by jury,⁵² the right to a verdict rendered only after a finding of guilt beyond a reasonable doubt,⁵³ the right to be

626 F.2d 11, 14-15 (6th Cir. 1980) (quoting the government's brief to the effect that testimony in civil forfeiture proceeding would constitute a waiver of fifth amendment privilege for purposes of criminal prosecution). The dilemma also operates in other ways. In one case the government gave a defendant immunity for his testimony in a criminal proceeding and then, arguing that the immunity applied only to criminal proceedings, attempted to use his testimony against him in a forfeiture hearing. See *United States v. One Parcel of Real Estate*, 911 F.2d 1525, 1527 (11th Cir. 1990). The appellate court remanded the case for the trial court to determine whether a forfeiture was "quasi-criminal." *Id.* It is interesting to note that for purposes of waiver of the fifth amendment privilege, the facts are conceded as "essentially the same," while they are not conceded as the "same" for double jeopardy purposes. See *Boyd*, 116 U.S. at 616, and cases cited *infra* note 54.

51. U.S. CONST. amend. 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Because the government does not technically acknowledge civil forfeiture as a "punishment" it is unclear whether an eighth amendment challenge could ever be raised; it is difficult to argue that punishment is excessive if the government refuses to acknowledge in the first instance that it is punishing you. Nevertheless, in one case a claimant argued that forfeiture of her Porsche was "unconscionable" when the vehicle, offered as collateral for her brother's appearance bond, was found to contain only .226 grams of marijuana. *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (1979). The court rejected claimant's argument because "[t]he courts have uniformly held that a vehicle is subject to forfeiture *no matter how small the quantity of contraband found.*" *Id.* (emphasis added) (citations omitted); see also *United States v. One 1985 Mercedes*, 917 F.2d 415 (9th Cir. 1990) (\$45,000 car forfeited for possession of \$75 worth of cocaine); *United States v. One Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988) (rejecting eighth amendment challenge as inapplicable in civil forfeiture context). The eighth amendment challenge has also been rejected in the criminal forfeiture context. See, e.g., *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987). Given the apparent proportionality requirement in the words "excessive fine," one could argue that forfeiture represented an excessive fine if it is not proportionate to the violation that justifies the forfeiture. The nature of the arguments in support of civil forfeiture indicates that the courts' response would be that a forfeiture is not a "fine."

52. See U.S. CONST. amend. VI, cl. 1 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."); *id.* amend. VII, cl. 1 ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."). The right to trial by jury is implicated both in civil forfeitures and third-party claims pursuant to criminal forfeitures. In neither case is trial by jury usually permitted. See 18 U.S.C. 1963(l)(2) (1988); 21 U.S.C. 853(n)(2) (1988). Although section 881 of the civil forfeiture statute does not explicitly call for a bench trial, generally jury trials are not given. The explanation for this is that forfeitures under admiralty were conducted without a jury. See *infra* note 111 and accompanying text. However, at least one court has held that a jury is constitutionally mandated in a civil forfeiture, and that there is historical support for this position. See, *United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 456-69 (7th Cir. 1980).

53. *In re Winship*, 397 U.S. 358 (1970). In civil forfeiture the court may render a verdict against a claimant on the basis of mere probable cause because "[o]nce the government demonstrates that probable cause exists, the burden of proof in a civil forfeiture proceeding shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture." *United States v. One Single Family Residence ("Heidi")*, 803 F.2d 625, 629 (11th Cir. 1986) (citing *United States v. Four Million Two Hundred and Fifty-five Thousand*, 762 F.2d 895, 904 (11th Cir. 1985)); see also *United States v. Parcel of Land and Residence*, 914 F.2d 1 (1st Cir. 1990) (government's evidence amounted to "mere suspicion" failing to meet probable cause standard). See generally Strafer, *Civil Forfeitures: Protecting the*

free from being twice charged with the same offense,⁵⁴ the right to be free from government seizures of property absent probable cause,⁵⁵ and the right to counsel of choice.⁵⁶ All of the claims to these rights

Innocent Owner, 37 U. FLA. L. REV. 841 (1985); Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822.

54. U.S. CONST. amend. 5, cl. 2 ("No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . ."). In spite of the words "life or limb," the double jeopardy clause is seen as applying to all criminal prosecutions, hence the invocation of the civil/criminal distinction. See *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (civil forfeiture not barred by acquittal on criminal charges arising out of same set of facts); *United States v. Dunn*, 802 F.2d 646 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987) (civil forfeiture of money which was held not forfeitable by jury in criminal proceeding does not violate double jeopardy); *But see Boyd v. United States*, 116 U.S. 616 (1886).

55. U.S. CONST. amend. 4 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ."). Section 881(b)(4) allows the Attorney General to seize property without a warrant if he "has probable cause to believe that the property is subject to civil forfeiture . . ." This language is so broad that it seemingly swallows up the other more specific provisions in the statute because, even though the statute presumably requires probable cause, it does not require any *showing* of probable cause until after the seizure. This provides the government with the opportunity to attempt to justify a seizure on the basis of information received as a result of the seizure itself, rather than by any pre-seizure information which would constitute probable cause. In fact, such after-the-fact justifications are attempted even where there is a warrant. See, e.g., *United States v. \$38,000.00*, 816 F.2d 1538 (11th Cir. 1987); *United States v. Ladson*, 774 F.2d 436 (11th Cir. 1985); *United States v. Certain Real Property*, 612 F. Supp. 1492 (S.D. Fla. 1985); *United States v. One 1981 Cadillac Eldorado*, 535 F. Supp. 65 (N.D. Ill. 1982). *But see Vance v. United States*, 676 F.2d 183 (5th Cir. 1982) (forfeiture denied where based on evidence obtained through illegal search); *United States v. Life Ins. Co. of Va. Single Premium Whole Life Policy*, 647 F. Supp. 732 (W.D.N.C. 1986) (warrants based on "information and belief," issued by clerk ex parte, are unconstitutional with respect to seizures under section 881); *Application of Kingsley*, 614 F. Supp. 219, 223 (D. Mass. 1985) (warrants issued under Admiralty Rule C must also meet "probable cause" standard in order not to violate fourth amendment). Furthermore, some courts have ruled that claimants generally, or lienholder claimants in particular, have no standing to challenge warrantless searches as due process violations. See, e.g., *United States v. One 1985 BMW 318i*, 696 F. Supp. 336 (N.D. Ill. 1988). For commentary on this problem, see Winn, *Seizure of Private Property in the War Against Drugs: What Process Is Due?*, 41 SW. L.J. 1111 (1988); Note, *Forfeiture Seizures and the Warrant Requirement*, 48 U. CHI. L. REV. 960 (1981).

56. U.S. CONST. amend. 6, cl. 3 ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."). The right to counsel of choice is currently the source of much debate in the criminal rather than the civil forfeiture context. See *United States v. One Single Family Home ("Alvarez")*, 683 F. Supp. 783, 789 (S.D. Fla. 1988). However, the expansion of the civil forfeiture doctrine of relation-back causes the problem in the criminal context, at least as the law is currently interpreted. See *infra* notes 283-312 and accompanying text. One wonders whether Congress could pass a statute calling for the forfeiture of essentially all of a person's assets and achieve the same result, and whether this is in fact what it has done with the "substitute proceeds" portions of section 1963 and section 853. If so, this implicates the prohibitions on Bills of Attainder and "corruption of the blood or forfeiture" contained in the Constitution, U.S. CONST. art. I, § 9, cl. 3; *id.* art. III, § 3, cl. 2., as the substitute proceeds provisions appear to call for a result that is indistinguishable from these prohibitions.

have been rejected, and their existence limited, or eliminated entirely, in the realm of civil forfeiture.⁵⁷ In addition, because civil forfeiture concepts have been borrowed in the drafting and interpretation of the criminal forfeiture laws,⁵⁸ these deprivations are being carried over into the criminal forfeiture setting as well.⁵⁹

Because the entire civil forfeiture doctrine is made up of legal fictions that if applied in a logically consistent manner provide no internal check on the government's power to employ forfeiture, its application is virtually unbounded. In effect, the operation of the civil forfeiture statutes allows the government to "bypass entirely the cumbersome criminal justice system, with its tedious set of impediments to investigation, prosecution, and conviction, and substitute a control system consisting of civil sanctions."⁶⁰ Arguably, this "bypass" is precisely the result that Congress intended when it enacted the forfeiture statutes, both civil and criminal, particularly the 1984 amendments.⁶¹

57. See *supra* notes 50-56.

58. See *infra* notes 266-312 and accompanying text.

59. See *infra* notes 266-312 and accompanying text.

60. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 925 (1987). The author was actually posing a rhetorical question by prefacing the quoted statement with "why not." What he framed as a rhetorical question is the reality with respect to civil forfeitures. Note that in the *Alvarez* case the government never secured a conviction because the defendant fled. In some cases the government has declined to pursue a criminal action and satisfied itself with the civil proceeding. See, e.g., *LaChance v. Drug Enforcement Admin.*, 672 F. Supp. 76 (E.D.N.Y. 1987) (no criminal charges filed). In another case, the government had sought criminal forfeiture of two separate sums of money. The jury returned a verdict finding only the lesser sum forfeit, whereupon the government instituted *civil* forfeiture proceedings against the greater sum. The civil forfeiture was granted and upheld and found not to violate due process or double jeopardy. *United States v. Dunn* 802 F.2d 646 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987); see also *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977) (civil forfeiture not barred by collateral estoppel where government voluntarily dismissed charges of illegal possession of a controlled substance but subsequently instituted civil forfeiture proceedings).

61. That Congress intended to make forfeitures easier to obtain is demonstrated by the following passage. "This bill [the 1984 amendments] is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." S. REP. NO. 225 *supra* note 44, at 192, *reprinted in* 1984 CODE CONG. & ADMIN. NEWS 3182, 3375. Some of the "ambiguities" and "limitations" referred to are the former requirements of pre-seizure notice and hearing, the former absence in the civil forfeiture statute of direct authority to forfeit real property, the difficulty of preventing fraudulent transfer of assets to third parties by criminal defendants, and the absence of a "funding mechanism" to defray the cost of pursuing forfeitures. *Id.* at 192-93, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3375-76.

An interesting aside is that one of the purported purposes of the amendments was to allow the government to use "criminal forfeiture as an alternative to civil forfeiture in all drug felony cases." *Id.* at 193 (emphasis added), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 3182, 3376. This statement presumes civil forfeiture is linked to criminal law enforcement. This aspect was supposed to be a boon to prosecutors. However, it did not take prosecutors long to

The 1984 amendments⁶² included: additions to, and broadening of, the categories of forfeitable property;⁶³ a provision whereby local law enforcement agencies could retain some of the proceeds of forfeitures;⁶⁴ and a codification of the relation-back and presumption of forfeitability doctrines, taken from civil forfeiture, into the criminal statutes.⁶⁵ These amendments have had the desired effect of vastly accelerating the use of forfeiture proceedings.⁶⁶ This, in turn, means

figure out, if indeed they ever were in doubt, that "in certain respects, civil forfeiture has advantages over criminal forfeiture." *Id.* at 196, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3379. The report notes these advantages as being an early right to seizure and a lower burden of proof. *Id.* As a result, and as the *Alvarez* case demonstrates, the government has in fact instituted civil forfeitures parallel with, *prior* to or in lieu of criminal prosecutions.

62. See CFA, *supra* note 9, at §§ 301, 323.

63. *Id.* § 306 (codified at 21 U.S.C. § 881(a)(7) (1988)). Prior to the 1984 amendments, the government could not seek the forfeiture of real property for drug violations under section 881 because it did not include real property in its list of forfeitable property. In spite of the already broad reach of civil forfeiture, Congress added real property to the list of forfeitable property in order to improve its effectiveness as a deterrent to drug-trafficking and to remove procedural restrictions that were perceived to be hindering the government's use of civil forfeiture as a weapon against drug trafficking. The real property amendment was apparently a key concern:

The extent of . . . civil forfeiture under 21 U.S.C. § 881 is also too limited in one respect. Under current law, if a person uses a boat or car to transport narcotics . . . his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture

S. REP. NO. 225, *supra* note 44, at 195, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3378. A footnote indicates that real property was forfeitable under section 881(a)(6) if it constituted proceeds of, or was traceable to, an illegal drug transaction. *Id.* at n.19. It is clear why this provision may have been difficult to implement, because even the most adept of government prosecutors might find it difficult to prove that a house had been purchased with the proceeds of an illegal transaction without first proving that a person had been guilty of conducting such a transaction.

64. CFA, *supra* note 9, §§ 309-310 (codified at 21 U.S.C. § 881(e), (j) (1988)). Allowing local law enforcement agencies to share in the proceeds of forfeiture calls into question their impartiality in seeking it. For a discussion of this problem, see *infra* notes 234, 323-29 and accompanying text.

65. *E.g.*, 21 U.S.C. § 853(c) (1988) (the relation-back provision). "[T]his approach, known as the 'taint theory' is one that 'has long been recognized in forfeiture cases.'" Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646, 2653 (1989) (citing legislative history) Note that the Court does not say *civil* forfeiture cases. Compare 18 U.S.C. § 1963(c); 21 U.S.C. § 853(e) (1988) with 21 U.S.C. § 881 (1988).

66. Seizures of drug cash and property by the U.S. Drug Enforcement Administration have soared to record levels in Miami, reaching \$210 million in 1989. That surpasses Los Angeles's \$159 million and New York's \$95 million. *Dirty Dollars: Laundering Drug Cash*, Miami Herald, Feb. 11, 1990, at 1A, col. 2, 25A, col. 1. See also Wisotsky, *supra* note 60, at 894 (new records have been set in "every category of measurement—drug seizures, investigations, indictments, arrests, convictions, and asset forfeitures") (citing ATTORNEY GENERAL OF THE UNITED STATES, ANNUAL REPORT OF THE ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCE PROGRAM 102-03 (1984)).

that the constitutional infirmities of the doctrine are regularly ignored—each such decision representing an example of the “stealthy encroachment” feared by the *Boyd* Court.

As the popularity of forfeiture as a law enforcement tool has grown, so has the concern over many of its constitutional infirmities.⁶⁷ The more often these concerns are ignored, or glossed over, the greater the danger that we will become inured to violations of civil rights, and the closer we will move toward a police state. A police state is surely not what the framers of the Constitution envisioned.⁶⁸ Nevertheless, since the Supreme Court’s 1974 decision in *Calero-Toledo v. Pearson Yacht Leasing*,⁶⁹ which held that forfeiture of an innocent lessor’s interest in a yacht, due to the presence of two marijuana cigarettes, did not violate due process, most of the recent constitutional challenges to the statutes have failed.⁷⁰

The civil forfeiture doctrine *must* be challenged.⁷¹ Its current

67. See, e.g., Finkelstein, *supra* note 35; Strafer, *supra* note 53; Winick, *supra* note 18; Winn, *supra* note 55; Wisotsky, *supra* note 60; Comment, *supra* note 50; Note, *supra* note 53. The importation of the concepts embodied in civil forfeiture to the criminal forfeiture penalty, see *infra* notes 266-84, brings these concerns into stark relief because, in the criminal setting, any pretense that forfeiture is remedial or regulatory must be cast aside.

68. See THE FEDERALIST NO. 51, *supra* note 1, at 265. Not only do the discussions surrounding the drafting and adoption of the Constitution reflect a concern for the separation and dissemination of power, but the Constitution itself, by its own terms, reflects a deep distrust of the consolidation of power in its various provisions setting up a separation of powers and protections for individual rights against government over-reaching. See B. BELKNAP, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 55-93 (1967).

69. 416 U.S. 663 (1974). In deference to Justice Brennan, a great defender of civil rights, it is perhaps unfair to lay the blame on *Calero-Toledo*. However, since *Calero-Toledo*, most of the important forfeiture case decisions have concerned the criminal forfeiture statutes. See, e.g., Caplan & Drysdale Chartered v. United States, 109 S. Ct. 2646 (1989). To some extent, the validity of these cases depends on the validity of civil forfeiture established in *Calero-Toledo*. See *infra* note 70.

70. See Clark, *supra* note 16, at 390-91. Clark too apparently gives up hope of unseating doctrines that “fl[y] in the face of venerable and apparently unshakable precedent.” *Id.* In a footnote to this statement he cites the example of civil forfeitures and the *Calero-Toledo* decision. *Id.* at 391 n.39; see also, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (civil forfeiture of innocent lessor’s yacht not a “taking” for purposes of fifth amendment); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (civil forfeiture instituted after acquittal on criminal charges based on same set of facts does not violate double jeopardy clause); *United States v. One 1985 Mercedes*, 917 F.2d 415, 420 (9th Cir. 1990) (due process requirements lower in civil forfeiture than in “traditional civil cases”); *United States v. One Parcel of Real Estate at 7715 Betsy Bruce Lane*, 906 F.2d 110, 111 (4th Cir. 1990) (conviction of underlying criminal activity not a prerequisite to forfeiture; hearsay evidence admissible); *United States v. A Single Family Residence (“Heidi”)*, 803 F.2d 625 (11th Cir. 1986) (civil forfeiture statute not unconstitutionally vague and does not violate due process); *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979) (civil forfeiture of Porsche automobile for .226 grams of marijuana not “unconscionable” and does not violate constitutional ban on “cruel and unusual punishment”).

71. The civil forfeiture doctrine has not gone unchallenged by legal scholars. In fact, the

operation represents an illegitimate exercise of governmental power. In order to challenge the doctrine, however, one must examine both the tangled historical roots and the modern justifications for the personification fiction which is at its heart because the personification fiction provides the screen behind which the constitutional problems are hidden or denied. The tangles are daunting. Explanations for the personification fiction in the forfeiture context, and the resultant categorization of forfeiture as a civil action, are many. There are no clear lines demarcating one theory from another and reasons often overlap. However, as one commentator put it,

[O]ne cannot hope to have such doctrines abandoned or their inequities remedied until the demon is tracked through history to its original contextual "lair" where it may finally be confronted, identified by its original name, and only then, effectively exorcised. All else is not much more than tinkering with the machinery or treating the symptoms.⁷²

Accordingly, Section II of this Comment "tracks the demon" by exploring the historical justifications for the personification fiction. Section III examines the "tinkering with the machinery" in which modern courts have engaged in order to justify civil forfeiture's continued vitality and argues that these modern rationales are unconvincing. Section IV explores the impact of the civil forfeiture doctrine in the criminal setting. Finally, Section V argues that Congress, in its frenzy to attack the drug problem by enacting draconian civil forfeiture laws, is only "treating the symptoms" of the disease, while impermissibly infringing upon precious civil liberties in the process. To the extent that important civil rights are brushed aside in the name of expediency and efficiency, the treatment may very well kill the patient. It is the responsibility of the courts to see that it does not.

II. "TRACKING THE DEMON"

In 1971, the United States Supreme Court, in *United States v. United States Coin & Currency*,⁷³ wrote, "Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. Simply put, the theory has been that if the object is 'guilty,' it should be held forfeit."⁷⁴ The Court found that this "traditional notion" had its roots in the old English

two most compelling assaults were made, far more thoroughly than in this Comment, long before the doctrine expanded as it has. See Finkelstein, *supra* note 35, and Note, *supra* note 24.

72. Finkelstein, *supra* note 35, at 258.

73. 401 U.S. 715 (1971).

74. *Id.* at 719 (citations omitted).

common law action of deodand.⁷⁵ Thus, the first task is to examine deodand to determine whether it has any remaining vitality as a justification for the personification fiction of modern civil forfeiture.⁷⁶

A. Deodand

The word "deodand" derives from the Latin *Deo dandum* meaning "given to God."⁷⁷ At English common law, deodand was a form of action by the Crown to assess and recover the value of an object, movable or immovable,⁷⁸ that was "the direct agent[] of a man's death."⁷⁹ "The deodand objects [were] not themselves confiscated, but their value assessed, the proceeds then being due to the Crown as

75. "The modern forfeiture statutes are the direct descendants of this [deodand] heritage." *Id.* at 720. The Court supported this assertion by pointing to Holmes's *The Common Law*: "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." *Id.* at 720-21 n.3 (quoting O.W. HOLMES, *supra* note 41, at 23); see also *Calero-Toledo*, 416 U.S. at 680. Numerous other courts have followed the Supreme Court's lead in describing deodand as a precursor to civil forfeiture. See, e.g., *United States v. Sandini*, 816 F.2d 869, 872 (3rd Cir. 1987) (citing deodand as precedent for in rem forfeiture); *United States v. Schmalfeldt*, 657 F. Supp. 385, 387-88 (W.D. Mich. 1987) (noting that in rem proceeding appears to have its "roots in the concept of the deodand"). *But see* *King v. United States*, 364 F.2d 235, 236 (5th Cir. 1966) (declining to accept the government's theory that the rifle used to kill President Kennedy is forfeit to the government "as a species of Deodands"). The Court's reliance on the Holmes quotation is a curious choice because its meaning is somewhat obscure. It originates from St. German's, *Doctor & Student* dialogues published in 1530. C. ST. GERMAN, *DOCTOR & STUDENT* 291 (91 Selden Soc'y 1974). One author has suggested that "reliance upon deodand as a general forfeiture principle of early English law is probably misplaced," because the St. German quotation is the sole source of support for that premise, and "a careful reading of the sentence in context does not support that conclusion." Note, *supra* note 24, at 772 & n.31.

76. This Comment proposes that a law must have some justification rooted in current as well as historical notions of justice and fair play. The United States Supreme Court does not seem to be working from this premise in the civil forfeiture context. In *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921), the Court wrote, "But whether the reason for [forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of this country to be now displaced." In *Calero-Toledo* the Supreme Court cited this language with approval and, with its long historical section, seemed to reason from the same premise. *Calero-Toledo*, 416 U.S. at 685-86. Reliance on tradition has proven a useful means for lower courts to avoid complicated analysis of civil forfeiture's troubling implications for due process. See, e.g., *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 417-18 (10th Cir. 1982) (citing *Calero-Toledo* Court's historical discussion); *United States v. One Chevrolet Truck*, 79 F.2d 651, 652 (5th Cir. 1935) (citing *Goldsmith-Grant* for proposition that forfeiture is not barred by owner's lack of notice of property's illegal use); *Beaudry v. United States*, 79 F.2d 650, 650 (5th Cir. 1935) (citing *Goldsmith-Grant* for proposition that guilt or innocence of owner is irrelevant to forfeiture determination).

77. Finkelstein, *supra* note 35, at 180 n.35.

78. This distinction is important because of later theories concerning the justification for deodand and its posture as an action in rem. See *infra* notes 114-16, 192-200 and accompanying text.

79. Finkelstein, *supra* note 35, at 185.

a forfeiture."⁸⁰ In spite of the fact that the proceeds from the action went to the Crown, not to the decedent's survivors, deodand was not, strictly speaking, a criminal action. Rather, it applied only in cases of death by misadventure or negligence, what would today be called wrongful death, an action sounding in tort.

The original justification upon which the Crown based the right of action in deodand is not known for certain, although there are many theories. All of the existing theories appear to be retrospective attempts to explain a form of action for which the justification was forgotten long before the action itself was abandoned.⁸¹ One theory is that forfeiture of the offending object or its price was a "religious expiation."⁸² The deodand object had been "tainted" by association with an act (an accident) that resulted in someone's death and the forfeiture represented a ritual "cleansing."⁸³ Another explanation offered is that forfeiture was a substitute for revenge by the decedent's relatives against the owner of the offending object.⁸⁴ In this view, the purpose of surrendering the offending object was to avoid private justice.⁸⁵ A third theory advanced is that the personification of the

80. *Id.*

81. It is beyond the scope of this Comment to investigate the origins of the concept of deodand, as the most accessible authorities do not agree, or simply admit that the exact theories of the action are unknown.

82. "The origins of deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974). For this proposition the Court cited EXODUS 21:28: "If an ox gore a man or a woman, and they die, he shall be stoned, and his flesh shall not be eaten . . ." *Id.* at n.17. *But see generally* Finkelstein, *supra* note 35 (arguing that Judeo-Christian tradition does not support this theory.)

83. "The concept of in rem forfeiture is based on the idea that the property itself can be tainted with guilt when involved in a criminal act." Comment, *supra* note 50, at 391 (citing D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.02 (1986)) (emphasis added).

Whatever the original justification, this treatment survives in the form of the relation-back fiction in both the criminal and civil forfeiture statutes. The relation-back provisions imply that forfeiture to the government is a form of expiation, that the object is "cleansed" of its unwholesome associations by being ritually sacrificed to the State. In this respect it appears that the State is assuming the role in society formerly played by the Church. *See infra* notes 94-101 and accompanying text.

84. Avoidance of private vengeance was apparently also the purpose of the Anglo-Saxon doctrine of noxal surrender, which may be the ancestor of deodand. The offending object was surrendered to the victim's relatives, "not as a true restitution for the damage done, but as a ransom to forestall further action by the injured party." Finkelstein, *supra* note 35, at 181 (citing from the LAWS OF ALFRED THE GREAT, ch. 13). Finkelstein notes however that "[w]e have little direct evidence of Anglo-Saxon practice that can with any confidence be thought to be uncontaminated by the biblical tradition and its moral categories." *Id.* This statement suggests that the theories that attempt to explain the deodand practice may be intertwined, with no one theory providing a complete explanation.

85. One of the problems with the "substitute revenge" theory is that human agency is not necessary in the deodand theory. Thus, if a man falls off of his own cart and is trampled to

offending object in a deodand action was simply an outgrowth of a natural, primal impulse such as "leads even civilized man to kick a door when it pinches his finger."⁸⁶ As plausible as these explanations are, none of them seem relevant today as a rationale for drug-related forfeitures. Furthermore, it is not an essential element of these theories that the government, in the form of the Crown, be the beneficiary of the action. Arguably, any of these goals could have been just as easily achieved had the right of action rested with the injured party. However, Blackstone offered a fourth theory of the rationale for deodand.

Although Blackstone too assumed that deodand had a religious purpose—to pay for masses to be said for the souls of the victim⁸⁷—he offered a more pragmatic explanation. He wrote that deodands were "grounded [on the] additional reason[] that such misfortunes [wrongful deaths] are in part owing to the negligence of the owner [of the thing forfeited], and *therefore he is properly punished* by such forfeiture."⁸⁸ Blackstone's explanation suggests that the purpose of deodand was the punishment and deterrence of negligence. Given that the elimination of the deodand action in England coincided with the

death by his own horses, all might be forfeit as deodand, even though the property belongs to the victim, and presumably would otherwise go to his family. See Finkelstein, *supra* note 35, at 182. In this scenario there is no "revenge" by the family that forfeiture to the government would forestall.

86. O.W. HOLMES, *supra* note 41, at 11. The attempt by the government to forfeit the gun which was used to assassinate President Kennedy may demonstrate that this "natural impulse" theory retains some validity. *United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle*, 250 F. Supp. 410 (D.C.N.D. Tex.), *rev'd sub nom. King v. United States*, 364 F.2d 235 (5th Cir. 1966). However, given the peculiar circumstances in which this case arose, it may demonstrate the government's willingness to use the most convenient tool available in the exercise of its authority to retain material evidence of a crime rather than any real concern about revenge. Ultimately the government retained the rifle on grounds other than forfeiture.

87. "[Deodand] seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to [the] holy church . . ." 1 W. BLACKSTONE, *supra* note 39, at *300. Note that this statement does not explain the necessity of the personification theory. It only supplies an explanation for the existence of an action to pay for masses. A number of other devices calculated to achieve this purpose can be imagined.

If Blackstone was initially correct in assigning to the deodand a religious purpose, then presumably the Crown was supposed to use the proceeds from deodands to pay for masses for the soul of the deceased—not to keep those proceeds for itself. There is little evidence that the Crown engaged in such a pious practice, or if it did, that it continued for long. Finkelstein, *supra* note 35, at 182.

88. 1 W. BLACKSTONE, *supra* note 39, at *301 (emphasis added). Deterrence of negligence might be the most persuasive argument for the deodand if only it were clear that negligence was a necessary component for the imposition of the fine. See *supra* note 85. One could argue, however, that it may have represented an evidentiary presumption of negligence. For an argument that the *in rem* posture of modern civil forfeiture actions represents an evidentiary presumption, see *infra* text following note 200.

creation of a private cause of action for wrongful death,⁸⁹ it would seem that Blackstone was correct.⁹⁰ However, this theory does not explain why the personification of the offending object was seen as necessary in the first place.

Furthermore, Blackstone's theory is inconsistent with the law's operation. If the object of deodand (and civil forfeiture) is to deter negligence, or to punish negligent owners, why then did the action operate though "no default [lay] in the owner?"⁹¹ Personification of an offending object shifts the inquiry *away from* any the negligence of the owner, and, thus, from the propriety of *punishing* him.

[T]he doctrine that the sovereign is authorized to impose forfeitures and confiscations on 'guilty things' without regard to the interests of the innocent owners of those things, is about as irrational and unjust a proposition as a sober mind can concoct, for all that it has a history of thousands of years behind it⁹²

Thus, still unanswered are the following questions: What function did the personification fiction perform, and what is there about deodand that bears any relationship to civil forfeiture which would justify reliance on it? Unfortunately, these questions appear to be unanswerable.

In 1845, in discussing the abolition of deodand, Lord Campbell remarked that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force . . . especially . . . [as it] was called into action almost weekly."⁹³ Lord Campbell's surprise notwithstanding, there is an explanation for the persistence of deodand, one that might also explain the tenacity of its grip on the modern judiciary. That explanation has its roots in the philosophy of legal positivism. As one commentator put it, "[T]he real rationale for the deodand institution lay in the assumption by the state—in England, i.e., the Crown—of the role of the vicar of transcendent concerns and

89. The act abolishing deodand was passed at the same time as the "Act for Compensating Families of Persons Killed by Accidents," commonly known as "Lord Campbell's Act." See Finkelstein, *supra* note 35, at 170-73 & nn.1-16. Both acts were passed in 1846. *Id.* at 170-71.

90. Indeed, the deterrence of negligence argument has been invoked as a justification for modern civil forfeiture. See *infra* notes 247-65 and accompanying text.

91. See *supra* note 75.

92. Finkelstein, *supra* note 35, at 257.

93. 77 HANSARD, PARLIAMENTARY DEBATES 1027 (1845). In contrast to Lord Campbell, the modern courts that have cited deodand as the source of the personification fiction in civil forfeiture generally have done so without any similar expression of wonder. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681-86 (1974); *In re Various Items of Personal Property*, 282 U.S. 577, 580 (1931); J.W. Goldsmith, Jr.-Grant v. United States, 254 U.S. 505, 511 (1921); Dobbins Distillery v. United States, 96 U.S. 395, 401-02 (1878). But see *United States v. United States Coin & Currency*, 401 U.S. 715, 720 (1971) (finding it "remarkable" that it is the money that is charged with "the actionable wrong").

values, superseding the Church in most of its authority in these domains."⁹⁴

In the sixteenth century, Henry VIII, King of England, designated himself the Head of the Church in place of the Pope because the Pope would not grant him the divorce he wanted.⁹⁵ The Reformation in England saw the beginning of an important shift in the role of the state,⁹⁶ and arguably facilitated the later adoption of a philosophy that saw its culmination in "the utilitarian view of morals, law and sovereignty as expounded by Bentham and Austin," and the philosophy of the State advanced by Hegel.⁹⁷ These views signaled a shift away from crimes concerning individual morals, and toward those considered an offense to the general well-being. The State, in this view, had the responsibility for the general well-being—both moral and physical. Hence, as the secular and spiritual merged and overlapped, the State became ascendent and the Church was, for all practical purposes, stripped of any real power or authority. Over time, religious crimes punishable by the ecclesiastical courts vanished, and all these matters became concerns of the State.⁹⁸

This concept may have had its impact on *all* forfeiture laws, including deodand. Blackstone anticipated this theory in the following explanation for forfeitures:

The true reason and only substantial ground of any *forfeiture for crimes* consists in this; that all property is derived from society, being one of those civil rights which are conferred upon individu-

94. Finkelstein, *supra* note 35, at 183.

95. Henry VIII wanted to divorce his wife, Katherine of Aragon, daughter of Ferdinand and Isabella of Spain, in order to marry Anne Boylen. His hope was that Anne Boylen would give him the legitimate male heir he had not produced in his marriage with Katherine. See generally M. BRUCE, ANNE BOYLEN (1972); J. SCARISBRICK, HENRY VIII (1968).

96. Henry VIII took advantage of this new position as Head of the Church to confiscate much of its revenues. See generally G. ELTON, REFORM AND REFORMATION, 1509-1660 (1971). He also abolished many Catholic practices that formerly resulted in income to the Church and redirected those revenues to the Crown. *Id.* Deodand seems to fit well into this shift in authority. Henry's assumption of this role, and his subsequent appropriation of the revenues of the Church, took place at the point of the sword. J. RIDLEY, STATESMAN AND SAINT 263-84 (1982). Although the emerging Protestant middle class may have applauded some of the reforms of the Church undertaken during the Reformation, *id.* at 216-17, 281, the break with the Pope was not universally popular, and many people were executed for their refusal to sign the Act of Succession and the Act of Supremacy. *Id.* at 277. As one might expect, the logic of appropriating the benefits of the Church as a result of claiming the title of Head of the Church was suggested to Henry by a lawyer, Thomas Cromwell. M. BRUCE, *supra* note 95, at 169-171, 288.

97. Finkelstein, *supra* note 35, at 201.

98. See *id.* at 198-212. In particular, see *id.* at 208 n.113 ("The state does not exist for the citizens; on the contrary . . . the state is the end and they are its means . . . All the value man has, all spiritual reality, he has only through the state.") (quoting G. HEGEL, REASON IN HISTORY 52-53 (R. Hartman trans. (1953))).

als, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If, therefore, a member of any national community violates the fundamental contract of his association, *by transgressing the municipal law*, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him.⁹⁹

Although Blackstone's comment pre-dates Hegel, it reflects his philosophy of legal positivism. Hegel saw the laws enacted by the State as prompted by the State's right to secure the general well-being.

In other words, granting the ideal that the sovereign authority corporately represents the expression of the greatest number, . . . the laws enacted by that society always reflect general expediency, and hence are always "right." In short, . . . there [is] . . . no distinction in kind between a violation of a public revenue law and a law protecting the public health.¹⁰⁰

99. 1 W. BLACKSTONE, *supra* note 39, at *299 (emphasis added). Blackstone was referring, in the passage in text, to forfeiture for "infamous crimes." Nevertheless, he ended this paragraph by introducing the theory of deodand without explaining why a similar "punishment" applied, even though there was no "infamous crime" with deodand since the claim was only the modern equivalent of negligence. Perhaps the same rationale applied—that of an "offense" to the King. In actuality, however, the deodand may have persisted because the Crown was loath to give up a source of revenue. The loss of revenue should the action be abolished became a sticking point in the debate over the proposal to eliminate the deodand. Finkelstein, *supra* note 35, at 204 n.105. It is no accident that Blackstone's section on deodands comes under the heading of "The King's Revenues." 1 W. BLACKSTONE, *supra* note 39, at *300. "It was estimated that the privy purse was receiving, in 1846, some £700-800 per year, arising from deodand." Finkelstein, *supra* note 35, at 173 n.16 (citation omitted).

Finkelstein argues, however, that the reluctance to do away with deodand had more to do with the "transcendence" of human life, which made it obnoxious to put a price on it. *Id.* at 173-83 (citing *Baker v. Bolton*, 170 Eng. Rep. 1033 (Nisi Prius 1808)). Because the Crown, as sovereign, had assumed the role of "vicar of transcendent concerns," resting the action in the Crown may have been seen as more appropriate than leaving it to individuals to degrade human life by quarreling over its price. *Id.* at 183.

It is also interesting to note that Blackstone equates "the state" with "society." He seems to be describing a more egalitarian and participatory form of the State than was represented by the English monarchy of his time. For a description of Blackstone's COMMENTARIES as an apologist attempting to reconcile contradictions in existing laws and power arrangements, thereby legitimizing them, see Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 211, 217-19 (1979).

100. Finkelstein, *supra* note 35, at 201-02. In the quoted passage, Finkelstein was exploring the philosophy of Bentham and the decision by Pollock, C.B., in *Regina v. Woodrow*, 15 M & W 403 (Exch. 1846) (holding that forfeiture of tobacco found adulterated in violation of the excise statutes was valid even though the owner had no knowledge or part in the adulteration; the aim of the excise statutes was solely and explicitly the protection of the Crown's revenues and thus did not require *scienter* because the law was made for "working some public good"). Another commentator has called this "the law is always right" argument; the "positivist idea that laws are valid simply because they have been enacted." Wisotsky, *supra* note 60, at 906.

What this means in practical terms is that there is no difference in kind between a crime which causes some *specific* harm to *identifiable, individual citizens*, and one which causes a more vague, diffuse injury to *the public as a whole*, on the theory that the violation in question either undermines the general moral fiber of society, or that it undermines the authority of the State.¹⁰¹ What it also means is that the laws enacted by the State do not depend for their legitimacy upon any rational explanation of purpose. Thus, the answers to the questions posed above—why use the personification fiction, and why allow the right of action in deodand to rest in the Crown—can be stated simply—because it is the law. *That* is what deodand has in common with civil forfeiture.

Although a positivist view of the law seems to dictate that the imposition of a punishment on an innocent person is justified in the name of the greater good, this view is not that adopted by the framers of the United States Constitution. The framers seem to have been at least as influenced by theories of natural law as by those of positivism.¹⁰² As written, the Constitution reflects a suspicion of an all-powerful, self-justifying government.¹⁰³ "The structure of the government [established by the Constitution] dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels."¹⁰⁴ The government was made for the people, not the other way around. A legal theory with its roots in the divine right of kings is ill-suited to the form of government reflected in this document. Nothing in the history of deodand appears to justify the continuation of a tradition that Lord Campbell referred to as "absurd" over one hundred and fifty years ago.¹⁰⁵ However, deodand is not the only historical basis for an action in rem. In the last passage quoted from Blackstone, he was referring to the justification for forfeitures *generally*,¹⁰⁶ not just deodand. At that time, forfeitures included both com-

101. Sometimes there *is* a distinction made between harms against individuals citizens and those against society as a whole. Whenever the State reserves its most severe punishments for crimes like treason, but punishes personal crimes, like assault for example, comparatively mildly, the State views crimes against itself *more* seriously than those against a person.

102. See B. BELKNAP, *supra* note 68, at 22-54. Arguably, the inherent tensions in the Constitution, as well as its ambiguities, are partially a result of the blending of natural law and positivist philosophies.

103. See B. BELKNAP, *supra* note 68.

104. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964). In this seminal opinion on the first amendment, Justice Brennan, writing for the Court, quotes James Madison as stating, "The people, not the government, possess the absolute sovereignty." *Id.* (citation omitted).

105. See *supra* note 93 and accompanying text.

106. See *supra* note 99. In fact, Blackstone was also referring to "forfeitures for crimes." Deodand did not really fall into that category, but Blackstone nevertheless included it, hypothesizing that it might be a form of punishment for negligence. For further discussion of

mon law and statutory forfeitures,¹⁰⁷ most of which were in personam. Thus, unlike today's civil forfeiture proceedings, in most early, English forfeiture proceedings, the guilt or innocence of the defendant was highly relevant to the imposition of the penalty—that is, outside of deodand and one other area.¹⁰⁸ The other exception is found in admiralty law.

B. Admiralty

The earliest American cases justifying a civil forfeiture proceeding in rem involved actions for the forfeiture of ships brought under the admiralty procedures.¹⁰⁹ The in rem posture of the admiralty forfeiture proceeding is another inheritance from English law. Early admiralty laws in this country were patterned after the English Navigation Acts of the mid-seventeenth century,¹¹⁰ and during this period in England, the admiralty courts did not have jurisdiction over persons.¹¹¹ Thus, those Acts constructed the forfeiture action as one in

the theory of civil forfeiture as a means to discourage negligent entrustment of property, see *infra* notes 247-65 and accompanying text.

107. Common law and statutory forfeitures were, for the most part, rejected by the framers. See U.S. CONST. art. I, § 9, cl. 3 & art. III, § 3 (prohibition on Bills of Attainder and "corruption of the blood"). But see Note, *supra* note 24, at 779 n.73, 785-88 nn. 101-115 (illustrating criminal forfeitures that were imposed in the colonies and the Confiscation Acts of the Civil War).

108. According to Blackstone, deodand actions, unlike modern civil forfeitures, were tried by a jury of "twelve men," and that "juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of death." 1 W. BLACKSTONE, *supra* note 39, at *302. Note too that, in spite of reliance on deodand as a precursor to modern civil forfeiture, the jury component of deodand was not borrowed. See *supra* note 52. Apparently only select history can justify modern civil forfeiture practices.

109. One of the first recorded cases was *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796) (holding that a jury in civil forfeiture was not required because forfeiture was properly under admiralty jurisdiction, which did not traditionally provide for jury trials). A later cluster of cases involve claims arising during the War of 1812. See, e.g., *The Friendschaft*, 17 U.S. (4 Wheat.) 105 (1819) (holding that the claimant/owner who resided in a neutral country was not exempted from forfeiture where the company that owned the ship was based in England); *The Langdon Cheves*, 17 U.S. (4 Wheat.) 103 (1819) (holding that the burden of proof in an in rem proceeding is on the claimant); *The Caledonian*, 17 U.S. (4 Wheat.) 101 (1819) (holding that any person may seize any property forfeit to government for purpose of enforcing forfeiture; grounded on right of government to seize enemies' property during war). Two other famous, early cases, *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844) (holding that innocence of owners is no defense to forfeiture in rem), and *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (holding that in rem forfeitures do not require criminal conviction on facts which constitute grounds for forfeiture) involved violations of piracy laws. Finally, there are the cases that arose during the Civil War for violations of the blockade of the Southern ports, the most famous of which are *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (holding forfeitures valid as an exercise of the war powers).

110. See Note, *supra* note 24, at 780.

111. 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 272 (5th ed. 1977). The fact that

rem.¹¹²

At first blush, one might think that the rule in admiralty law—of proceeding in rem—bears no relationship to the action of deodand. Indeed, the evidence suggests that the method of proceeding that they had in common sprang from different sources, and that any similarity was largely accidental.¹¹³ Holmes, however, believed that the personification concepts of deodand and that of the maritime lien were connected, although in the process of making the connection he offered an entirely different sort of justification for deodand than those explored in the previous Section. Holmes believed that “the fact of motion” was *the* essential component of the deodand personification fiction, and that it was this component of “motion” that also made the concept of the maritime lien “intelligible.”¹¹⁴

A ship is the most living of inanimate things. . . . [E]veryone gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the *criminal* law applied with even more striking thoroughness in Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.¹¹⁵

In spite of this rather nimble attempt at reconciling the two doctrines,¹¹⁶ Holmes recognized that perhaps other, practical motivations were at work in the employment of the personification fiction in admiralty law, practical motivations that were unique to the problems of admiralty.

It may be admitted that, if this doctrine were not supported by an

the admiralty courts during this period had no jurisdiction over persons may explain why there was no provision for a trial by jury. This suggests that the absence of a jury trial in modern civil forfeiture is the result of an historical accident.

112. Note, *supra* note 24, at 780 & n.77. The English Navigation Acts were themselves seen as fairly radical departures from the previous law because of the severity of the required forfeiture, divorced by the Acts from any concept of culpability. *Id.* at 774-75. “[T]he older opinion [was] that the owner [of a ship] was not liable for the torts (and, presumably, by analogy, the crimes) of the master and crew.” 8 W. HOLDSWORTH, *supra* note 111, at 272.

113. See *infra* notes 117-27 and accompanying text.

114. O.W. HOLMES, *supra* note 41, at 25-34.

115. *Id.* at 26-27 (emphasis added). One particularly interesting feature of the quotation in text is Holmes’s reference to the “criminal law.” Given that the criminal forfeiture laws acted in personam, Holmes must have been referring to deodand. This conclusion is also supported by the fact that Holmes had been discussing the concept of deodand in the passages before the one quoted. Holmes appears to have perceived deodand as essentially a *criminal* action.

116. Holmes’s attempt to make the maritime rule “intelligible” by tying it to deodand has been characterized as “fims[y],” resting up on scholarship that is “ingenuous rather than solid.” Note, *supra* note 24, at 770 n.22 (quoting G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 484 (1957)).

appearance of good sense, it would not have survived. The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.¹¹⁷

Holmes's second argument is the one most commonly offered in support of the admiralty rule.¹¹⁸ In admiralty law, the personification fiction reflected a slightly different purpose than those previously discussed in deodand. Gone is the whiff of superstition in its invocation, although it still has a slightly archaic flavor. Instead, in admiralty, the personification fiction appears to have been thought of as merely a necessary procedural form, calculated to obtain jurisdictional control over vessels whose cargo was contraband, or whose crew had committed some violation, but whose owners might be far away. "The process of the Admiralty courts against the ship seems clearly to have originated . . . as a ready and effectual means of compelling the wrongdoer to appear and defend the action or make recompense."¹¹⁹ Because owners might be far away, or difficult to ascertain, seizure was perhaps the most appropriate and efficient remedy for violations of the admiralty law. As one commentator put it, the procedure reflected:

the essential condition of maritime traffic, namely, that it functions largely in areas—the oceans—where sovereignty either does not exist, or is in dispute The vessel alone, and its cargo, were usually all that could be seized for the satisfaction of any claim or as a forfeiture for any offense.¹²⁰

Although the difficulties inherent in obtaining jurisdiction over ships apply with equal force in both the criminal and civil context, Holmes' explanation focused on the problems presented to private parties—that of "one's own citizens" searching abroad for a foreign remedy in foreign courts. However, the early American cases most often *cited* in support of the personification fiction in civil forfeiture,

117. O.W. HOLMES, *supra* note 41, at 28. Holmes's faith that a doctrine not "supported by good sense" will not survive, may have been misplaced in this instance.

118. See 8 W. HOLDSWORTH, *supra* note 111, at 272. Holdsworth examined and rejected Holmes's view that the maritime lien had its roots in the action of deodand. Instead he noted that "this lien arose from the Admiralty process of arresting the ship in order to compel payment." *Id.* See also *infra* notes 119-27 and accompanying text.

119. 8 W. HOLDSWORTH, *supra* note 111, at 272 n.6 (citation omitted).

120. Finkelstein, *supra* note 35, at 231. Note the importance Professor Finkelstein assigns to the notion of "sovereignty." If indeed forfeiture is merely positive law at its purest, this comment means that because there was no "sovereign" on the seas, neither was there any "law."

with its attendant constitutional disabilities, reveal that they almost never involved the sort of problem with which Holmes was concerned. These cases did not involve private parties seeking restitution for some injury, but rather, involved the government seeking forfeiture for the breach of some criminal law.

For example, in *United States v. Brig Malek Adhel*,¹²¹ the government sought forfeiture of a merchant vessel and its cargo because of acts of piracy committed by its captain that were in violation of United States law.¹²² There was no question that the ship's American owners had no knowledge of, nor did they consent to, the captain's activities.¹²³ Nevertheless, in a decision that surely represents a masterpiece of "transcendental nonsense,"¹²⁴ the United States Supreme Court held the vessel forfeit, but "acquitt[ed]" the cargo.¹²⁵ Justice Story, writing for the Court, stated, "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."¹²⁶ He noted that this practice was "not an uncommon course in the admiralty, acting under the law of nations," as it was done "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."¹²⁷

Justice Story's explanations for this practice are those later articulated by Holmes. They are, however, inapposite. The *Brig Malek Adhel*'s owners were American, not foreign.¹²⁸ What "necessity" required dispensing with their innocence or guilt in any partici-

121. 43 U.S. (2 How.) 210 (1844).

122. *Id.* at 220.

123. *Id.* at 237. Not only were the owners of the *Brig Malek Adhel* innocent of any wrongdoing, counsel for the owners argued that even the captain was not responsible for his own actions that strongly suggested that he was insane. *Id.* at 212-19. The Court, to the contrary, found the captain's actions "cunning" and thought that there was "much method in his mad projects," *id.* at 233, although a review of the testimony found at the beginning of the case suggests otherwise. *Id.* at 212-29. If the captain had a piratical purpose, his peculiar behavior and erratic actions indicate that he must have been a very unsuccessful pirate indeed. He was apparently preoccupied not with larceny, but with getting his chronometer rated. *Id.*

124. The reference to "transcendental nonsense" is from an article by Professor Felix Cohen, a noted legal realist. In the article, Professor Cohen criticized the legal profession's reliance on "meaningless" metaphysical concepts and arguments, rather than on ones that could be empirically proven, or that had their roots in "actual experience." Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822-29 (1935). Professor Cohen's observations precisely describe the absurd reasoning of the doctrine of civil forfeiture.

125. *Brig Malek Adhel*, 43 U.S. (2 How.) at 229-37.

126. *Id.* at 233.

127. *Id.*

128. *Id.* at 229.

pation or approval of their captain's behavior? Admiralty's "necessity of the case" seems to disappear when the owners are citizens. Furthermore, like Holmes, Justice Story offers the argument of "indemnity" to injured parties as if this was a commercial case between private parties. But the "injured party" in this case was the government. Its "injury" was whatever intangible injury the government suffers from a violation of the criminal law regarding piracy.¹²⁹ The tangible damages suffered were those of the other ships that encountered the Brig Malek Adhel, some American, some not, which the Brig Malek Adhel fired on and harassed.¹³⁰ Nevertheless, the forfeiture was to the government, not to those ships' passengers or owners.

The early cases cited in support of civil forfeiture almost uniformly involve violations of the piracy acts,¹³¹ and laws against trading with the enemy.¹³² These are primarily crimes against the government. In each of these cases, the party to be "indemnified" is the government. Its motivation in exacting the "indemnity," however, looks more punitive in nature than remunerative. The propriety of an in rem procedure to impose a punishment on a citizen for criminal acts was challenged in *The Palmyra*,¹³³ a case that preceded *Brig Malek Adhel*.¹³⁴ The *Palmyra* Court held that a conviction under the piracy law was not a necessary prerequisite to the forfeiture of a vessel used to commit an act of piracy.¹³⁵ Justice Story, writing again for the Court, noted that while many forfeitures required a prior conviction, this was never "applied to seizures and forfeitures, . . . in rem, cognizable on the revenue side of the Exchequer."¹³⁶

This justification, with its allusion to the government's power to collect revenues, utterly fails to address the issue raised by the claimant: that a *civil* forfeiture in this context is improper because its purpose is more penal than remedial. The invocation of revenue, however, raises an important point. As previously noted, forfeiture to the government hardly aids our "own citizens" who have been injured

129. *Id.*

130. *Id.*

131. *See, e.g., id.* at 229; *The Palmyra*, 25 U.S. (12 Wheat.) 1, 1 (1827).

132. *See, e.g.,* *The Friendschaft*, 17 U.S. (4 Wheat.) 105 (1819); *The Langdon Cheves*, 17 U.S. (4 Wheat.) 103 (1819); *The Caledonian*, 17 U.S. (4 Wheat.) 101 (1819); *La Vengeance*, 3 U.S. (3 Dall.) 297 (1796).

133. 25 U.S. (12 Wheat.) 1 (1827).

134. 43 U.S. (2 How.) 210 (1844).

135. *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15.

136. *Id.* at 14. The invocation of the "revenue" argument strikes a familiar chord. It harks back to the earlier discussion of the abolition of deodand and Parliament's concern for the protection of the deodand revenue. *See supra* note 99.

by the negligence of the employees of the owners of foreign vessels, as they recover nothing. In the early years of this country, prior to the institution of the federal income tax, customs duties were a major source of federal income.¹³⁷ Thus, punishment by forfeiture for violations of these laws would indeed represent a protection of governmental revenues. Customs violations were, and are, regularly punished by forfeiture.¹³⁸ Since most trade presumably was transacted by ship at that time, it is easy to see how Justice Story may have felt that the violation charged in *The Palmyra* was of this type.

However, the violation for which forfeiture was sought in *The Palmyra* was piracy.¹³⁹ This is distinct from violations of customs laws. The only tie criminal acts on the high seas have to customs violations is that both involve ships. To be sure, failure to pay customs duties is often classified as a crime, as well as a civil violation.¹⁴⁰ Nevertheless, it is a crime of which the particular nature—failure to pay—carries with it the appropriate punishment—collection and fines through forfeiture. The government, in its proprietary function, has been cheated and it collects. This cannot be said to be true of criminal acts such as piracy where the persons who have suffered the loss do not do the collecting. It is even less true of crimes such as trading with the enemy, where the harm suffered is essentially political and, thus, the extent of damages indeterminate. Justice Story appeared to be lumping two distinct situations under the rubric of “revenue,” where one of these situations seemed to have nothing at all to do with revenue collection.¹⁴¹ “It [forfeiture in this context] lacks all the ordinary characteristics of a tax, whose primary function ‘is to provide for the support of the government,’ and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.”¹⁴²

Even taking Holmes’s explanation at face value, and assuming that the in rem form was necessary to protect American citizens from

137. At that time, customs duties constituted some 80% to 90% of federal revenues. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, H.R. DOC. NO. 33, 86th Cong., 1st Sess. 712 (1960).

138. See, e.g., 19 U.S.C. § 1595(c) (1988) (“Any merchandise that is introduced or attempted to be introduced into the United States contrary to law . . . may be seized and forfeited.”).

139. *The Palmyra*, 25 U.S. (12 Wheat.) at 2.

140. See, e.g., 19 U.S.C. § 1590(c)-(d) (1988).

141. See *supra* notes 136-39 and accompanying text. The reference to the English courts of the Exchequer may be an inappropriate analogy; the system of courts adopted in the United States did not include a court of the exchequer. See Note, *supra* note 24, at 775-78.

142. *United States v. One Ford Coupe Auto*, 272 U.S. 321, 339 (1926) (Butler, J., dissenting) (emphasis added) (citations omitted).

having to seek out the negligent parties from around the globe, is his explanation a satisfactory one? It is certainly "easier" to seize a foreign vessel and leave its foreign owners to deal with the problem of "strange courts." This does not mean, however, that it is just. Two justifications for the action are that a nation's first duty is to protect the interests of its own citizens before protecting the interests of foreigners, and that, presumably, the foreigner chose to come here, rather than the other way around. But once again, by protecting the revenue laws, the government is only tangentially protecting its citizens. In the case *Brig Malek Adhel*, the claimant owners were American citizens, not foreigners. Judging from the vigor with which they pursued their claim, no doubt the owners regarded the government's action in seizing and forfeiting their ship with a jaundiced eye and would have been willing to do without the "protection."

Finally, it is worth pointing out that the devices that were appropriate in admiralty several hundred years ago may not be necessary in an age of mass and instant world communication. Two hundred years ago, the requirement that citizens or the government seek out foreign owners around the globe for their indemnity would impose a significant, if not impossible, burden. Surely, that is less true today. This is not to say that the concerns that prompted the use of the personification fiction in admiralty have been totally overcome by the technological developments of the modern world. At the very least, however, they have been mitigated, and do not seem to justify the retention of this archaic fiction.¹⁴³ As Holmes so powerfully stated:

It is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁴⁴

Whatever the rationale, the admiralty law's in rem concepts still are often analogized to other civil forfeiture laws as a justification for

143. As Judge Vance, dissenting in *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1580 (11th Cir. 1988) (en banc), put it: "The majority today . . . resuscitat[es] an anachronistic and conceptually flawed rule of admiralty, and appl[ies] it to a modern forfeiture action where it does not belong. I would take this en banc opportunity to rid this circuit of this dated jurisdictional jetsam" Judge Vance nevertheless felt constrained to add the following qualifier at the beginning of his opinion: "[M]y dissent in no way impinges on the activities of federal officials in their war against narcotics importation." *Id.* at 1577 (emphasis added). But of course it does. Judge Vance could hardly have meant to suggest that the legal fiction of a proceeding in rem is anachronistic *only* as a jurisdictional concept, but is perfectly acceptable to apply to what he frankly, and correctly, labeled "a penal proceeding." *Id.* at 1578. This is an example of how the desire to eradicate drug trafficking leads to the desire to create "drug exceptions." The inability of anyone (so far) to come up with a principled basis on which to make such an exception creates corresponding intellectual boondoggles.

144. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

continuing the practice,¹⁴⁵ even though the personification fiction has fallen into disrepute in admiralty law itself.¹⁴⁶

III. "TINKERING WITH THE MACHINERY"

Holmes's observation above applies with equal force to both of the historical bases for civil forfeiture's personification fiction: admiralty law and deodand. They are its most commonly cited historical supports. Both justifications, however, are inadequate. Each offers outdated rationalizations for imposing what is essentially a criminal penalty¹⁴⁷ under the guise of a civil proceeding.

[D]isguise the matter as we may, under whatever form of words, if the intent which the owner of property carries in his bosom is the gist of the thing on which the forfeiture turns, then the question is one of the criminal law, and forfeiture is a penalty imposed for crime, instead of being a [regulatory] forfeiture¹⁴⁸

Nevertheless, the courts persist in asserting that these actions may be legitimately maintained as civil. Given the inadequacies and inconsis-

145. The connection between civil forfeiture and admiralty law may have survived, in part, because Congress had few other procedural guidelines for the conduct of *in rem* proceedings when it enacted these laws. Section 881 calls for the seizures of property subject to civil forfeiture under that chapter to be effected by the Attorney General with warrants issued "pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims . . ." 21 U.S.C. § 881(b) (1988). This feature of the statute has caused no small outcry over the applicability of admiralty procedures to civil forfeitures, inasmuch as the Supplemental Rules provide for a clerk to issue an *in rem* arrest warrant *ex parte*, without any prior pleading or determination of probable cause. See *United States v. \$38,000 in United States Currency*, 816 F.2d 1538, 1540 (11th Cir. 1987) (application of admiralty rules to section 881 has created "a procedural morass"); *United States v. Real Property Located at 25231 Mammoth circle*, 659 F. Supp. 925, 927 (C.D. Cal. 1987) (fourth amendment applies to civil forfeitures because of forfeiture's "punitive" nature); *United States v. Life Ins. Co. of Va. Single Premium Whole Life Policy*, 647 F. Supp. 732, 742 (W.D.N.C. 1986) (supplemental rules unconstitutional when applied to section 881 forfeiture seizures); *United States v. \$128,035 in United States Currency*, 628 F. Supp. 668, 672-73 (S.D. Ohio 1986) (seizure without prior determination of probable cause unconstitutional); *Application of Kingsley*, 614 F. Supp. 219, 223 (D.C. Mass. 1985) (even warrants issued under Admiralty Rule C require probable cause determination); *United States v. Certain Real Estate Property*, 612 F. Supp. 1492, 1497-98 (S.D. Fla. 1985) (warrantless seizures under Supplemental Rule C unconstitutional absent exigent circumstances). Whether these decisions represent voices crying out in the wilderness, or the beginnings of a trend, is unclear. The sections complained of certainly have not been repealed.

146. See *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1578 (11th Cir. 1988) (en banc) (Vance, J., dissenting) ("The [in rem admiralty] fiction has been severely criticized during the past thirty years.") (citing *Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 23 (1960)).

147. Holmes may have found attractive the notion that an owner's guilt or innocence was irrelevant to the government's ability to exact forfeiture, since he posited that the law was moving away from moral standards to objective ones "from which the actual guilt of the party concerned is wholly eliminated." O.W. HOLMES, *supra* note 41, at 38.

148. J. BISHOP, *CRIMINAL LAW* § 703 (2d ed. 1858).

tencies of the historical explanations, the modern attempts to justify a civil forfeiture proceeding in rem that disregards the "intent which the owner carries in his bosom," must be examined.

A. *The Civil/Criminal Distinction*

The search for a modern justification for civil forfeiture finds the courts, for the most part, twisting and turning in an effort to avoid identifying the only purposes of the action as punitive and deterrent.¹⁴⁹ Even the courts, which acknowledge that one of the purposes of section 881 is to deter crime, strive to find additional purposes which can be more comfortably fit into a civil context.¹⁵⁰ The difficulty is finding a meaningful way to distinguish between civil and criminal penalties.

149. In some opinions, the Supreme Court has disingenuously suggested that civil forfeiture's goals are *only* remedial, thus removing it from the criminal sphere altogether. *See, e.g., One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (forfeiture is intended to aid in the enforcement of tariff regulations; therefore, it is remedial rather than punitive); *United States v. One Ford Coupe*, 272 U.S. 321, 327 (1926) (forfeiture of car for violation of the National Prohibition Act described as a "tax"); *Dobbin's Distillery v. United States*, 96 U.S. 395, 399 (1877) (forfeiture is not a criminal penalty where "information . . . does not involve the personal conviction of the wrong-doer for the offence charged" in order to impose the penalty). This last rationale, which simply restates the procedural posture of the case without justifying it, is clearly tautological.

In others cases, the Court has acknowledged that crime deterrence was one of the goals of the forfeiture laws. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-88 (1974) (forfeiture laws impose an economic penalty on illegal behavior with the intent of rendering it unprofitable); *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971) (forfeitures are intended as a penalty "only upon those who are significantly involved in a criminal enterprise"); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (a forfeiture proceeding is quasi-criminal).

150. *See supra* note 149. It is not universally true that courts have resisted acknowledging a crime deterrence purpose in the forfeiture statutes. Startlingly enough, at times a court has acknowledged the basic criminal nature of the proceeding without attempting to justify it at all. Consider the following:

Although the facts [in a civil forfeiture] relate to violations of criminal law, the government is not subject to the burdens traditionally associated with criminal trials. To the contrary, the government's burden is comparatively easy, *even for a civil case*. It only need establish probable cause, which is defined as a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion. . . .

In proving its case, the government is permitted to use certain types of evidence that is normally excluded in criminal proceedings. Specifically, hearsay evidence is admissible to prove probable cause in a civil forfeiture proceeding.

United States v. One 1977 36 Foot Cigarette Ocean Racer, 624 F. Supp. 290, 295 (S.D. Fla. 1985) (citations omitted) (emphasis added). Apparently it never occurred to the court to question the propriety of this doctrine. *See also United States v. One Parcel of Real Estate Located at 7715 Betsy Bruce La.*, 906 F.2d 110, 113 (4th Cir. 1990) (noting that hearsay evidence is admissible in civil forfeiture context); *United States v. Certain Real Property*, 910 F.2d 343, 353 n.3 (6th Cir. 1990) (Krupansky, J., dissenting) (claiming that crime deterrence is a "remedial purpose").

The term "civil forfeiture" is, in and of itself, something of an oxymoron. One authority defines "civil" as: "Relating to *private rights* and remedies sought by civil actions *as contrasted with criminal proceedings*."¹⁵¹ By comparison, "forfeiture" has been defined as "[s]omething to which the right is lost by the *commission of a crime or fault* or the losing of something by way of penalty."¹⁵² These definitions suggest that the terms are mutually exclusive.¹⁵³ Modern civil forfeiture has little to do with private rights or remedies. Furthermore, the issue of fault is marginalized in the doctrine's operation and irrelevant in its conceptualization. While colloquial usage makes the terms "punishment" and "penalty" somewhat interchangeable, in the law they are often characterized as distinct. "Penalties," as the term is used in the civil context, are almost exclusively monetary in nature.¹⁵⁴ Often, the imposition of monetary penalties is seen as not requiring the constitutional scrutiny essential to the imposition of criminal penalties such as incarceration.¹⁵⁵ Nevertheless, there must be some constitutional limit on the government's power to inflict a

151. BLACK'S LAW DICTIONARY 244 (6th ed. 1990) (emphasis added).

152. *Id.* at 585 (5th ed. 1979) (emphasis added); *see also* United States v. Batre, 69 F.2d 673 (9th Cir. 1934) (term "penalty" is substantially synonymous with the word "forfeiture," which indicates a punishment for a violation of the law). It should be noted that the 6th edition of BLACK'S LAW DICTIONARY splits the definitions of forfeiture into several separate types: "A deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition. Loss of some right or property *as a penalty for some illegal act*. Loss of property or money because of breach of a legal obligation." BLACK'S LAW DICTIONARY, *supra* note 150, at 650 (emphasis added). This Comment retains the earlier definition because it contains essentially the same information put more succinctly.

153. If the definitions of "civil" and "forfeiture" are not mutually exclusive, then they suggest that civil forfeiture should at least be subject to very strict scrutiny. In fact, it has been stated that as a "harsh" doctrine, civil forfeiture must be "strictly construed." *See, e.g.*, United States v. One 1957 Rockwell Aero Commander 680 Aircraft, 671 F.2d 414, 417 (10th Cir. 1982) ("Forfeitures are clearly not favored and are to be enforced only when within both the spirit and letter of the law."); United States v. One 1981 Cadillac Eldorado, 535 F. Supp. 65, 67 (1982) (forfeitures not favored, therefore section 881 must be strictly construed). *But see* United States v. Stowell, 133 U.S. 1, 12 (1890) (forfeiture of real estate and other property, as penalty for running an illegal still, is a penalty for revenue evasion and therefore is *not* to be strictly construed); United States v. Batre, 69 F.2d 673, 674-75 (9th Cir. 1934) (generally forfeiture statutes are strictly construed, but statutes should prevent fraud on revenues to be "fairly and reasonably" construed).

154. *See* Clark, *supra* note 16, at 397-413. The category of "civil penalties" does, however, include things besides fines and forfeitures, such as the loss of a drivers license, loss of public office, and loss of citizenship. *Id.* While penalties for "petty offenses" such as traffic violations do not normally raise constitutional issues, *id.* at 397-401, laws that impose more severe penalties such as deportation often raise problems that parallel those raised in the context of civil forfeiture. *Id.* at 487-88.

155. *See, e.g.*, *Helvering v. Mitchell*, 303 U.S. 391, 399 n.2 and 402 n.6 (1938) (an example of a "remedial" sanction is deportation; Congress may not provide civil procedure for enforcement of punitive sanctions).

severe monetary penalty without the protections of the criminal process. Civil forfeiture tests those limits.

In *Kennedy v. Mendoza-Martinez*,¹⁵⁶ Justice Goldberg attempted to summarize all the criteria previously used by the Court into a comprehensive list¹⁵⁷ in order to distinguish between sanctions that were essentially penal and those which were legitimately civil in nature. In so doing, he noted that "this problem has been extremely difficult and elusive of solution,"¹⁵⁸ and that while all of the tests were "relevant to the inquiry,"¹⁵⁹ many of them "point in differing directions."¹⁶⁰ The traditional tests were:

- [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned¹⁶¹

Applied to civil forfeiture, these tests indeed "point in different directions."¹⁶² Even at their most straightforward, without dealing with the difficult questions of definitions for words like "punishment" or "disability," the tests are inconclusive.¹⁶³ More fundamentally, some of the tests are question-begging. For example, asking whether a punishment is applied only upon a finding of *scienter* is really only another way of asking what does the statute say. Asking whether the statute makes *scienter* an element of the charge is not the same as asking whether it ought to do so.

Similarly circular is the inquiry into whether something historically has been regarded as a punishment. To the extent that the con-

156. 372 U.S. 144 (1963).

157. *Id.* at 168-69.

158. *Id.* at 169.

159. *Id.*

160. *Id.*

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

162. *Id.* at 169.

163. Civil forfeiture does not impose a disability or a restraint on the person as those concepts are defined in the cases. "Restraint" in general means imprisonment, see Clark, *supra* note 16, at 401-03, and "disability" usually refers to a civil disability such as the loss of citizenship involved in *Kennedy*. See *id.* at 487. Presumably, the Court has felt that to define "disability" to include any monetary exaction or property loss would expand the category of penal sanctions too greatly, and that the takings clause of the fifth amendment was meant to protect persons from government overreaching in this area.

cept of civil forfeiture has a long history,¹⁶⁴ the answer to that question is no. This inquiry, though, ignores both the question of whether civil forfeiture is *experienced*¹⁶⁵ as a punishment, and whether *civil* forfeiture, as distinct from forfeiture in general, historically has been considered an anomaly to the general rule that a forfeiture is a punishment.¹⁶⁶

The most relevant question is what is the purpose of the statute? If it is crime deterrence, and the penalty exacted by the statute is severe,¹⁶⁷ then it ought not to be imposed without the constitutional protections afforded to the criminal defendant. It is beyond dispute that among the aims of civil forfeiture under section 881 are deterrence and retribution. In *Calero-Toledo v. Pearson Yacht Leasing*,¹⁶⁸ the Court noted that civil forfeiture of vehicles, for violation of the drug laws, "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing a economic penalty, thereby rendering illegal behavior unprofitable."¹⁶⁹ Legislative history supports the Court's finding.¹⁷⁰ Given the undeniable elements of crime deterrence and retribution in the civil forfeitures statutes, the last two tests posed in *Kennedy v. Mendoza-Martinez*,¹⁷¹ whether the statute has an alternate purpose and whether the punishment imposed does not appear excessive,¹⁷² are determinate.

B. *Civil Forfeiture Justified as "Remedial"*

Perhaps disturbed by the constitutional ramifications of the expansion of forfeiture laws which rest on the fragile historical sup-

164. See *supra* notes 75-108 and accompanying text (discussing evolution of deodand).

165. It would be difficult to argue that civil forfeiture is not experienced as a punishment by those upon whom it is imposed.

166. Blackstone lumps deodand and admiralty forfeiture in with the more common statutory forfeitures for crimes, and he generally refers to forfeiture as resulting from "transgressi[ons]." See 1 W. BLACKSTONE, *supra* note 39, at *299. Holmes appears to have shared this notion of forfeiture as a penal sanction when he refers to deodand as part of the "criminal law." See O.W. HOLMES, *supra* note 41, at 26-27.

167. Determining what is "severe" is fraught with difficulty. Any line-drawing on the basis of a specific dollar amount is bound to be arbitrary. The amount of money a successful attorney thinks constitutes a "severe" penalty is bound to differ from the amount a welfare recipient considers "severe." However, this sort of line-drawing is a familiar legal exercise.

168. 416 U.S. 663 (1974).

169. *Id.*, 416 U.S. 663, 687 (1974).

170. "It was hoped that through the use of current criminal and civil forfeiture provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering." S. REP. NO. 225, *supra* note 44, at 194, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3377.

171. 372 U.S. 144 (1963).

172. *Id.* at 168-69.

ports explored above,¹⁷³ and in light of the purposes of crime deterrence identified, the courts have attempted to articulate more substantial justifications for proceeding in rem. The most commonly cited rationale is that civil forfeiture is a "remedial" measure, and thus subject to less constitutional scrutiny.¹⁷⁴ However, there is no clear definition of what constitutes a "remedial" sanction.¹⁷⁵ The best definition one is able to glean from the caselaw is that "remedial" equals "not criminal."¹⁷⁶ The Court has, at various times, defined the following purposes as "remedial" with respect to civil forfeiture: (1) it is justified by necessity or exigent circumstances; (2) it serves as a form of liquidated damages or tax; and (3) it serves as a deterrent to negligent entrustment of property. Each of these justifications is, upon closer examination, unconvincing.¹⁷⁷

1. EXIGENT CIRCUMSTANCES

In *One Lot Emerald Cut Stones v. United States*,¹⁷⁸ the Court offered, among others, the following justification for forfeiture as a civil proceeding: "[F]orfeiture is intended to aid in the enforcement of tariff regulations. It prevents *forbidden merchandise* from circulating in the United States [I]n other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions."¹⁷⁹ In adhering to the policy that civil forfeiture was remedial and regulatory, the decision in *One Lot Emerald Cut Stones* was consistent with most of the Court's precedent.¹⁸⁰ The "forbidden mer-

173. See *supra* notes 73-146 and accompanying text (discussing deodand and admiralty).

174. See, e.g., *Calero-Toledo*, 416 U.S. at 688 (forfeiture's "remedial" purposes legitimate its civil posture, but its crime deterrence purpose renders it not a "taking"); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (forfeiture is remedial not punitive; it provides a source of revenue to enforce the law, liquidated damages for violations of the law, and keeps contraband out of circulation); *In Re Various Items of Personal Property*, 282 U.S. 577 (1931) (constitutional protections do not apply because the proceeding is one in rem).

175. See Clark, *supra* note 16, at 385-91.

176. *Id.* at 391; see also *supra* note 174. As one commentator has put it, "[a]lthough commentary has struggled to extract a rule . . . to explicate the Court's punitive-remedial distinction, no coherent explanation has thus far emerged More than one academic critic has . . . given up hope of formulating an explanation" Clark, *supra* note 16, at 390-91.

177. See *infra* notes 178-265 and accompanying text.

178. 409 U.S. 232 (1972) (per curiam).

179. *Id.* at 237.

180. *But see* *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971) ("When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700-01 (1965) (forfeiture proceeding is "quasi-criminal" . . . "clearly [a] penalty for criminal offense"); *Boyd v. United States*, 116 U.S. 616, 634 (1886) (forfeiture grounded on alleged offenses "committed by [the defendant], though they may be civil in form, are in their nature criminal"); *Coffey v. United States*, 116

chandise" argument has been commonly invoked. This justification might be characterized as one form of an "exigent circumstances" argument.¹⁸¹ Included in the exigent circumstances analysis are a variety of situations that, at first glance, may seem distinct: (1) protection of the general public from dangerous products; (2) regulatory control over banned substances; and (3) the exercise of extraordinary remedies during war.

a. Imminent Danger

The first of the categories of the "forbidden merchandise" argument involves the government's right to confiscate, as a regulatory measure, misbranded drugs, spoiled food, and other items that constitute a "danger to the public."¹⁸² When an imminent danger exists that such items constitute a risk to the public, the government, in its sovereign capacity (so the argument goes), has a legitimate interest in seizing them and preventing them from circulating. The risk to the public of misbranded drugs or spoiled food is physical harm. It is the danger of physical harm to the public that justifies the forfeiture as the only adequate remedy. However, this argument would seem difficult to apply in the case of a car forfeited because of the presence of some illegal narcotics.

b. Contraband

In the second category of "forbidden merchandise," contraband per se,¹⁸³ the justification for forfeiture is that possession of the thing itself violates some articulated public policy. Because possession of contraband is illegal by statute, citizens are not deemed to have any property interest in it which could be violated by its forfeiture.¹⁸⁴ Per-

U.S. 436, 444-45 (1886) (acquittal on criminal charges, based on same set of facts on which subsequent civil forfeiture based, bars civil forfeiture).

181. This use of "exigent circumstances" is distinct from, but related to, that term as it is used with respect to searches and seizures. Each of the theories categorized in this Comment as falling under the "exigent circumstances" heading relies on the presence of some element of danger or emergency to justify forfeiture.

182. See, e.g., *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

183. Contraband per se, also known as *malum in se*, is something of which the mere possession is illegal and in which there can be no property interest. Some examples of contraband per se include heroin, cocaine, counterfeit currency, and certain types of firearms. See Clark, *supra* note 16, at 478-79 and accompanying notes. If the personification fiction had any remaining vitality, it might best be found with respect to contraband per se; there is a sort of logical symmetry between the notion of a guilty thing and that which is prohibited by its nature. Conceptual problems arise with respect to goods for which the appropriate duties have not been paid—a category perhaps closer to the "instrumentalities" definition than contraband per se. See *infra* notes 186-91 and accompanying text.

184. See *Calero Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 680-90 (1974) (civil

haps one could argue that contraband per se represents those items that the government has determined to be a "danger" to the public, and that the first and second categories overlap. With some of these items, however, the danger may or may not be imminent, physical harm. Nevertheless, there at least exists an argument that items designated contraband per se often are, in and of themselves, "dangerous." Narcotics, illegal weapons, and alcohol (during Prohibition) fall into this category.¹⁸⁵

Alternatively, contraband may merely be something that represents a threat to governmental authority, such as counterfeit money, passports, or other governmental documents, the circulation of which would perhaps undermine public confidence in the government.¹⁸⁶ Arguably, such items also represent an imminent danger to the public to the extent that the security of, or confidence in, the government is undermined. This reasoning breaks down, however, once one moves away from either contraband per se or items that are otherwise dangerous, such as spoiled food, and begins to include instrumentalities,¹⁸⁷ derivative contraband,¹⁸⁸ proceeds,¹⁸⁹ derivative proceeds,¹⁹⁰

forfeiture not a taking). The concept of contraband is obviously a legal fiction. No doubt possessors of illegal narcotics very much mind if the government takes their drugs. However, few are likely to have a problem with the employment of the fiction of contraband unless they object to the categorization without regard to such takings, as for example those who believe marijuana should be legalized. In that case, the forfeiture of the contraband upon discovery of possession is, as this Comment demonstrates, probably the least of one's objections.

185. The argument that items are designated by law as contraband because they are dangerous applies to things which are *not* deemed contraband, such as tobacco and alcohol. Whatever one's views on the legalization of drugs, it is difficult to deny that narcotics are dangerous. Nevertheless, the determination as to what is legal and what is not seems fairly arbitrary and sensitive to prevailing customs, attitudes, and moral values. For example, many of the civil forfeiture cases that constitute the precedent that validates forfeiture were decided during Prohibition and involved violations of the liquor laws. *See, e.g., Dodge v. United States* 272 U.S. 530 (1926); *United States v. One Ford Coupe*, 272 U.S. 321 (1926). It is easy to draw parallels between Prohibition and the current "War on Drugs"—not the least of which may be their respective futility.

186. Presumably there are limits upon the government's ability to designate things as contraband. One way to identify contraband per se might be to say that if the government must destroy the item, or if it is clearly not in the government's best interest to have the item(s) in circulation, then it is contraband. If the government can re-sell the item after the forfeiture, then it is probably not contraband per se. Under this formula, counterfeit money and illegal drugs would be contraband per se (although an exception might be made for certain permitted usages of illegal drugs, such as for research, or for use in police sting operations); illegally imported clothing would not. This is not the formulation that the courts have adopted.

187. *See* 21 U.S.C. § 881(a)(3)-(4) (1988); *see also infra* note 192.

188. *See* 18 U.S.C. § 1963(a)(3) (1988).

189. *See* 21 U.S.C. § 881 (a)(6) (1988).

190. *See id.* The terms "proceeds" and "derivative proceeds" are sometimes used interchangeably. *See United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925 (1987).

and substitute proceeds.¹⁹¹

The term "instrumentalities" refers to property that is used to facilitate a violation of the law.¹⁹² It has tended in the past to be limited, for the most part, to vehicles that were used to transport illegal goods.¹⁹³ Part of the justification for seizure offered in such cases was exigent circumstances: Vehicles are mobile and evidence would be destroyed if the government did not immediately seize them. But this argument does not distinguish between a rationale for seizure and one for forfeiture.¹⁹⁴ There is a fairly significant difference between having property temporarily seized as evidence and having it permanently taken away.¹⁹⁵

191. See 18 U.S.C. § 1963(m); 21 U.S.C. § 853(p) (1988).

192. Even the most casual review of the case law reveals that the majority of forfeiture cases involve forfeiture of some sort of vehicle; generally, boats, cars, or airplanes. See, e.g., *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979) (virtually every case cited by the court involves a car). Indeed, mobility was initially seen as a partial limitation on "instrumentality" forfeiture, beyond paraphernalia. See *supra* notes 26, 61-63 and accompanying text. With the 1984 legislation that amended § 881 to include real property and proceeds, this limitation vanished. See *supra* note 63.

193. See cases cited in *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383 (W.D. Pa. 1979).

194. See *United States v. Parcel of Land and Residence*, 914 F.2d 1, 4 n.10 (1st Cir. 1990) (noting that the government in this case "seems to confuse probable cause to forfeit and probable cause to seize").

195. "Exigent circumstances" has been established as a valid exception to the warrant requirement of the fourth amendment. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967). In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court found that the Puerto Rican government's seizure of a yacht was justified, in part, by the fact that the boat, since it was mobile, could be easily moved from the jurisdiction. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

The argument advanced in *Calero-Toledo* to justify seizure without pre-seizure notice or hearing is reminiscent of the "motion" concept that so fascinated Holmes, leading him to believe that the personification fiction was justified by the aspect of motion. See *supra* notes 114-16 and accompanying text. However, this notion of movement, or the fear that property will be taken from the jurisdiction, only justifies the thing's warrantless seizure, not its forfeiture. As Justice Douglas pointed out in his dissent, the seizure in *Calero-Toledo* took place two months after the government had found the marijuana. *Id.* at 691 (Douglas, J., dissenting). The purpose of the seizure in that case was not to search the vessel, but to forfeit it. It is difficult to understand what sort of "exigency" requires forfeiture, even in the case of moveable property. It is even more difficult to understand in the context of immovable property. Nevertheless, in a recent case, the government tried to invoke just this argument to justify seizure of real property, for purposes of forfeiture, without notice or an opportunity for a hearing. *United States v. Certain Real Estate Property Located at 4880 S.E. Dixie Highway ("Spina")*, 612 F. Supp. 1492, 1476 n.7 (S.D. Fla. 1985). The court rejected the government's argument and found that no exigent circumstances existed with respect to the real property because it was not going anywhere. "[W]here the property is large and immovable (e.g., land and the buildings thereon), and the likelihood of it being concealed or destroyed is remote, there is no overriding need for 'prompt action' which would sacrifice the property owner's right to procedural due process." *Id.* at 1496. This case does not, however, appear to represent the majority opinion on this issue: section 881 does not require pre-seizure notice or hearing, regardless of the property's mobility. 21 U.S.C. § 881(b) (1988). The statute

Furthermore, it is important to remember that "words are more plastic than wax."¹⁹⁶ Almost anything may be termed an "instrumentality," even though the term initially was restricted to vehicles. As a matter of plain meaning, assuming a person wants to move illegal substances from point *A* to point *B*, and uses a car or other vehicle to do so, the word "instrumentality" makes sense. The vehicle is "instrumental" in facilitating the crime—transportation and possession of an illegal substance. The argument becomes more attenuated when, for instance, a home is forfeited because an illegal drug sale took place in the driveway.¹⁹⁷ In such a case, it is difficult to understand how the fact that the transaction took place in the driveway is anything more than fortuitous. These arguments would seem to apply with even greater force to the categories of derivative contraband, proceeds, derivative proceeds, and substitute proceeds. Since these categories, by definition, constitute neither contraband per se, nor are likely to be used in any meaningful sense to facilitate any violations of the law, any argument of "exigency" for their forfeiture collapses.

However, as previously mentioned, the justification for forfeiture rests, not on an argument of facilitation, but rather, on the legal fiction of "taint." The argument is that the car, boat, house, or cash in question has been "tainted" by the presence of an illegal substance, or by the commission of an illegal act, and is, therefore, subject to forfeiture.¹⁹⁸ Once the legal fiction of "taint" is employed, one moves away from the notion that the government's action is justified by some sort of exigent circumstances, or imminent danger. As the Court so aptly noted in *One 1958 Plymouth Sedan v. Pennsylvania*,¹⁹⁹

There is nothing even remotely criminal in possessing an automo-

alternatively requires: (1) warrants issued pursuant to the admiralty rules, 21 U.S.C. § 881(b) (1988) (at one time these rules presumably *did* deal with moveable objects), that do not require notice or even probable cause; or (2) that the Attorney General have probable cause to believe the property is forfeitable, 21 U.S.C. § 881(b)(4) (1988). Thus, the same probable cause which justifies property's seizure justifies its forfeiture. "Forfeiture actions are unique in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause." *United States v. One Lear Jet*, 836 F.2d 1571, 1578 (11th Cir. 1988) (en banc) (Vance, J., dissenting). Other courts have noted this problem. *See United States v. \$152,160 in United States Currency*, 680 F. Supp. 354, 357 (D. Colo. 1988) (citing *Spina* with approval); *United States v. Real Property Located at 25231 Mammoth Circle*, 659 F. Supp. 925 (C.D. Cal. 1987); *United States v. \$128,035 in United States Currency*, 628 F. Supp. 668 (S.D. Ohio), *appeal dismissed*, 806 F.2d 262 (6th Cir. 1986); *Application of Kingsley*, 614 F. Supp. 219 (D. Mass. 1985), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986).

196. *American Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 11 (5th Cir. 1974) (citation omitted).

197. *See, e.g., United States v. Real Property and Residence at 3097 S.W. 111th Ave.*, 699 F. Supp. 287, 288 (S.D. Fla. 1988).

198. *See supra* notes 26-33 and accompanying text.

199. 380 U.S. 693 (1965).

bile. It is only the alleged use to which this particular automobile was put that subjects [the claimant] to its possible loss Furthermore, the return of the automobile to the owner would not subject him to any possible criminal penalties for possession or frustrate any public policy concerning automobiles, as automobiles.²⁰⁰

What the "taint" doctrine really represents is an evidentiary presumption. That is, if a car is found to contain illegal substances, it is logical to assume that the owner had knowledge of their presence, if, indeed, he did not put them there in the first place. Since there is no public policy or exigency that requires prohibiting cars as cars, the purpose of forfeiting the car must be to punish the owner for what is, on the basis of this assumption, his probable wrongdoing. In employing the "taint" doctrine, the government simply is declining to *test* this assumption in the individual case. Instead, it relies on a presumption of guilt as to the underlying behavior that is sought to be suppressed. The "taint" doctrine has nothing at all to do with "exigency" unless one posits that it would over-strain governmental resources to prosecute the *people involved*, rather than looking to their property, in order to punish them.

c. War Powers

There is a third, albeit minor, strand of the exigent circumstances argument. This third line of argument suggests that in times of war, or other national emergency, the government must be empowered to take the sort of extreme action represented by forfeiture which it might not otherwise legitimately take because war is itself an exigent circumstance. However, this justification was employed in times when there was no war.

In *Dodge v. United States*,²⁰¹ the Court relied on an early American opinion, *The Caledonian*,²⁰² to support the proposition that a property which was subject to forfeiture did not need to be seized *by the government* in order for the seizure to be effective.²⁰³ In *Dodge*, Justice Holmes paraphrases *The Caledonian* Court, writing that "anyone may seize any property for a forfeiture to the Government, and . . . if the Government adopts the act and proceeds to enforce the forfeiture by legal process, *this is of no less validity than when the seizure is by authority originally given.*"²⁰⁴ It should be noted that *The*

200. *Id.* at 699.

201. 272 U.S. 530 (1926).

202. 17 U.S. (4 Wheat.) 100 (1819).

203. *Dodge*, 272 U.S. at 532 (citing *The Caledonian*, 17 U.S. (4 Wheat.) at 103).

204. *Id.* at 532 (emphasis added). Holmes went on to write that this principle "embod[ied]

Caledonian is one of a series of cases²⁰⁵ that involve charges of dealing with the enemy. In each case, the ships had been seized for dealing with the British during the War of 1812.²⁰⁶ In justifying the forfeiture, Justice Story wrote that “the right of the government to the forfeiture . . . arises from its general authority to seize all enemies’ property coming into our ports *during war*.”²⁰⁷ Although Justice Story’s argument about the exigencies of war may explain the government’s right to *seize* foreign ships, and by analogy, Justice Holmes’s argument about the validity of the seizure in *Dodge*, neither of these arguments seem to advance any justification for *forfeiture*.²⁰⁸ The *Dodge* Court apparently did not find any such distinction and laid down startling precedent—a special “forfeiture exception” to the warrant requirement.²⁰⁹ The breadth of the holding suggests that one’s neighbors could make a forfeiture seizure as long as the government “adopted” the seizure by instituting forfeiture proceedings.

The exercise of war powers²¹⁰ by the government is generally

good sense” and upheld the forfeiture in *Dodge*. *Id.* However he added in a somewhat cryptic aside that “[t]he exclusion of evidence obtained by an unlawful search and seizure stand[s] on a different ground.” *Id.* The seizure in *Dodge* was made by police officers of the city of Providence, Rhode Island. *Id.* at 531. The claimant argued that they were not “officers of the law” as defined by the relevant provision of the National Prohibition Act. *Id.* Rather than broadly hold that *anyone* may effect a valid seizure if the government “adopts” it, it would seem to have been easier to simply find that the statute meant what it said by “*any* officer of the law.”

205. The Supreme Court decided *The Caledonian* along with *The Friendschaft*, 17 U.S. (4 Wheat.) 105 (1819), and *The Langdon Cheves*, 17 U.S. (4 Wheat.) 103 (1819).

206. Even though the cases were not decided until 1819, well after the war was over, the seizures were made during the war, in 1813 and 1814. See *The Friendschaft*, 17 U.S. (4 Wheat.) at 105; *The Langdon Cheves*, 17 U.S. (4 Wheat.) at 104; *The Caledonian*, 17 U.S. (4 Wheat.) at 101. It is not entirely clear whether the ships involved were engaged in trading with the enemy. In *The Langdon Cheves*, the Court apparently assumed from the fact that the ship was captured by the enemy and then released after six weeks rather than condemned as prize that it was engaged in trade with the enemy. From the recitation of the facts, it is not obvious that the *Langdon Cheves* and its crew were anything more than unfortunate enough to have been captured and then released unharmed, only to have their ship and cargo forfeited by their own side.

207. *The Caledonian*, 17 U.S. (4 Wheat.) at 102 (emphasis added). Justice Story goes on to add that the government’s power to exact forfeiture in this case also stems “from its authority to enforce a forfeiture against its own citizens, whenever the property comes within its reach.” *Id.* Justice Story may have referred, in this context, to enforcing a forfeiture against citizens dealing with the British. However, the sentence could be read to mean any forfeiture whatsoever.

208. Given that the *Dodge* seizure was not made during wartime, the Court’s reliance on a war powers argument calls into question the appropriateness of the analogy.

209. See *supra* note 204 and accompanying text.

210. *The Caledonian*, while explicitly invoking the war powers, does not stand alone. Other cases have invoked this power implicitly. See, e.g., *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). Both cases involved alleged acts of piracy. In particular, in the case of *The Palmyra*, attacks were made on American

conceded to be broad.²¹¹ Nevertheless, any seizures made under these powers are inapposite to peacetime seizures and forfeitures, notwithstanding any of the metaphors employed, such as that the government is waging "a war on drugs."²¹² Furthermore, an historical review of governmental excesses approved under the rubric of the war powers²¹³ suggests that this justification must be sharply limited. It is a rationale without any stopping place—allowing the government to suppress disfavored behavior with impunity by invoking "war" or a national emergency.

Not surprisingly, once one analyzes the arguments for forfeiture of "forbidden merchandise" in exigent circumstances, one realizes that they do not justify the modern civil forfeiture with which this Comment is concerned. Even though the imminent danger and regulation of contraband rationales would justify seizure and forfeiture of dangerous or illegal property to protect the public, they still do not provide a compelling rationale for forfeiture of anything but those items. Furthermore, the argument for the relaxation of the warrant requirement in emergency circumstances fails to justify seizure of immovable property. Finally, forfeiture based on exigent circumstances in times of war should not be expanded to include forfeitures to fight the metaphoric war on drugs.

2. TAXATION AND LIQUIDATED DAMAGES

The next argument advanced in the search for a modern justification for civil forfeiture is that the purpose of civil forfeiture is com-

vessels and citizens. 25 U.S. (12 Wheat.) at 2. These situations do not appear far removed from an exercise of the war powers. Attacks on American vessels or citizens while at sea, in an area where sovereignty does not operate, are viewed more as hostile acts against the nation than as independent harms. See *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

211. Notwithstanding the fairly broad power allowed the government during times of war or national emergency, Professor Laurence Tribe has noted: "The American Constitution contains no language providing for the Constitution's general suspension, or for its replacement by an alternative set of principles or powers, during times of national crisis, however severe." L. Tribe, Memorandum to Authors of the Constitution for the Czech and Slovak Federated Republic (Jan. 8, 1991) (unpublished manuscript available in *University of Miami Law Review* files).

212. The metaphor of a "war on drugs" is a very powerful one, and to the extent that the drug enforcement campaign has been militarized, it is not mere rhetoric. See Wisotsky, *supra* note 60, at 893, 919-20. "By amending the Posse Comitatus Act in 1981 and authorizing the Navy to interdict smuggling vessels at sea, Congress inflicted the first breach in the century-old wall of separation between civilian and military law enforcement roles." *Id.* at 919-20 (citing 18 U.S.C. § 1385 (1982)).

213. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (authorizing the internment of Japanese-Americans in concentration camps during World War II); *Schenk v. United States*, 249 U.S. 47 (1919) (ruling that criminal conviction for publication and distribution of pamphlets criticizing the draft does not violate first amendment).

pensatory, either as a tax or fine,²¹⁴ or as "liquidated damages."²¹⁵ Thus, the argument goes, these forfeitures may be conducted properly as civil actions. Much of the modern groundwork for this approach evolved during Prohibition.

When Congress passed the National Prohibition Act, outlawing the manufacture, sale, or transportation of alcoholic beverages, it apparently failed to repeal the many ancillary taxes and customs dues relating to alcohol, or the laws calling for forfeiture for violations of these laws.²¹⁶ In light of the existence of these laws, which arguably conflicted with the National Prohibition Act, the claimant in *United States v. One Ford Coupe*²¹⁷ argued that forfeiture under these laws was no longer an enforcement of the government's revenue collecting powers, but instead acted as a penalty.²¹⁸ The claimant argued that "the enactment of the National Prohibition Act changed the purpose of the tax [forfeiture] from raising revenue to preventing manufacture, sale, and transportation" of illegal alcohol.²¹⁹ Therefore, when imposed as a penalty on an innocent third party, it violated due process.²²⁰ Justice Brandeis, writing for the Court, was not persuaded. He noted:

It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such.²²¹

Nevertheless, he wrote, "*A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because its main purpose in retaining the tax is to make law-breaking less profitable.*"²²² The Court also did not find illogical that one's vehicle could be forfeited as a result of an attempt either to remove liquor from the place where the tax should have been paid, or

214. See, e.g., *United States v. One Ford Coupe*, 272 U.S. 321, 327 (1926) (no conflict between National Prohibition Act's protection of innocent persons from forfeiture for transportation of illegal alcohol (§ 26), and tax forfeiture statute (§ 3450), which made no such provision for innocent owners in forfeiture action based on transportation of tax unpaid liquor, because forfeiture is a "tax").

215. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972).

216. See *General Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932); *United States v. Commercial Credit Co.* 286 U.S. 63 (1932); *United States v. The Ruth Mildred*, 286 U.S. 67 (1932); *General Import & Export Co. v. United States*, 286 U.S. 70 (1932).

217. 272 U.S. 321 (1926).

218. *Id.* at 328.

219. *Id.*

220. *Id.* at 328.

221. *Id.*

222. *Id.* (emphasis added).

to conceal liquor from the taxing authorities, when such places to pay taxes or tax authorities no longer existed.²²³ That tax stamps for liquor were no longer obtainable and that no officer was authorized to receive payment of the taxes were merely "supervening obstacles to paying the tax," and did not reflect Congressional intent to discontinue the tax.²²⁴ Finally, the government's taxation motive was not rendered less persuasive by the fact that the seizure was effected by the prohibition director, rather than an internal revenue officer.²²⁵

Section 26 of the National Prohibition Act contained an innocent owner exception from forfeiture.²²⁶ The various tax and customs statutes did not.²²⁷ Without provision for innocent owners, the tax statute employed in *One Ford Coupe* obviously would result in more forfeitures to the government than the similar provision under the National Prohibition Act. However, the government did not limit itself to invoking the tax laws. As it transpired, with very little ingenuity on the government's part, almost any seizure of a vehicle could be brought under the rubric of "revenue" because the Court narrowly defined "transportation" within the National Prohibition Act.²²⁸ The definition of "transportation" under the Act did not include tax evasion and failure to pay import duties, even though there may have been elements of "transportation" to these violations.²²⁹ Thus, the National Prohibition Act offered no protection to the innocent owner in the case of the importation of alcohol in violation of the customs or navigation laws.²³⁰ These decisions may explain why the government brought many Prohibition forfeiture cases under the taxing or customs laws.²³¹ Nevertheless, the Court's various arguments in these

223. *Id.* at 327, 329.

224. *Id.* at 327.

225. *Id.* at 325.

226. *See* *General Motors Corp. v. United States*, 286 U.S. 49, 59 n.* (1932). The innocent owner section of the National Prohibition Act gave the owner an opportunity to present "good cause" why his property should be returned and protected innocent lienholders. *Id.* Significantly, claimants in this case and the one that follows it, *United States v. Commercial Credit Co.*, 286 U.S. 63 (1932), were the lienholders of the forfeited cars.

227. *See* *General Motors Corp. v. United States*, 286 U.S. at 59-61.

228. *Id.* at 59 (1932).

229. *Id.*

230. *United States v. Commercial Credit Co.* 286 U.S. 63, 65 (1931) (fact that liquor was transferred to a different vehicle once in the United States did not change essential character of violation from "importation" to "transportation"); *General Motors*, 286 U.S. at 57; *United States v. The Ruth Mildred*, 286 U.S. 67, 69 (1931) (because forfeited ship's license was for fishing, ship was forfeitable for presence of liquor; ship would have also been forfeitable had it contained "wheat or silk or sugar").

231. *See* *United States v. One Chevrolet Truck*, 79 F.2d 651 (5th Cir. 1935); *United States v. One Chevrolet Sedan*, 12 F. Supp. 793 (W.D.N.Y. 1935); *Beaudry v. United States*, 79 F.2d 650 (5th Cir. 1935).

cases are unconvincing. Forfeiture “lacks all the ordinary characteristics of a tax, whose primary function ‘is to provide for the support of the government,’ and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.”²³²

More recently, in *Calero-Toledo v. Pearson Yacht Leasing Co.*²³³ the Court invoked the revenue argument in a footnote in its characterization of forfeiture as providing a source of funding for law enforcement activities.²³⁴ The Court did not argue that random and arbitrary forfeiture is a legitimate means of taxation. Rather, it argued that forfeiture is meant as “compensation” to government, a form of “liquidated damages.”

The concept of liquidated damages is a familiar one in contract law. The idea is that the parties to a contract may stipulate to the damages that would be suffered in the event of a breach by specifying the amount in the contract. The difficulty with the liquidated damages argument is that it is inappropriate in the context of a general social “damage,” such as drug trafficking. The Uniform Commercial Code, in dealing with liquidated damages in contracts for sale, states that such liquidation provisions are only enforceable “at an amount which is reasonable in light of the actual or anticipated harm caused by the breach A term fixing unreasonably large liquidated damages is void as a penalty.”²³⁵ Thus, in order to constitute liquidated damages, forfeiture must be “reasonable” in light of the harm suffered.

How can a price be put on the actual “damage” the government suffers by an individual breach of the narcotics laws? The specific damages attributable to the specific act in question are almost impossible to ascertain. Even “when definite, [they are] so vast, that the . . . theory serves to define nearly any monetary exaction as merely compensatory.”²³⁶ If forfeiture is meant to be compensatory, then the courts should attempt to tie the expenses caused by the violation and

232. *United States v. One Ford Coupe Auto*, 272 U.S. 321, 339 (1926) (Butler, J., dissenting) (emphasis added) (citations omitted).

233. 416 U.S. 663 (1974).

234. *Id.* at 687 n.26 (citing *One Lot Emerald Cut Stones* with approval). Section 881 does specifically provide for the partial return of proceeds from forfeitures to the local law enforcement agencies that assisted in the seizure and commencement of the forfeiture action, as well as to a general federal fund maintained for that purpose. 21 U.S.C. § 881(e)(3) (1988). There is no doubt that the policing of the drug laws is costly. Presumably, though, the government undertakes to enforce the drug laws on behalf of the public at large. Theoretically, the public “compensates” the government for public goods, such as police protection, through uniformly imposed taxes, not random forfeitures.

235. U.C.C. § 2-718(1) (1990) (emphasis added).

236. Clark, *supra* note 16, at 470. Professor Clark adds: “Doubtless, where the government sues in a purely proprietary role—for example, as party to a breached contract or

the harm suffered from it in the *particular* case, to the forfeiture incurred. Any excess over what would make the government "whole" must be something other than compensation. However, through the operation of the "taint" doctrine, the value of the particular item to be forfeited is merely fortuitous.²³⁷ The government often may gain a windfall by forfeiting extremely valuable property based on minor violations,²³⁸ such as where a \$20,000 yacht is forfeited because of the presence of one or two marijuana cigarettes,²³⁹ or where a Porsche 911S is forfeited for .226 grams of marijuana.²⁴⁰ Possession of these minute amounts of marijuana most often is a misdemeanor, usually punishable by a relatively minor fine, *if* an action is pursued against the person at all.²⁴¹ Thus, proportionality appears to be no part of the civil forfeiture doctrine. Once again, it begins to look as if the purpose of civil forfeiture is to exact a penalty for illegal behavior. When a forfeiture is incurred as a result of prohibited activity, the cost, theoretically at least, falls "uniquely on the lawbreak-

as owner of damaged property—the damages recovered are compensatory in the traditional legal sense." *Id.*

237. The value of property for which the government seeks forfeiture is *not* fortuitous to the extent that law enforcement officers and prosecutors exercise their discretion in seizing and seeking forfeiture of property. In light of this discretion, it may not be an accident that the asset sought to be forfeited is very valuable. For obvious reasons, the government is more likely to seek forfeiture of expensive rather than inexpensive cars. Given the government and law enforcement agencies' vested interest in the acquisition of property through the operation of section 881(e)(3), the forfeiture of valuable property appears to be anything but fortuitous.

238. Remarkably, one court has held that the punishment of civil forfeiture is proportionate to the crime.

The effect of a forfeiture under § 1963 [RICO] is the functional equivalent of a forfeiture *in rem*. . . . The magnitude of the forfeiture is directly keyed to the magnitude of the defendant's interest in the enterprise conducted in violation of law. Accordingly, we conclude that it is not cruel and unusual punishment in the constitutional sense.

United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980).

The sense one gets from reading this passage is that the punishment fits the crime. That is clearly not the case with respect to civil forfeiture. See *United States v. One 1982 28' Int'l Vessel*, 741 F.2d 1319 (11th Cir. 1984) (vessel subject to forfeiture on the basis of "a twig and two leaves" of marijuana). The court in *Grande* merely states that it is forfeiting only the *defendant's interest*, as opposed to that of any third parties. It does not say that this is an appropriately proportional punishment with respect to the crime.

239. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 693 (Douglas, J., dissenting).

240. *United States v. One Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979).

241. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965) for a criticism of this aspect of the forfeiture laws. Not surprisingly, forfeiture has more utility than the criminal sanction as a method of funding law enforcement activities. Criminal fines may not even compensate the government for the cost of the prosecution. Civil forfeitures, on the other hand, not only offer an increased recovery, but simultaneously promise a less costly procedure, because none of the criminal procedural protections apply.

ers."²⁴² This seems to impose what Professor Packer has called a "crime tariff."²⁴³ But, is this really the purpose of the laws, criminal and civil, against drugs? Accepting the revenue argument means that the government is, in effect, taxing drugs. This conclusion leaves open the question of the purpose in criminalizing drugs at all. Can the prospect of the government earning huge amounts of money from the drug trade, through random and arbitrary forfeitures, be less unsavory than the idea of legalized, controlled drugs subject to a uniform governmental tax?

Even if one takes the view that the compensation justification may encompass punitive fees or fines, it is a very strange "fine" that today is \$100,000, tomorrow \$10,000, and next week a million dollars—all for the same violation. In *Solem v. Helm*,²⁴⁴ the Court stated that the "principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."²⁴⁵ It is not enough to say that the criminal requirement of proportionality does not apply because this is a civil action. Even a compensation argument requires a nexus between the damages and the harm suffered. Because the government should not ask random citizens to underwrite or defray the costs of enforcing the laws, costs that are supposed to be borne by society as a whole,²⁴⁶ the compensation arguments fail.

3. NEGLIGENCE

A third rationale advanced for civil forfeiture is the so-called "negligence" standard. The Court invoked this standard in *Calero-Toledo v. Pearson Yacht Leasing Co.*²⁴⁷ The negligence argument asserts that forfeiture induces due care on the part of the owner who lends or sells property to another who engages in criminal behavior.²⁴⁸ If the owner has not taken the proper care to see that his property is not put to an illegal use, then, the rationale goes, perhaps he

242. Clark, *supra* note 16, at 467 (discussing the Court's decision in *Helvering v. Mitchell*, 303 U.S. 391 (1938) which held that a 50% "additional tax" was not a penalty, and thus did not implicate the double jeopardy clause).

243. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 277-82 (1968). "The crime tariff is what the seller must charge the buyer in order to monetize the risk he takes in breaking the law." Wisotsky, *supra* note 60, at 894.

244. 463 U.S. 277 (1983).

245. *Id.* at 284 (recidivist, previously convicted of six non-violent felonies, received excessive sentence of life imprisonment for issuing a bad check for \$100).

246. In *Lipke v. Lederer*, 259 U.S. 557 (1922), the Court stated: "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intentment of the term a tax was laid." *Id.* at 561-62 (citations omitted).

247. 416 U.S. 663 (1974).

248. *Id.* at 687-88.

“deserves” the punishment of forfeiture. This argument is reminiscent of Blackstone’s justification for deodand.²⁴⁹ It is an argument with some appeal if one’s vision of what occurs in most of these cases is either that the owner is in complicity with the criminal or is deliberately looking the other way, such as when one buys an expensive watch at a ridiculously low price from a man on the street in a raincoat. Unfortunately, the caselaw does not articulate any concrete standard of “due care.” All that has been said, therefore, is that some theoretical level exists beyond which the exaction of forfeiture would be unconstitutional.

In enunciating the “negligence” standard, the *Calero-Toledo* Court wrote:

It . . . has been implied that it would be difficult to reject the constitutional claim of an owner whose property . . . had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, *but also that he had done all that reasonably could be expected* to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.²⁵⁰

This is the passage that established the modern “negligence” approach in civil forfeitures. The statement is somewhat mystifying, as the Court did not specifically say in what way Pearson Yacht Leasing Company, the owner of the forfeited yacht, failed to do “all that reasonably could be expected” in investigating the lessees responsible for bringing the marijuana on board.²⁵¹ The Court did not discuss what Pearson did, or failed to do, that justified the forfeiture. Indeed, the vast majority of the opinion deals with rationalizations of why the Court need not deal with the question of the company’s behavior on the grounds that it is an *in rem* proceeding.²⁵² The opinion leaves one wondering how negligence is deterred by imposing punishment without regard to whether any negligence occurred.

As the Court suggested in the above passage, it makes no sense to discuss inducing “due care” if it would be ineffectual, as in the case

249. For a case that approves of forfeiture as a penalty for negligence in wrongful death cases, see *State v. One 1986 Subaru*, 553 A.2d 869 (N.J. Super. App. Div. 1989) (forfeiture sought of car that caused a person’s death during a drag race), *aff’d in part, rev’d in part*, 120 N.J. 310, 576 A.2d 859 (N.J. 1990). We seem to have come full circle.

250. *Id.* at 689-90 (emphasis added) (citations omitted).

251. Because the Court announced the negligence argument in *Calero-Toledo*, it is not surprising that there was no discussion of any facts relating to the reasonableness of the company’s behavior because they could have hardly known it was such a relevant issue.

252. *Id.* at 680-88.

where property is obtained by theft or fraud. In distinguishing the case of an owner whose property is taken without his "privity or consent," the Court relied on a similar statement in *J.W. Goldsmith, Jr. - Grant Co. v. United States*,²⁵³ in which the Court reserved ruling on the question.²⁵⁴ Yet, in *Beaudry v. United States*,²⁵⁵ decided after *Goldsmith-Grant*, the United States Court of Appeals for the Fifth Circuit upheld the forfeiture of a vehicle where it appeared to be undisputed that the violator had obtained the vehicle in question from the claimant by fraud.²⁵⁶ In denying the claimant's argument that he should be exempted from forfeiture because his property was obtained from him through fraud, the court distinguished the case of a vehicle obtained through trespass or theft, from one obtained through fraud in a contract for sale. Because fraud in a contract makes the contract voidable, it gives the injured party an election of either enforcing the contract, or asking for damages from the party who defrauded him.²⁵⁷ Thus, the court found that the claimant's cause of action was against the purchaser who had used a false name, not against the government in the forfeiture action.²⁵⁸

In light of *Beaudry*, it is unclear just what standard of care a claimant must establish in order to qualify for "innocent owner" protection. How could the claimant in *Beaudry* be said to have truly "consented" to give possession of the car to someone who used a false name to secure that possession? In what manner could the claimant have defended himself against such fraud? Was his failure to discover the fraud negligent? Perhaps. It is even possible that he colluded with the purchaser. However, in the absence of guidance as to what constitutes "reasonable care" on the part of an owner so as to qualify for "innocent owner status" and avoid the imputation of negligence, the lower courts have tended to interpret the negligence standard as a rule of "when in doubt, the government wins," and to uphold forfeitures on questionable facts.²⁵⁹

253. 254 U.S. 505 (1921).

254. *Id.* at 512.

255. 79 F.2d 650 (5th Cir. 1935).

256. *Id.* at 651. In *Beaudry*, a lienholder challenged the forfeiture because the car's purchaser, later found to have illegally transported liquor, used a false name. The lienholder argued that this misrepresentation was tantamount to a theft which entitled him to escape forfeiture. *Id.* at 650.

257. *Id.* at 651.

258. *Id.* No doubt the reassurance that he had a cause of action against the buyer for fraud was small comfort to the hapless seller/claimant, because the remedy the court was proposing was likely to be illusory.

259. See, e.g., *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 418 (10th Cir. 1982) (Illinois resident who acquired airplane located in New Mexico in payment of a debt could not contest the forfeiture because "complete inattentiveness" for

Negligence is a tort concept. Given that punitive damages are available in tort, establishing tort as a sort of private cause of action against crime, what makes the element of punishment in a civil forfeiture so objectionable? The answer is that a tort action is one against a person, not a thing, and for the imposition of punitive damages the person's state of mind matters. "Fault" matters. In a tort case, the defendant's actions are evaluated and those actions must be proven to be the proximate cause of the plaintiff's injuries.²⁶⁰ Furthermore, punitive damages are only available upon a showing of a "willful," "wanton" or "reckless" conduct by the defendant.²⁶¹ The defendant's conduct and intent are legally relevant. It is not enough, for the imposition of punitive damages, to establish mere fault; rather, fault must be tied to some state of mind, like malice, or to some degree of negligence which is considered its constructive equivalent.²⁶² Both of these notions involve judging the conduct and the actions of the *person* accused. By contrast, the personification fiction dictates that the culpability of the individual is irrelevant to the imposition of the civil forfeiture penalty. This irrelevance is not offset merely by holding that some hypothetical innocent owner could be exempted if, in practice, no one qualifies for that status.

If forfeiture is exacted from those who have not been guilty of any negligence, it is unclear what sort of deterrent effect it has on negligent behavior. "[W]here the forfeiture performs no real function of prevention or incapacitation, it is difficult to see this requirement of a guarantee of the behavior of the user as anything but arbitrary and

over six months failed to meet the *Calero-Toledo* negligence standard); *United States v. One Single Family Residence ("Alvarez")*, 683 F. Supp. 783, 789 (S.D. Fla. 1988) ("reasonable" bonding company would have apprised itself of the charges against defendant, presumably leading it to reject the home as collateral for a bond). *But see United States v. One 1981 Datsun 280ZX*, 644 F. Supp. 1280, 1287-88 (E.D. Pa. 1986) (father was not negligent in failing to tell his daughter not to use his car for illegal purposes because he had no reason to believe she would do so).

260. See Zwier, "Cause in Fact" in Tort Law—A Philosophical and Historical Examination, 31 DE PAUL L. REV. 769, 769 (1982) ("Under traditional tort analysis, 'cause in fact' has long been an essential element in finding a defendant liable for a plaintiff's injury. The cause in fact requirement has been essential *not only to negligence theory, but also to the growth of strict liability theory . . .*") (emphasis added) (citations omitted).

261. RESTATEMENT (SECOND) OF TORTS § 908(2) (1979). "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others . . ." Commentary to the Restatement explains:

Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can only be awarded for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime.

Id. comment b.

262. *Id.*

hence violative of due process."²⁶³ The "negligence" approach turns civil forfeiture into a form of strict liability for drug violations, and lessors into the guarantors of their lessees' behavior. In fact, it is something worse than strict liability because even there the plaintiff has the burden of proof. As one commentator has noted,

[I]t is unfair and impractical to make a lender or seller a surety for the good behavior of a borrower or buyer The rules . . . invite or demand discrimination [by the lender or the seller] against persons with criminal records or reputations, extending their punishment capriciously and making their reintegration into society more difficult.²⁶⁴

Because of the lower standard of proof, which only requires the government to show probable cause to justify forfeiture, civil forfeiture is also a form of strict liability for *possible* drug violations. In his dissent in *Calero-Toledo*, Justice Douglas wrote that this "traditional forfeiture doctrine cannot at times be reconciled with the fifth amendment."²⁶⁵ Accordingly, the negligence argument is insufficient also.

IV. THE IMPACT OF CIVIL FORFEITURE DOCTRINE IN THE CRIMINAL FORFEITURE CONTEXT

The preceding Sections have demonstrated that there is neither historical nor rational support, consistent with anything but the plenary exercise of power, for retaining civil forfeiture's personification fiction. Thus, the abridgement of civil liberties in the civil forfeiture context is unjustified. As obnoxious as this doctrine is in its civil form, however, its application in the criminal context is, if possible, more offensive. In the criminal context, reliance on the label "civil" to justify the absence of constitutional protections is absent. Nevertheless, the central concepts informing the civil forfeiture doctrine, "taint" and relation-back, as well as many of the procedural forms, have been imported to the criminal forfeiture statutes²⁶⁶—with grim results. More generally, subsection 853(o), the federal criminal forfeiture statute, provides that "[t]he provisions of this section shall be liberally construed to effectuate its *remedial* purposes."²⁶⁷ This Sec-

263. Clark, *supra* note 16, at 481.

264. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 426-27 (1988). The article's subject is criminal forfeiture, but its argument applies with equal force to civil forfeiture and indeed addresses the *Calero-Toledo* standard of care.

265. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 693 (1974) (Douglas, J., dissenting).

266. "[Criminal forfeiture] was entangled at its birth in procedures drawn from the inappropriate model of civil forfeiture." Fried, *supra* note 264, at 434.

267. 21 U.S.C. § 853(o) (1988) (emphasis added). This guideline is in direct conflict, however, with the notion sometimes expressed in the civil forfeiture area that forfeitures must

tion sets forth a sampling of some of the problems with the application of civil forfeiture concepts in the area of criminal forfeiture.

A. *Third-Party Claimants in Criminal Proceedings*

Procedurally, third-party claimants to property in a criminal forfeiture proceeding get the worst of both worlds. The post-adjudicatory proceeding, which is their only remedy, is basically a civil forfeiture with a new face.²⁶⁸ As in civil forfeitures, the burden is on the claimant to prove that he is either an innocent owner, or a bona-fide purchaser for value.²⁶⁹ He must prove that status by a preponderance of the evidence.²⁷⁰ However, because the items to be forfeited are part of the indictment in the criminal proceeding—that is, part of what the government must plead and prove against the defendant—the third-party claimant only enters the proceeding after a forfeiture judgment has already been rendered against the criminal defendant on

be "strictly construed," as they are "historically disfavored." *United States v. \$38,000.00 in United States Currency*, 816 F.2d 1538, 1547 (11th Cir. 1987) ("Forfeitures are not favored in the law; strict compliance with the letter of the law by those seeking forfeiture must be required."); *United States v. One 1957 Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982) ("Forfeitures are clearly not favored and are to be enforced only when within both the spirit and the letter of the law.") (citing *United States v. One Ford Coach*, 307 U.S. (1939)); *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500, 501 (5th Cir. Unit B May 1981) ("As a general rule, forfeiture is not favored, and statutes providing for forfeiture are strictly construed.") (citations omitted). Despite this language, one is hard pressed to find many examples in which the courts have disfavored forfeiture. In all but one of the above examples, forfeiture was upheld despite the purportedly "strict construction" given to the statute. *But see United States v. Four Parcels of Real Property*, 893 F.2d 1245, 1251 (11th Cir. 1990) (forfeitures not favored and should be enforced only if within spirit and letter of the law), *vacated en banc*, 902 F.2d 24 (1990).

268. Third parties with interests in property that has been determined forfeitable in a prior criminal proceeding have the burden, just as in the civil forfeiture context, of proving their innocence in any wrongdoing. *See, e.g.*, 21 U.S.C. § 853(n)(6) (1988) (requires the claimant to establish "by a preponderance of the evidence" that his claim is valid). In general, the procedural structure is also the same. *See, e.g.*, § 853(n)(1)-(7) (entitled "Third party interests"). The statute specifically directs that "[e]xcept to the extent that they are inconsistent with the provisions of this section, the provisions of section 881 of this title shall apply to a criminal forfeiture under this section." 21 U.S.C. § 853(j) (emphasis added). Finally, and perhaps most importantly, 21 U.S.C. § 853(c), establishes that "[a]ll right, title, and interest in property described in subsection (a) [of this section] vests in the United States upon the commission of the act giving rise to forfeiture under this section." This is the relation-back concept stemming from the "taint" doctrine in civil forfeiture. *See supra* notes 21-30 and accompanying text. Professor Fried argues:

By invalidating most third-party transfers after the commission of the offense giving rise to forfeiture, and putting the burden on the transferee to prove, not just his good faith, but his ignorance of the transferor's criminal activities, the CFA in effect established a new class of collateral civil forfeitures.

Fried, *supra* note 264, at 349-50.

269. *See supra* note 6.

270. *See* 21 U.S.C. § 853(n)(6) (1988).

the same property. In some circumstances, this prior judgment of forfeiture represents a more egregious burden on the third-party claimant than the finding of probable cause to forfeit in the true civil forfeiture context because it presumably was rendered only after meeting the higher burden of proof required in the criminal trial.²⁷¹

Theoretically, this prior judgment ought to operate as collateral estoppel against the claimant, since in order to prove its case that property is forfeitable, the government ought to show that the property to be forfeited belonged—in the first instance—to the defendant, and do so “beyond a reasonable doubt.” However, the government does not need to prove the defendant’s ownership because subsection 853(d) creates a rebuttable presumption that all of a defendant’s property is forfeitable.²⁷² Thus, all the government must do is list in the indictment or information all of the property it believes belongs to the defendant and is forfeitable under the statute. If a defendant does not testify, or if he does not adequately overcome this presumption, then the government has not really proven this element “beyond a reasonable doubt;”²⁷³ it has only received a default judgment by virtue of the *defendant’s failure* to prove non-ownership or non-forfeitability. Nevertheless, the judgment of forfeiture that the third-party claimant must overturn *is* a judgment. Thus, in addition to the presumption

271. Section 853(d) creates a rebuttable presumption, in the *criminal proceeding*, that “any property of a person convicted of a felony under this subchapter” is subject to forfeiture. 21 U.S.C. § 853(d) (1988). The government must prove forfeitability by a preponderance of the evidence in order to invoke this presumption. As a practical matter, this means that, like in the context of parallel civil forfeiture proceedings, the defendant must testify if he wants to claim his property because he cannot rebut the presumption by remaining silent. *See supra* note 50. He cannot, however, dispute this presumption with testimony without waiving his right to remain silent. The defendant has little incentive to testify even if the property *is* his. He has even less if it is not. Thus, the interests of third-party claimants and criminal defendants are often adverse at trial. Because of the statutory bar on intervention, however, third-party claimants have no opportunity to challenge this presumption at the criminal trial. *See* 21 U.S.C. § 853(k) (1988). Despite the third-party claimant’s lack of opportunity to be heard, section 853(n)(5) specifically directs the court to “consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture,” for purposes of the third-party, post-adjudicatory proceeding. 21 U.S.C. § 853(n)(5) (1988).

272. The subsection reads in full:

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that -

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

21 U.S.C. § 853(d) (1988).

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

created by the statute, the third-party claimant must try to rebut whatever psychological weight a prior jury verdict of forfeiture carries. But the effect of a prior judgment of forfeiture is not merely psychological. The government may enter as evidence the transcript from the criminal proceeding in order to uphold the judgment of forfeiture,²⁷⁴ requiring the third-party claimant to rebut evidence presented in an action to which he was not a party and had no opportunity to cross-examine witnesses.

The government may ask for a pre-trial restraining order²⁷⁵ that can tie up a claimant's property for years because the claimant is statutorily barred from intervening with his claim until the criminal proceeding is over.²⁷⁶ It is not unusual for the government to hold property for over a year before instituting *civil* forfeiture proceedings.²⁷⁷ But the requirement that a third-party claimant be barred from intervening until the criminal trial is over stretches this potential into years.²⁷⁸ By the time a claimant can be heard, the property is likely to have been destroyed or deteriorated beyond salvage.²⁷⁹

274. See 21 U.S.C. § 853(n)(5) (1988).

275. See 21 U.S.C. § 853(e) (1988) (entitled "Protective orders").

276. 21 U.S.C. § 853(k) (1988) reads:

(k) Bar on interventions

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may -

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

277. See, e.g., *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555 (1983) (eighteen month delay between seizure and the institution of the forfeiture proceeding was not a violation of due process); *United States v. U.S. Treasury Bills Totaling \$160,916.25*, 750 F.2d 900 (11th Cir. 1985) (fourteen month delay did not violate due process); *United States v. One Single Family Residence ("Alvarez")*, 683 F. Supp. 783 (S.D. Fla. 1988) (6 month delay permitted); *United States v. M/V Christy Lee*, 640 F.Supp. 667 (S.D. Fla. 1986). *But see* *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193 (C.D. Cal. 1978) (sixteen month delay precluded forfeiture).

278. A Florida newspaper reported that a retired couple had their property tied up in a criminal forfeiture case for three years. Katel, *Forfeiture*, *Miami Rev.*, Mar. 6, 1990, at 1, col. 2. The couple had financed the sale of their building themselves, with the intention that the buyer's mortgage payments would act as their retirement income. *Id.* Unfortunately, their purchaser was apparently involved in drug trafficking. *Id.* at 4, cols. 1 & 3. The government seized the property and the buyer stopped making the payments. *Id.* Now, the couple cannot sell the building, rent it to anyone else, or in any other way recover their stream of income. Perhaps most importantly, they are not even able to settle these issues by proving their innocence until the criminal proceedings are over.

279. See, e.g., *United States v. One 1983 Homemade Vessel Named "Barracuda,"* 858 F.2d 643 (11th Cir. 1988) (United States Customs destroyed claimant's vessel while her case was pending because she failed to post a bond for it pursuant to FED. R. Civ. P. 62(d)); *United*

Finally, the criminal forfeiture statutes also provide that the hearing requested by a third-party claimant "be held before the court alone, without a jury."²⁸⁰ Thus, the statute denies third-party claimants the right to a trial by jury. Although bench trials are the common practice in the civil forfeiture context, their employment to enforce a forfeiture under the criminal statute is questionable. This provision, however, has not gone unchallenged. At least one court has found it unconstitutional—albeit without explicitly saying so.²⁸¹ Nevertheless, it is remarkable that this provision was included in the statute without apparently causing any concern. It appears that because Congress borrowed the procedural conduct of third-party claims from the civil forfeiture setting, no one was struck by the problem. However, it is the operation of the civil forfeiture "taint" concept that is most egregious in the criminal forfeiture setting.²⁸² Here is where most of the controversy rages.

B. *The "Taint" Doctrine and the Criminal Forfeiture Statutes*

As has been previously noted, Congress borrowed the "taint" doctrine from civil forfeiture.²⁸³ It may be found in the criminal forfeiture statutes in subsection 853(c).²⁸⁴ Although defendants have the constitutional protections of a criminal proceeding, this concept is nevertheless harmful to them because of the presumptions it sets up.²⁸⁵ And, though some people may feel that depriving *criminal*

States v. Martinson, 809 F.2d 1364 (9th Cir. 1987) (Bureau of Alcohol, Tobacco & Firearms inadvertently destroyed claimant's guns while his petition for their return was pending after two years). Although the first case is a civil forfeiture case and the second involves a claimant who also happened to be the defendant in a criminal action, both cases demonstrate the real concern that "accidents will happen." The constitutionality of default forfeiture where the claimant cannot meet the bond requirement is also questionable. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

280. 21 U.S.C. § 853(n)(2) (1988).

281. In ruling without opinion in an unreported criminal forfeiture case, District Court Judge Roettger held that a third-party claimant was entitled to a trial by jury. See *United States v. Bachner*, No. 87-8028, slip op. at 1, para. 3 (S.D. Fla. Jan. 5, 1990). In the civil forfeiture context, the Court of Appeals for the Seventh Circuit ruled that a claimant was entitled to a jury trial. *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980). The *Bachner* ruling is appropriate because, as previously noted, the post-adjudicatory procedures for third-party claimants under the criminal forfeiture statute closely parallels a civil forfeiture.

282. See *supra* notes 26-33 and accompanying text.

283. See *supra* note 266 and accompanying text.

284. *Id.*

285. There is an argument that the relation-back doctrine is constitutionally infirm because, among other things, it serves to deprive defendants of their counsel of choice. See Winick, *supra* note 18. In addition, the relation-back provision expands the scope of the defendant's assets accessible through forfeiture. When forfeiture renders a defendant indigent, and similarly divests his family of their home or other assets in common, it seem factually

defendants of counsel of choice or bail is desirable, it is difficult to understand what justifies the imposition of this disastrous concept on third-party claimants.²⁸⁶ It essentially turns any third-party claim to property, in a post-adjudicatory, *criminal* proceeding, into a *civil* forfeiture proceeding.²⁸⁷ This cannot be appropriate for what is supposed to be a criminal punishment, inflicted only after a finding of guilt beyond a reasonable doubt.²⁸⁸ As Judge Logan of the United States Court of Appeals for the Tenth Circuit has noted in a dissenting view, in reference to the use of the "taint" doctrine:

In deciding the constitutional issues presented by this case, we cannot be carried away by our emotional revulsion to drug dealers and others who make crime a way of life. The same analysis [relation-back] that today permits a pre-trial seizure and then a forfeiture of the property of drug dealers may be applied tomorrow to anyone who violates federal antitrust laws or laws prohibiting polluting the water or the air. Indeed, the reasoning of the majority would support a law forfeiting as of the date of the offense *all of a person's*

indistinguishable from the "corruption of the blood" laws that were barred by the Constitution. See U.S. CONST., art. III, § 3, cl. 2.

286. Section 853(c) further states:

Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless *the transferee* establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. § 853(c) (1988) (emphasis added).

287. Pursuant to section 853(n)(6), third-party claimants asserting an interest in forfeited property have a burden of proof by the "preponderance of the evidence." 21 U.S.C. § 853(n)(6) (1988). A preponderance of the evidence standard is usually applicable only in civil cases. Furthermore, pursuant to section 853(j), the provisions of the *civil* forfeiture statute (section 881) apply to section 853 "except to the extent that they are inconsistent with the provisions of" section 853. 21 U.S.C. § 853(j) (1988). Arguably, this provision is inconsistent with the provision in section 853(d) which requires that the government establish by a "preponderance of the evidence" at the *defendant's* trial that an asset listed in the indictment is subject to forfeiture. See 21 U.S.C. § 853(d) (1988). This argument raises two points: (1) even though this is a rebuttable presumption, the burden of proof on the government in criminal trials is usually "beyond a reasonable doubt"; and (2) the third-party claimant thus comes into the post-adjudicatory hearing having to establish a proposition contrary to that presumably already proven "by a preponderance of the evidence" by the government at the criminal trial. Section 853(n)(5) reads in part that "the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture." 21 U.S.C. § 853(n)(5) (1988). Therefore, a third-party claimant may confront testimony without any opportunity to test it by cross-examination, because section 853(n)(5) only allows the claimant to cross-examine witnesses who "appear at the hearing." *Id.*

288. *But see* United States v. Ortiz, 910 F.2d 376, 382 (7th Cir. 1990) ("We see no reason why Congress is not free to adopt procedures from an *in rem* action into an *in personam* one.").

*property, for his or her lifetime, for any offense . . .*²⁸⁹

To explore the inappropriateness of imposing on the third-party claimant the application of a civil forfeiture concept that stems from the notion of a "guilty" property, it is useful to examine its application in a particular case, aside from the attorneys' fees cases, such as *Caplin & Drysdale, Chartered v. United States*,²⁹⁰ which excite the most attention.²⁹¹

In *United States v. Magean*,²⁹² a Nevada federal district court held that the relation-back provision of the Racketeer Influenced and Corrupt Organization Act ("RICO") forfeiture statute²⁹³ gave the government title, superior to tort claimants,²⁹⁴ to a defendant's corporate assets. Thus, in order to have their claims exempted from the forfeiture order, the tort claimants had to fall under 18 U.S.C. § 1963(l)(6), the bona-fide purchaser for value exception.²⁹⁵

289. *United States v. Nichols*, 841 F.2d 1485, 1509 (10th Cir. 1988) (en banc) (Logan, J., dissenting) (emphasis added). The United States Supreme Court approved and upheld the central holding in this case, that relation-back can be used to justify pre-seizure restraint of a defendant's forfeitable assets, even if he or she is deprived of the right to counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989).

290. 109 S. Ct. 2646 (1989). Some of the predictable excesses resulting from this decision have already occurred. See *United States v. Marquez*, 909 F.2d 738, 740 (2d Cir. 1990) (government attorneys used threat of forfeiture of funds that the court had already ordered repaid to persuade the defendant to plead guilty).

291. It is useful to look at cases other than those involving attorneys' fees because the focus on the sixth amendment right to counsel creates the temptation to "avoid the constitutional dilemma[s]" posed by civil forfeitures and to create an exception to the relation-back provision for attorney fees, see, e.g., Winick, *supra* note 18, at 838-69, rather than to recognize that the premise is constitutionally infirm in all of its applications because of its origins in the personification fiction. Professor Winick argues that the statute should be construed to void only "sham" transfers to attorneys, not just all sham transfers to third parties, because of the third parties' constitutional rights. *Id.*

292. 649 F. Supp. 820 (D. Nev. 1986).

293. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 901-904, 84 Stat. 922, 941-948 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)). With respect to the concerns addressed in this Comment, 18 U.S.C. § 1963 and 21 U.S.C. § 853 are indistinguishable.

294. The tort claimants in this case did not have a judgment. The tort action in state court had been stayed until the district court determined their rights against the assets of the defendant's company. *Magean*, 649 F. Supp. at 821. Conceivably, the case could have been decided in the same way merely on the basis that the claimants did not have a ripened interest in defendant's assets because they had not secured a judgment. However, the court indicated in dicta that the absence of a judgment was irrelevant and that the tort claimants' interests would not have been protected in any case. *Id.* at 825.

295. Section 1963(l)(6) reads in relevant part:

If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant *at the*

Although the court acknowledged that Congress' purpose in enacting the relation-back provision was to void "sham" transactions,²⁹⁶ it found it impossible to torture the definition of bona-fide purchaser for value so far as to include tort claimants.²⁹⁷ By contrast, the court did read into the bona-fide purchaser for value section of the statute protection for trade creditors,²⁹⁸ protection which is not explicitly there.²⁹⁹ The government argued that section 1963(l)(6)³⁰⁰ only extended protection to claimants with "legal interests."³⁰¹ The court agreed "that only legal interests are recognized" and conceded that "the trade creditors do not, *in a technical sense*, have legal interests in the forfeited property."³⁰² Nevertheless, the court found that trade creditors were protected because they had dealt with the company at arms' length and had rendered services for value; thus, the purpose of the provision would be satisfied.³⁰³ The court also noted that "although the trade creditor's losses may be insignificant in comparison to the tort claimants' injuries, the tort claimants *were not involved in an arm's length transaction* [with the company] *and did not pay value for their claims.*"³⁰⁴

This reasoning is a curious reversal of what one would expect. Tort claimants, because they have not *chosen* to deal with the defendant company (i.e., they could not have done some sort of investigation of it), and because they have suffered serious losses, ought to be given *greater* protection than trade creditors, rather than less. This result is

time of the commission of the acts which gave rise to the forfeiture of property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section . . .

18 U.S.C. § 1963(l)(6) (1988) (emphasis added).

296. "[T]he legislative histories of § 853 and § 1963 show that the purpose of the relation-back doctrine is to 'close a potential loophole in current law whereby the criminal forfeiture statute would be avoided by transfers that were not 'arm's length' transactions.'" *Mageean*, 649 F. Supp. at 824 (citations omitted).

297. "While it is true that their claims were not created through 'sham' transactions, it does not seem possible to stretch the definition of bona fide purchaser to include the tort claimants." *Id.* at 824.

298. *Id.* at 828.

299. 18 U.S.C. § 1963(m)(6) grants exemption from forfeiture to bona fide purchasers for value of "right, title or interest." The statute does not say whether this is meant to apply only to secured creditors or whether the word "right" is to be interpreted more broadly. However, as the *Mageean* court noted, the legislative history seemed to limit this provision to those with "legal interests." See *Mageean*, 649 F. Supp. at 828-29.

300. See *supra* note 296.

301. *Mageean*, 649 F. Supp. at 828-29.

302. *Id.* at 828 (emphasis added).

303. *Id.* at 827-31.

304. *Id.* at 826 (emphasis added).

particularly persuasive given that the operation of the statute is presumably meant to deter and punish the *convicted* defendant, not innocent parties. Particularly, with respect to the “negligence” standard in civil forfeiture, which is often mistakenly invoked in these circumstances, there is *nothing* that the tort claimants could have done to avoid “doing business” with a criminal.³⁰⁵ The same may not necessarily be true of trade creditors.

One should also remember that the tort claimants were not denied a remedy because of a superior *third-party* interest. Their “rival” for the defendant company’s assets was the government. The convicted defendant is not punished any less because the property taken from him is given to his victims, rather than the government. Giving the proceeds of forfeiture to the government, rather than to the tort claimants, hardly looks like a means to insure “an indemnity to the injured party,” which the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*³⁰⁶ offered as a support for the personification fiction. Rather, it turns the government into “a coequal competitor to the common law owner, akin to a bank fighting with an accused robber over money allegedly stolen from the bank.”³⁰⁷ Unlike the bank, however,

[t]he government’s interest in forfeited property . . . does not derive from a common law ownership right to the property, for the government neither owned the property before the crime nor gave value for the property as a creditor or purchaser does. Forfeiture, as an exception to the Fifth Amendment’s requirement that property shall not be taken for public use without “just compensation,” is grounded entirely on public policy. *Criminal forfeiture is a penalty to prevent a criminal from profiting from crime or from retaining the means to commit more crimes, or is in the nature of a fine, to punish the criminal.*³⁰⁸

305. As one commentator argues:

[T]ort claimants, or at least those whose claims do not arise from any commercial dealings with the defendant, arguably have a stronger claim of priority than contract claimants, because they are not subject to suspicions about their good faith or the reasonableness or propriety of their dealing with criminals.

Fried, *supra* note 264, at 426.

306. 416 U.S. 663, 684 (1974) (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 238 (1844)).

307. *United States v. Nichols*, 841 F.2d 1485, 1510 (10th Cir. 1988) (en banc) (Logan, J., dissenting).

308. *Id.* (emphasis added) (citations omitted). Significantly, Judge Logan does not designate the type of forfeiture that it is an exception to the fifth amendment’s takings clause. Furthermore, to the extent that “public policy” is difficult to distinguish from “public use”—arguably, property taken in furtherance of a public policy would seem to have been taken for a public use—the argument fails to convince. The preceding sections suggest that *civil* forfeiture

It is difficult to see how depriving tort claimants of a remedy advances the government's interest in deterring crime or punishing the criminal. Moreover, it is significant that the *Mageean* court did not discuss the fact that the statute also provides for restitution to the victims of the convicted criminal from the proceeds of the forfeiture,³⁰⁹ albeit such restitution is given entirely at the discretion of the Attorney General.³¹⁰ It is not irrational to argue that the presence of this provision indicates Congressional intent to compensate these victims whenever they can be identified. Instead, the *Mageean* court noted:

[P]rior to the 1984 amendments, there was no judicial remedy for any third party claiming interest in forfeited property. Since Congress could choose to provide *no* judicial remedy it is not unconstitutional for Congress to provide a remedy *only for certain claimants* even though this choice leads to disparate treatment of different classes of claimants³¹¹

Arguably, the *Mageean* court has it backwards. A more persuasive argument as to the 1984 amendments, which added the protection to bona-fide purchasers, is that Congress amended the statutes to include this protection to innocent parties precisely *because* it realized that the statutes were constitutionally infirm without such protection, and that Congress did *not* have the power to enact such a statute.³¹²

is also intended to prevent a criminal from profiting from crime, or from retaining the means to commit more crimes. Although Judge Logan neatly avoids the issue, clearly this passage could be lifted out of its context and applied to civil forfeitures without diminishing its applicability.

309. See 21 U.S.C. § 853(i) (1988). This section, entitled "Authority of the Attorney General," reads in part as follows:

With respect to property ordered forfeited under this section, the Attorney General is authorized to -

(1) grant petitions for mitigation or remission of forfeiture, *restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice* and which is not inconsistent with the provisions of this section

Id. (emphasis added).

Section 1963 contains a similar provision. 18 U.S.C. § 1963(g) (1988). Arguably, these provisions reflect congressional intent to compensate tort claimants from the proceeds of the forfeiture because they could not have been knowingly "dealing" with a criminal; moreover, the criminal is not punished any less when the property taken from him is given to the tort claimants, rather than to the government.

310. Since the law enforcement and prosecution arms of the government have an interest in the disposition of forfeited assets because of the provision giving them claim to proceeds, see *infra* notes 323-29, it is unlikely that victims were often compensated.

311. *United States v. Mageean*, 649 F. Supp. 820, 826 (D. Nev. 1988) (emphasis added).

312. The *Mageean* court suggests this:

In enacting subsection (m) [the bona fide purchaser protection in section 1963], Congress recognized that since criminal forfeiture actions are *in personam* proceedings, a forfeiture order would be invalid if it reached a third party's

V. "TREATING THE SYMPTOMS"

Whatever one's private beliefs about the nature of the legislative process, one must assume, as a threshold matter, that Congress' aims are worthy when it passes measures that are designed to control, deter, or punish drug trafficking. However, this does not mean that the courts should abdicate their responsibility to ensure that the means chosen by Congress pass constitutional muster. Forfeiture, with its disregard of personal guilt is a utilitarian form of punishment. Congress' assumption in creating this penalty seems to have been that proving whether a particular person is guilty of trafficking in narcotics is more costly than necessary because forfeiture will have the salutary benefit for the community of deterring such conduct. Thus personal liberties are sacrificed to the common good. "Utilitarianism . . . justifi[es] the punishment of a person wholly innocent of a crime in circumstances where it would yield some overall net benefit to the community."³¹³

Congress enacted the drug and RICO civil forfeiture provisions³¹⁴ principally as measures to punish and deter violations of the criminal laws. Indeed, if the legislative history is to be taken seriously, these are the *central* justifications.³¹⁵ One only need look at the legislative history of the Comprehensive Crime Control Act of 1984,³¹⁶ which made extensive changes to both the existing criminal and civil forfeiture statutes, to confirm Congressional intent.³¹⁷ It is

interest in property which was either exclusive of or superior to the interest of the defendant. . . .

649 F. Supp. at 823.

It is not clear why, if the tort claimants had had a valid judgment against the defendant, that would not have been an interest "superior to the interest of the defendant." As previously noted, the *Mageean* court could have simply declined to find a "superior" interest because the claimants *in this case* did not have such a judgment. However, it went further and indicated that an enforceable judgment giving them a "right, title or interest in the forfeited property" was "simply not the case." *Id.* at 825.

313. Spjut, *supra* note 46, at 199.

314. There are several other areas in which forfeiture is one of the punishments for a violation of a particular law. Although this Comment is primarily concerned with drug-related forfeitures, it is worth noting other civil forfeiture statutes because many of the arguments made here apply to these provisions as well. See, e.g., 8 U.S.C. § 1324 (1988); 19 U.S.C. §§ 1590, 1594, 1595(a), 1597 (1988); 19 U.S.C. § 1703 (1988). This is by no means an exhaustive list.

315. See *supra* notes 61-64 & 170 and accompanying text.

316. Pub. L. No. 98-473, 98 Stat. 1837 (1984). Section 301 of the law is entitled the "Comprehensive Forfeiture Act" ("CFA"). *Id.* at 2040. See *supra* note 9 and accompanying text.

317. "Clearly if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. *Forfeiture is the mechanism through which such an attack may be made.*" S. REP. NO. 225, *supra* note 44, at 191 (emphasis added).

riddled with references to forfeiture as "a powerful weapon in the fight against drug trafficking and racketeering."³¹⁸

Given the crime deterrence purpose, Congress' aims *might* be more tolerable, if no less unconstitutional, if the statutes worked. There is little indication, however, that forfeiture is having a sufficient deterrent effect on the drug problem to justify its imposition. Congress is treating the symptoms rather than the disease. Perhaps if, rather than giving the proceeds of forfeiture over to the law enforcement agencies, these proceeds were directed toward drug rehabilitation or work programs, even draconian forfeiture laws would seem less offensive.³¹⁹ But such is not the case. In its frenzy to eradicate the drug problem, Congress has expanded some of the concepts embodied in civil forfeiture, such as "relation-back," into the relatively new criminal forfeiture statutes.³²⁰ Because those concepts rely upon the personification fiction to avoid constitutional scrutiny, their application in this area is particularly disturbing.³²¹ Indeed, it is part of an overall abridgement of civil liberties that is occurring with respect to the drug problem—the "drug exception."³²²

318. *Id.*

319. It is far from clear that drug rehabilitation programs or the like would be any more effective than civil forfeiture at solving the drug problem.

320. See 21 U.S.C. § 853(c) (1988) (relation-back provision borrowing "taint" concept from civil forfeiture); 21 U.S.C. § 853(j) (1988) (applying section 881—civil forfeiture statute—to section 853 "[e]xcept to the extent that they are inconsistent"); 21 U.S.C. § 853(n)(2) (1988) (no jury for third-party claimants). Congress erroneously thought that it was doing something new, and possibly on the edge of permissible constitutional limits, when it enacted the criminal forfeiture statutes in the first place. See Hughes & O'Connell, *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPPERDINE L. REV. 613, 621 (1984) ("When enacted by Congress, these [criminal forfeiture] provisions were perceived to be a bold and innovative approach to attack the economic base of criminal activity . . ."); see also Note, *supra* note 24, at 794-96. Congress was wrong. Such statutes had been enacted and sporadically applied in the early part of the last century for crimes generally until they were considered barred by the constitutional prohibition on Bills of Attainder or by 18 U.S.C. § 3563 (1988). See Note, *supra* note 24, at 779-92. In addition, the Confiscation Acts of 1862, 12 Stat. 589 (1862), repealed by Act of Mar. 4, 1909, ch. 321, 35 Stat. 1153, calling for the forfeiture of property belonging to confederate sympathizers, were passed only after narrowly escaping a presidential veto because Lincoln thought that they were unconstitutional. *Id.* at 787.

321. "As . . . the CCE necessarily implicates the constitutional standards applicable to the criminal justice system, requiring proof of guilt prior to forfeiture . . . , resort to civil forfeiture cases as guidance in criminal forfeiture cases, [is] highly dubious to say the least of it." *United States v. Veon*, 538 F. Supp. 237, 242 (E.D. Cal. 1982).

322. See generally Wisotsky, *supra* note 60. Another troubling aspect of this phenomena is the new, stringent mandatory minimum sentences imposed by the Anti-Drug Abuse Act of 1986. The law removes judicial discretion in sentencing for distribution and possession of narcotics, so that even first-time offenders receive sentences of ten years without parole. At least one federal judge has called these rules "unjust," commenting, "It behooves us to think that it may profit us very little to win the war on drugs if in the process we lose our soul." See Taylor, *Ten Years for Two Ounces*, AM. LAW., Mar. 1990, at 65, 66-68.

There is a further problem with the civil forfeiture statutes. The current law allocates up to ninety percent of the proceeds from drug-related forfeitures to be returned to the local law enforcement agencies.³²³ These agencies have an incentive to urge forfeiture actions because they have a stake in them to the extent that forfeiture funds their budgets.³²⁴ The stake these agencies have in the outcome of the proceeding may explain the dramatic increase in the number of forfeiture actions brought and the amounts collected.³²⁵ In addition, sometimes these agencies simply keep the property forfeited. For example, law enforcement agencies use forfeited luxury cars and boats in undercover "sting" operations. Worse, sometimes these properties are improperly put to personal use by law enforcement personnel.³²⁶ This situation hardly resembles the *Calero-Toledo* Court's characterization³²⁷ of drug-related seizures as "not initiated by self-interested parties,"³²⁸ in order to escape the requirements of notice and hearing

323. See, e.g., 21 U.S.C. § 881(e)(1)(A) (1988).

324. See Fried, *supra* note 264, at 360-66. Professor Fried notes that "Assets Forfeiture Fund income for fiscal year 1986 totalled \$93,711,430." *Id.* at 365 n.167 (citation omitted). He also notes that another institutional incentive for seeking forfeiture is that "[t]he dollar value of forfeited property becomes a convenient way to measure the success of enforcement efforts in general and to distinguish between the performance of individual officers." *Id.* at 362.

This effect is not limited to the federal government. For one thing, the forfeiture statutes authorize payments of proceeds from forfeitures to go to "any State or local law enforcement agency which participated directly in the seizure or forfeiture . . ." 21 U.S.C. § 881(e)(1)(A) (1988); 21 U.S.C. § 853(i)(4) (1988) (referring to Attorney General's authority to dispose of proceeds obtained under § 853 "in accordance with the provisions of 881(e)"). Second, to the extent that the states have enacted similar laws, see *infra* note 331, the incentive effect is experienced throughout the law enforcement community. Indeed, at least one enterprising locality in Missouri, allows law enforcement agencies to bypass a forfeiture proceeding and simply require the owner to pay a certain sum to get his property released. See Osborne, *Police State*, *The Riverfront Times*, Dec. 12-18, 1990, at 1. The procedure is called a "compromise, settlement and release." *Id.* at 11. Police and prosecutors establish the settlement amount at their discretion. *Id.* According to one defense attorney, the process goes something like this: "They say, 'Hey, this looks like a nice-looking car; you look like you've got some money; let's call it \$2,500.'" *Id.* While this procedure is apparently not universally available to law enforcement agencies in the state, *id.* at 12, the article notes that proceeds from drug-related seizures and forfeitures in St. Louis County have increased from \$735.29 in 1983, to \$279,697.97 in 1990 through August. *Id.* at 10.

325. See *supra* note 66.

326. Some examples of forfeited property converted to personal, albeit purportedly "official" use, are cited in Winn, *supra* note 55, at 1111, 1128 (citing GOVERNMENT ACCOUNTING OFFICE, INTERNAL CONTROL—DRUG ENFORCEMENT ADMINISTRATION'S USE OF FORFEITED PERSONAL PROPERTY (Dec. 10, 1986) (report to Sen. Lawton Chiles)).

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

328. *Id.* at 679. It is open to question whether, even in *Calero-Toledo*, the government officials were not "self-interested." In the opinion, Justice Brennan notes: "It is agreed that the yacht was appraised at a value of \$19,800 and that the Chief of the Office of Transportation of the Commonwealth purports to maintain possession of the yacht as legal owner." *Id.* at 668 n.4. In the opinion, this is characterized as "official use." *Id.* at 668. One wonders why the

laid down in *Fuentes v. Shevin*.³²⁹

Finally, as is so often the case, the states have followed the federal government's lead in enacting "tough" forfeiture laws, with predictable results.³³⁰ Over forty states have some type of forfeiture law, either civil, or civil and criminal, many of them patterned after the federal statutes.³³¹ Supporting strict drug control laws and punishments apparently is just as popular and politically fail-proof for state legislators as it is for members of Congress. Given this political climate, claimants in the state courts (where judges are often elected, not appointed) are unlikely to fare any better than those in federal court.³³² Furthermore, to the extent that a state's statute mirrors the federal statutes, federal caselaw represents precedent that is highly persuasive, if not binding.³³³ These factors combine to suggest that

"Office" of the chief was not claiming ownership. Certainly if the chief used the yacht for personal purposes, the forfeiture would appear to be "self-interested." Compare *United States v. Hernandez*, 911 F.2d 983 (5th Cir. 1990) (police instituted a forfeiture action on the jewelry claimant was wearing when arrested).

329. 407 U.S. 67 (1972).

330. The state courts have tended to follow the federal courts' lead in interpreting the forfeiture laws. However, in some of these cases, the existing caselaw has been totally confused. See, e.g., *Florida v. Crenshaw*, 548 So. 2d 223 (Fla. 1989).

331. Some states have statutes that are virtually identical to the federal ones. See, e.g., N.C. GEN. STAT. § 90-112 (1990); 42 PA. CONS. STAT. ANN. § 6801 (Purdon 1990). Others have statutes that are substantially similar but differ in some significant respects. See, e.g., FLA. STAT. §§ 893.12, 932.703-.704 (1989); KY. REV. STAT. ANN. § 218A.270(4), 218A.410 (Michie/Bobbs-Merrill 1982); MASS. GEN. L. ch. 94C, § 47 (1990). A third group of statutes are substantially different than the federal statutes. See, e.g., LA. REV. STAT. ANN. §§ 40:2601-2622 (West Supp. 1991); N.Y. CIV. PRAC. L. & R. § 1311 (McKinney Supp. 1991).

332. See *Florida v. Crenshaw*, 548 So.2d 223 (Fla. 1989). In this case, the issue was whether the government needed to prove that a nexus existed between the use of a vehicle and the prohibited conduct for purposes of a forfeiture statute. *Id.* at 225. It is not clear whether the case was a civil or criminal forfeiture. For instance, the case is styled as one against a person as if it were criminal action. *Id.* at 223. On the other hand, the opinion contains the following language: "Civil forfeitures of property belonging to defendants convicted of criminal offenses is not something new." *Id.* at 225 (emphasis added). This suggests that the case before the court was a civil forfeiture. It also erroneously suggests that a claimant must be convicted of a crime before civil forfeiture can be imposed. Finally, the court suggest that all forfeitures are civil penalties assessed for criminal behavior: "We find that the legislative message was clear: possessing drugs, even solely for personal use, subjects individuals not only to criminal penalties but also to forfeiture of the vehicle, boat or aircraft in which drugs are found." *Id.* at 226.

Justice Kogan, joined by Justices Shaw and Barkett, vigorously dissented. *Id.* at 227. Although he realized that "society's drug-related problems have escalated in recent years," Justice Kogan did not believe "that an abandonment of basic legal principles [was] justified." *Id.* He further outlined the premise that forfeitures for drug-related crimes were not remedial. "The purpose of forfeiture is not to make the state 'whole,' but rather it is intended to deter drug possessors, sellers, and smugglers by seizing their assets and thus penalizing them financially." *Id.* at 229.

333. The Florida Constitution, like that of other states, has a "piggy back" provision with respect to certain constitutional rights, that grafts the federal law onto the state law by

not only are we in danger of becoming inured to the violation of cherished constitutional rights in this context, but that the forfeiture statutes pose significant dangers of governmental corruption at worst, and privateering at best.

VI. CONCLUSION

The "demon" has been tracked to its "lair." The historical justifications for the personification fiction of civil forfeiture have been reviewed and appear irrelevant to modern society. Current justifications for the doctrine similarly ring hollow. The arguments put forth by the courts on this issue are weak and singularly unconvincing. "The modern doctrine of the offending res . . . is a deliberate subterfuge—a judicial fiction, by resort to which the sovereign, with the sanction of the courts, can impose a punishment on a blameless individual who is thereby deliberately left without recourse to his constitutional rights of due process."³³⁴

The government's purpose in the passage of such laws is clear—to wage war on drugs and organized crime. The question is, can it do so in this fashion? Is this a legitimate exercise of the police power? The current application of civil forfeiture is repugnant to the values expressed in the Bill of Rights and the Constitution. Our criminal justice system is principally based on the premise that "[p]unishment is justified when and to the extent it is deserved for responsible wrongdoing."³³⁵ Thus, an action in which criminal sanctions are applied without regard to "wrong-doing," and where the constitutional protections of the criminal process are not afforded to the person so punished, hardly seems to comport with our notions of justice and fair play.

There is no doubt that the drug trade, and its associated evils are a blight on the land. But as one court put it,

We are not unsympathetic to the government's strong desire to eradicate drug trafficking: we recognize that illegal drugs pose a tremendous threat to the integrity of our system of government. We must not forget, however, that at the core of this system lies the Constitution, with its guarantees of individuals' rights. We

providing that rights under a certain provision of the state constitution will be governed by the United States Supreme Court's interpretations of the corresponding provision in the federal Constitution. See FLA. CONST. art. I, § 12 (1982) ("This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.").

334. Finkelstein, *supra* note 35, at 252.

335. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L.R. 655, 656 (1989) (adopting a retributive Kantian theory of punishment).

cannot permit these rights to become fatalities of the government's war on drugs.³³⁶

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336. *United States v. \$38,000 in United States Currency*, 816 F.2d 1538, 1548-49 (11th Cir. 1987). Notably the court does not emphasize the threat to the integrity of our citizens or their health and well-being, but rather to the "integrity of our system of government." It is a telling distinction.