



# CRIMINAL LAW AND PROCEDURE NEWS

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## FORFEITURE IS REASONABLE, AND IT WORKS

Stefan D. Cassella \*

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations -- from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal criminal code.

### Why do forfeiture?

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. Like the statutes the First Congress enacted in 1789, the modern laws allow the

government to seize contraband -- property that is simply unlawful to possess, like illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. For example, if drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its use time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has the right to retain the money

## FORFEITING REASON

Roger Pilon\*

If ever one wanted a glimpse of judicial reasoning gone awry, one could hardly do better than turn to the three forfeiture cases decided by the United States Supreme Court late in the 1995 Term. Two terms ago, when the Court issued four other forfeiture rulings, it looked like this bizarre area of law might soon be rethought from the ground up. For the moment, however, those hopes have been dashed by no less than the chief justice himself, the author of the latest opinions.

### Guilty Things

Under forfeiture, law enforcement officials can seize "guilty property" almost at will. Originating in the Old Testament and the medieval doctrine of "deodands"--in the idea that animals and even inanimate objects involved in wrongdoing could be sacrificed in atonement or forfeited

to the Crown--modern forfeiture law earned its credentials through early American admiralty and customs law, enduring and expanding thereafter with little restraint. It has always been used against "morals" crimes, but not there alone. Today, as during Prohibition, it has come into its own in the endless War on Drugs. Police and prosecutors love forfeiture as a "tool of the trade" and a source of vast revenues that directly enrich their coffers. Victims of all kinds, especially innocent victims, are left reeling in the wake.

### Editor's Note

This is a reprinted version of *Criminal Law and Procedure News*, Vol. 1, No. 2. The earlier version omitted a portion of Roger Pilon's article and failed to note that the essay appeared originally in *Regulation* magazine. This version also contains an addendum to the article which is in response to Mr. Cassella's article.

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gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits -- and any property traceable to it -- thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims -- like carjacking or fraud -- we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and as a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence. In fact, in many cases, prosecution and incarceration are not needed to achieve the ends of justice. Not every criminal act must be answered with the slam of the jail cell door. Sometimes, return of the property to the victim and forfeiture of the means by which the crime was committed will suffice to ensure that the community is compensated and protected and the criminal is punished.

### The parade of horrors

The expansion of forfeiture into all of these areas has, of course, been controversial. When laws that were designed to seize pirate ships from privateers are applied, over the course of a decade, to the seizure of homes, cars, businesses and bank accounts, there are a lot of issues to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far, in violation of the Excessive Fines Clause of the Eighth Amendment? The ten forfeiture cases that the Supreme Court has had on its docket in the past five terms are part of this sorting out process. There are certain to be more; and Congress will need to pass legislation to fill in many of the loopholes.

An informed debate on these issues is welcome. The debate is not informed, however, if it is muddled by the misconceptions and plain old-fashioned misstatements that seem to pop up in every article critical of asset forfeiture. Roger Pilon's article, containing the usual parade of horrors, is a good example.

Once again we are told that forfeiture is based on an absurd legal "fiction" that the property is guilty of the crime, which implies that property can be forfeited without proof that a crime was committed by a real live person. We're told that the government can seize property "almost at will," *i.e.* without due process, and that innocent people find the process so unfair that they walk away from their

property without filing claims. And we're told that even when they do file claims, innocent owners just don't have any rights. Let's see if we can't inject a little truth and understanding into the debate on these points.

### The legal "fiction"

There are three types of forfeiture under federal law: administrative forfeiture, civil judicial forfeiture, and criminal forfeiture. An administrative forfeiture is essentially a default proceeding. It occurs when property is seized and no one files a claim contesting the forfeiture. By definition, *all* administrative forfeitures are uncontested. Between 80 (eighty) and 85 (eighty-five) percent of all forfeitures handled by the Department of Justice fall into this category.

If someone does file a claim to the property, the government has a choice (assuming Congress has provided both options by statute). It can file a civil complaint against the property in district court, thus

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commencing a civil judicial forfeiture; or it can include a forfeiture count in the indictment in a criminal case, which sets the stage for a criminal forfeiture. In 1995, the Justice Department began aggressively training criminal prosecutors in the use of the forfeiture laws, so that now more than half of all contested forfeitures are criminal forfeitures.

Just because a forfeiture is handled administratively or civilly, of course, doesn't mean that there isn't a related criminal case. In *all* forfeiture cases there must be proof that a crime was committed by someone. In fact, in more than eighty percent of *all* forfeitures, including administrative and civil forfeitures, there is a parallel arrest and/or criminal prosecution. There wouldn't have been such a wail and cry about forfeiture constituting a violation of the Double Jeopardy Clause a few years ago if that weren't so. (Between the Ninth Circuit's decision in *United States v. \$405,089.23* in 1994 and the Supreme Court's decision putting the double jeopardy issue to rest in *United States v. Ursery*, thousands of federal prisoners filed post-conviction actions alleging that their criminal conviction and the civil forfeiture of their property constituted double jeopardy.)

The legal "fiction" that the property is "guilty" of the crime is simply a shorthand for the way a civil forfeiture case is styled: *United States v. \$405,089.23*, *United States v. 92 Buena Vista Ave.*, and so forth. In legal parlance, the property in such a case is the "defendant." But property doesn't commit crimes; people do. If there isn't proof that a person committed a crime, there is no forfeiture. If our normally verbose legal system styled its civil forfeiture cases to set forth the full legal theory, this would be obvious. The above cases, for example, might have been called *United States v. \$405,089.23 in Proceeds Earned by Charles Arlt From Selling Methamphetamine*; or *United States v. A Residence at 92 Buena Vista Ave. Purchased with Drug Proceeds that Joseph Brenna, a Drug Dealer, Gave to His Girlfriend*.

In short, forfeiture is a way of reaching the property involved in a crime, but the focus is on the crime, without which there can be no forfeiture. Why do civil forfeiture?

If all forfeitures involve the commission of a crime, and the vast majority involve an arrest or prosecution, why does the government use civil forfeiture at all? It is not, as many contend, because it is necessarily easier. To the contrary, the easiest way to forfeit a criminal defendant's property in many cases is not to file a separate civil action, but to present the forfeiture issue to the same jury that just

convicted the defendant in the criminal case. But sometimes, criminal forfeiture isn't available or doesn't make sense.

Take the administrative forfeiture cases for example. There is no point in including a criminal forfeiture count in an indictment and presenting the issue to a jury if the defendant is not going to contest the forfeiture. If a defendant facing criminal conviction for drug trafficking thinks it pointless to contest the forfeiture of the cash seized from him as drug proceeds at the time of his arrest, it is equally pointless to clutter the indictment with a forfeiture count when administrative forfeiture will answer.

What about the contested forfeitures that are done civilly? The reasons for this are many. First, while there are over 100 civil forfeiture statutes, there are relatively few criminal forfeiture statutes. Drug proceeds can be forfeited either civilly or criminally, for example, but firearms, gambling proceeds, vehicles used to smuggle illegal aliens, and counterfeiting paraphernalia can only be forfeited civilly. See 28 U.S.C. § 2461(a). This is a problem Congress needs to fix.

Second, criminal forfeiture requires a federal conviction for the crime giving rise to the forfeiture. If the defendant is dead or is a fugitive, there can be no prosecution and therefore no criminal forfeiture. If the defendant was prosecuted in a State case, the federal forfeiture has to be civil, because there is no federal prosecution for the criminal offense. And if the defendant is prosecuted for one crime, but the property was involved in a related but separate crime, the forfeiture has to be civil, because the criminal forfeiture is limited to the offense of conviction. For example, drug proceeds seized from a defendant at the time of his arrest must be forfeited civilly if the defendant is charged with possession of drugs with intent to distribute, because such money was necessarily the proceeds of an *earlier* drug deal, not the one for which the defendant is actually prosecuted.

Third, and perhaps most important, criminal forfeiture is limited to the property of *the defendant*. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. For example, if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane. But suppose the only person arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third-party in South America,

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The very names of the relatively few cases that make it to court tell the story: *United States v. \$405,089.23 in United States Currency*; *United States v. 92 Buena Vista Avenue*; *United States v. One Mercedes 560 SEL*. Civil forfeiture actions are brought against *the property*, not against the individual. They are *in rem* proceedings--not for the purpose of gaining jurisdiction over a real person but for the purpose of seizing property for forfeiture to the government. Fantastic as it may sound, it is the property that is charged.

Under this law, officials can seize a person's property, real or chattel, without notice or hearing, upon an *ex parte* showing of mere probable cause to believe that the property has somehow been "involved" in a crime. Neither the owner nor anyone else need be charged with a crime because the action is against "the thing." The showing could allege that the property is contraband, that it represents the proceeds of crime (even if in the hands of someone not suspected of criminal activity), or that it was somehow "used" in crime. And probable cause may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party with interests adverse to those of the property owner.

Once the property is seized, the burden is upon the owner, where permitted, to prove his innocence--not by a probable-cause but by a preponderance-of-the-evidence standard. In defending his innocence, the owner must prove a negative, of course. Moreover, he will be up against the overwhelming resources of the government. And if he has been involved in any activity that might lead to criminal charges, however trivial or baseless those charges may ultimately prove to be, he has to weigh the value of the property against the risk of self-incrimination entailed by any effort to get it back. As a practical matter, the burden is often too high for many innocent owners, who end up walking away from their losses.

### Sex in a Car

In the first of the Court's latest cases, *Bennis v. Michigan*, Mrs. Tina Bennis found herself on the wrong end of a Michigan law when Detroit police charged her husband with engaging a prostitute in the family car. After convicting him of gross indecency, the state brought an action to have the car forfeited as a public nuisance due to its "use" in the crime. A victim of her husband, Mrs. Bennis was now a victim of the state, which took her half-interest in the car. There being no innocent-owner defense available to her under the statute, Mrs. Bennis contested the forfeiture by claiming, among other things, that it

deprived her of her property without due process of law as protected under the Fourteenth Amendment.

In writing for the majority of five that found Mrs. Bennis's claim without constitutional merit, Chief Justice Rehnquist sought the aid of authority--of "long-standing practice"--no fewer than ten times over his brief eleven-page opinion. In fact, the opinion is little but a sustained argument from authority, from "a long and unbroken line of cases" that includes one in which a woman purchased a car from a dealer who, while entrusted with the car, allowed it to be used for the illegal transportation of liquor, resulting in its forfeiture to the state; and another in which a leased yacht was lost after it was used by the lessee to transport marijuana in direct violation of the ship's lease. In a recent book, *Forfeiting Our Property Rights*, published for the Cato Institute, Congressman Henry J. Hyde catalogues a long list of far worse cases: police who stop motorists and seize their cash on the spot; agents who destroy boats, cars, homes, and airplanes, and even kill and maim in the name of forfeiture. Such is the history of a body of law that is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."

What that law says is that Mrs. Bennis is effectively out of court. The essence of her due process claim, Rehnquist notes, "is not that she was denied notice or an opportunity to contest the abatement of her car; she was accorded both. Rather, she claims she was entitled to contest the abatement by showing she did not know her husband would use [the car] to violate Michigan's indecency law." It is here, precisely, that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited *by reason of the use to which the property is put* even though the owner did not know that it was to be put to such use." Thus, the process Mrs. Bennis was due was essentially pointless: once it had been determined that the car had been so used, nothing Mrs. Bennis could have said at any proceeding would have made a difference; for as the Court said in 1827 in the famous case of *The Palmyra*, "the thing is here primarily considered as the offender."

### Disquieting Implications

Through the years, not surprisingly, the Court has struggled mightily with that fiction. Even in *Bennis*, for example, Rehnquist tries to correct a 1993 Court observation that in a 1921 case the Court had "expressly reserved the question whether the [guilty-property] fiction could be employed to forfeit the property of a truly innocent owner." That observation "is quite mistaken," Rehnquist says, for the 1921 Court expressly reserved opinion about

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or by the pilot jointly with his spouse, criminal forfeiture is pointless.

The same is true if we want to forfeit a crack house. We can prosecute the tenants in the building until the cows come home, but we will never be able to forfeit the building criminally if the tenants don't own it. If the building belongs to a slumlord who allowed his property to be turned into a crack house, we need civil forfeiture to shut it down.

### Due Process

Whatever the reasons why civil forfeiture is essential to federal law enforcement, it goes without saying that the process must be fair. All property owners -- whether they be criminal defendants or third parties -- are entitled to due process of law. Mr. Pilon contends that due process is lacking. He says that the government can seize property "almost at will," that officials can "seize property, real or personal, without notice or hearing," and that innocent parties find the system so daunting that they abandon their property without filing a claim. On all points, he is greatly mistaken.

Seizures of property for forfeiture are governed by the same rules that govern seizure of property for evidence -- the search and seizure requirements of the Fourth Amendment. See *United States v. Lasanta*, 978 F.2d 1300 (2d Cir. 1992). If federal agents want to seize property for forfeiture, they have to get a warrant, unless one of the recognized exceptions to the Fourth Amendment applies, like when cash is found in plain view in a vehicle that can be driven away, and there is probable cause to believe it's drug proceeds, or when property is found during a search incident to a lawful arrest. In fact, in many instances, forfeiture seizures are more limited than their evidentiary counterparts. See 18 U.S.C. § 981(b)(2) (in money laundering cases, warrantless seizures are authorized during searches incident to arrest, but not in other exigent circumstances).

In real property cases, the rules are still more restrictive. In *United States v. James Daniel Good Property*, 114 S. Ct. 492 (1993), the Supreme Court held that real property may not be seized at all, even with a warrant based on a showing of probable cause, until the property owner has been given notice and an opportunity to be heard. In short, in real property cases, the Due Process Clause of the Fifth Amendment requires the government to give property owners more "process" than is due under the Fourth Amendment.

Moreover, seizing the property isn't the end of the process; it's only the beginning. If someone wants to contest a forfeiture he has a right to file a

claim, thereby forcing the government to file a civil or criminal forfeiture action in federal court. If the case is civil, the claimant has all the rights that attend normal civil litigation, including the right to discovery and the right to a trial by jury. Finally, the forfeiture verdict must be based on a preponderance of the *admissible* evidence, not the probable cause evidence that was sufficient for the seizure.

Of course, any system can be improved. The Justice Department has proposed legislation to make the government carry the burden of proof in civil forfeiture cases. We also have suggested making it easier for people to file claims in forfeiture cases by extending the filing deadlines, and we have proposed a remedy for those whose property is damaged in government custody. (The Justice Department's legislative proposal and supporting testimony are published in the record of the Hearing on the Civil Asset Forfeiture Reform Act, H.R. 1916, House Committee on the Judiciary, 104th Congress, 2d Sess., Serial No. 94, July 22, 1996.) But it is preposterous to say that property owners are denied due process under current law.

### The Uncontested Forfeitures

What should we make of the fact that so many forfeitures are uncontested? The critics, of course, see this as evidence that innocent property owners are walking away from their property without filing a claim because the procedures are unfair. But the opposite is far more likely. Four out of five forfeitures are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless. A defendant charged with smuggling illegal aliens, for example, might see little advantage in contesting the forfeiture of the truck he was driving when he was arrested and the aliens were found. Remember, eighty percent of all forfeitures involve a parallel arrest or prosecution. Those are cases in which the defendant is in court anyway, has counsel, and yet most of the time does not object to the forfeiture.

Certainly, there are still due process issues to be worked out. One of the most nettlesome involves the current flood of post-conviction pleadings being filed by federal prisoners who contend that they didn't contest forfeiture actions because they didn't receive proper notice. See *e.g. United States v. Clark*, 84 F.3d 378 (10th Cir. 1996). Most commonly, the prisoners complain that the government sent the notice to the wrong jail or to a home address when the government knew that the person was incarcerated. Criminals have due process rights just like everyone else, so the government must

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find a way to provide notice of forfeiture actions to persons being held in jail. But these are hardly cases that involve innocent claimants not filing claims because the procedures are stacked against them.

### Innocent Owners

In his discussion of *Bennis v. Michigan*, Mr. Pilon makes a persuasive argument that the Constitution does not adequately protect innocent owners in civil forfeiture cases. It is an argument, however, that has little relevance to federal forfeiture law.

*Bennis*, it must be remembered, was a State case. Michigan, apparently, does not provide statutory protection for innocent owners, and the Supreme Court held that no such protection is required by the Due Process Clause. Fair enough. But the fact that the Constitution doesn't protect innocent owners doesn't mean that the legislature cannot do so. In fact, Congress has included an innocent owner defense in virtually all of the most widely used federal forfeiture statutes. For example, the drug statutes, 21 U.S.C. § 881(a)(4) and (7), say that neither vehicles nor real property, respectively, may be forfeited if they were used to commit a crime without the knowledge or consent of the owner.

Mr. Pilon's claim that "hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them" is just plain wrong. Even a property owner who "knows" that his property is being used for an illegal purpose is protected from forfeiture if he shows that he took all reasonable steps to prevent the activity. See *United States v. 141st Street Corp.*, 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); *United States v. One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496 (11th Cir. 1992).

For example, the owner of a residential hotel doesn't have to put a stop to drug transactions on his property; he just has to do what a reasonable owner would do to try to stop it, like call the police, evict tenants convicted of committing drug crimes on the premises, and install security devices like locks and adequate lighting. See *United States v. All Right, Title and Interest (Kenmore Hotel)*, 77 F.3d 648 (2d Cir. 1996).

### What Congress Can Do

A key provision in the Justice Department's legislative proposal would codify this concept and thus extend the innocent owner defense to *all* federal forfeiture statutes. In addition to the other due process reforms discussed above, this would go a long way toward making sure that the forfeiture laws are up to date and protect the rights of all property owners. But there is more that Congress can do to enhance the forfeiture laws.

First, the criminal forfeiture statutes should be revised to make sure the government can use them in all cases where it's appropriate to do so. Criminal forfeiture should be available wherever civil forfeiture is authorized. The government also needs better tools to enforce criminal forfeiture judgments against convicted defendants, and needs to be able to restrain property subject to forfeiture, including substitute assets, pre-trial, to make sure that the assets are still around once the defendant is convicted.

Also, there is no rhyme or reason to the current forfeiture laws regarding the forfeiture of criminal proceeds. We can forfeit proceeds in drug cases, but not in fraud cases; we can forfeit the money paid to a "bag man" in a money laundering case, but not the money paid to a "hit man" in a murder-for-hire case. All criminal proceeds should be subject to forfeiture, and the term "proceeds" should be defined to mean gross proceeds, not net profits. It is absurd that some courts have allowed heroin traffickers to deduct their overhead expenses from the amount of proceeds subject to forfeiture. See *United States v. McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996).

In these and many other ways, the forfeiture laws can be improved both to protect the rights of property owners and to allow the government to make full use of this dramatically successful law enforcement tool. Congress has that opportunity this year. If we can avoid the misstatements and misconceptions that serve only to polarize the debate, law enforcement, defense attorneys and legislators can work together to produce a genuinely comprehensive and effective body of laws to make forfeiture work for all of us.

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whether forfeiture "can be extended to property *stolen* from the owner or otherwise taken from him *without his privity or consent*." One may ask whether there is any real difference between those two reservations. But regardless, the distinction Rehnquist then draws between property that is "used without the owner's consent," where the question of forfeiture's application is reserved, and property that is "used in a *manner* to which the owner did not consent," where forfeiture is applied, should be utterly irrelevant. For if the *property* is guilty--that is forfeiture's premise--it matters not at all whether it was stolen or merely "entrusted."

Not even Rehnquist appears willing to follow the logic of the argument, however. Thus, he answers Justice Stevens's suggestion, in dissent, that this law "would justify the confiscation of an ocean liner just because one of its passengers sinned while on board" with a dodge: "When such application shall be made it will be time enough to pronounce upon it." (Let the record show that hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them.) And in a move that only muddies the foundations of this law, Rehnquist notes that "forfeiture also serves a deterrent purpose distinct from any punitive purpose." Absent any knowledge of what her husband was up to, it is hard to imagine what Mrs. Bennis might have done, under the threat of forfeiture, to deter his assignation. That she was punished by the law, however, is beyond any doubt. **Does Forfeiture Punish?**

Or is it? We come thus to the other two cases in this term's forfeiture trilogy, *United States v. Ursery* and *United States v. \$405,089.23 in United States Currency*, which were consolidated in a single opinion because they raised the same question: Do civil forfeitures constitute "punishment" for purposes of the Fifth Amendment's Double Jeopardy Clause? Notwithstanding the admission just noted from *Bennis*, Rehnquist concluded, this time with all but Justice Stevens on board for at least the judgment, that civil forfeitures do not constitute punishment and so are not subject to the strictures of the Double Jeopardy Clause.

That clause prohibits the government, as the Court recently put it, from "punishing twice, or attempting a second time to punish criminally for the same offense." In *Ursery*, the Sixth Circuit had cited double jeopardy to reverse Guy Ursery's conviction and sixty-three-month sentence for manufacturing marijuana because Ursery had already been punished by the forfeiture of his home following its use in the crime. In *\$405,089.23*, the Ninth Circuit had cited

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## APPELLATE CORNER

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courts in their conduct of *voir dire*." Moreover, she noted that the old rule admitted of no limiting principle because jurors might conceivably give undue credit to any number of identifiable classes of witnesses, not just police officers. (Indeed, in his panel concurrence, Judge Luttig had argued that unless the Circuit's precedent were overruled, the Court would similarly have to require that jurors be asked whether they would give special credence to the word of a criminal defendant simply because he is a criminal defendant.) In scrapping the *per se* rule, Judge Williams stated that the Fourth Circuit was joining the Third, Fifth and Eleventh Circuits.

Applying the new standard, the majority concluded that the District Court's extensive questioning of potential jurors as to whether their family relationships with law enforcement officers or their employment with law enforcement agencies might make it difficult for them to be completely impartial in the case sufficiently placed the potential jurors on notice that bias in favor of law enforcement officials was inappropriate. In addition, the Court's questioning whether potential jurors would be prejudiced against the defendants because of their status as inmates and its catch-all probing of any other forms of bias or partiality was sufficient to ensure that the testimony of the police officers was not given heightened credibility solely because of their status as officers.

Judge Murnaghan wrote a vigorous dissent joined by Judges Ervin, Hamilton, and Michael. He criticized the majority for abandoning circuit precedent and a rule adhered to by the First, Second, Seventh, Eighth, Ninth, and D.C. Circuits. He also contended that the *per se* rule constituted a narrow exception to the general principle of deference to a trial court's supervision of *voir dire* and that it was necessary to root out impermissible bias in cases where the government's case turns on the credibility of law enforcement officer testimony. This bias, he felt, could not adequately be exposed through questions about potential jurors' relationships with law enforcement officers and agencies, bias against the defendants as inmates, and general biases. Finally, the dissent criticized the majority for discarding a *per se* rule in favor of a case-by-case test "that gives [district courts] little [guidance] or none at all." Curiously, Judge Motz did not join Judge Murnaghan's dissent, although she professed her total agreement with his reasoning. She wrote separately to urge the adoption of the *per se* rule under the Court's supervisory authority even if the rule were not constitutionally mandated. Given the Supreme Court's recent denial of certiorari in

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penalty. However, when considerations of equality point to a stricter capital jurisprudence, with less room for discriminatory refusal to impose the penalty, it is strangely silent.

The opponents of capital punishment have utterly failed in their attempts to persuade the American people. Solid majorities across all racial, geographic, income, and educational lines favor it.<sup>29</sup> The anti-death penalty strategy now is to kill it by imposing unrealistic conditions on its imposition. While pretending to be neutral, the American Bar Association is, in fact, an active participant in that strategy.

<sup>1</sup> *United States v. Monsanto*, 491 U.S. 600, 610, 614 (1989).

<sup>2</sup> *Wanted: Pro Bono Counsel for Indigent Death Row Inmates*, 14 Hum. Rights 29 (Winter 1987).

<sup>3</sup> Quade, *From Wall Street to Death Row*, 14 Hum. Rights 18, 62-63 (Winter 1987).

<sup>4</sup> 21 U. S. C. § 848(q)(9).

<sup>5</sup> American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 5.1 III, at 59 (1989).

<sup>6</sup> Harris, Report Accompanying Recommendation 107, at 4 (1997).

<sup>7</sup> Lyon, *Defending the Death Row Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 700 (1991).

<sup>8</sup> American Bar Association, *Annotated Model Rules of Professional Responsibility* Rule 3.1, at 297 (3d ed. 1996); *id.*, at 302 (no exception for "dilatatory tactics" by criminal defense lawyers).

<sup>9</sup> *See Murray v. Carrier*, 477 U.S. 478, 484 (1986).

<sup>10</sup> *Brown v. Allen*, 344 U.S. 443 (1953). Before *Brown*, the rule was that when the processes of state review and certiorari to the Supreme Court had been completed, "a federal court will not ordinarily re-examine upon habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U.S. 114, 118 (1944).

<sup>11</sup> *See, e.g., Adamson v. Ricketts*, 865 F.2d 1011, 1027 (9th Cir. 1988) (Arizona death penalty unconstitutional because judge, rather than jury, finds qualifying circumstances); *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990) (that issue had been settled the other way years earlier); *Dunn v. Simmons*, 877 F.2d 1275, 1278 (6th Cir. 1989) (Kentucky procedure for adjudicating validity of prior conviction violates "federal standards"); *Parke v. Raley*, 506 U.S. 20, 28 (1992) (Kentucky rule "easily passes constitutional muster"); *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985) (Arkansas death penalty law unconstitutional in part); *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir. 1989) (*Collins* overruled as irreconcilable with later Supreme Court precedent).

<sup>12</sup> *See* 28 U. S. C. § 2254(d).

<sup>13</sup> *See* 28 U. S. C. § 1738.

<sup>14</sup> Harris, *supra* note 6, at 11-12.

<sup>15</sup> *McFarland*, 114 S.Ct., at 2574.

<sup>16</sup> *Lonchar v. Thomas*, 134 L.Ed.2d 440, 449 (1996).

<sup>17</sup> 499 U.S., at 502.

<sup>18</sup> *Model Rules*, *supra* note 8, Rule 3.3, at 307.

<sup>19</sup> While the report states it is not official ABA policy, it is publicized by the ABA along with the resolution. It can be found on the ABA Web page, <http://www.abanet.org>. If a dissenting report exists, it is not similarly publicized.

<sup>20</sup> Harris, *supra* note 6, at 13.

<sup>21</sup> Klein & Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 *Jurimetrics J.* 33 (1991).

<sup>22</sup> *McCleskey v. Zant*, 580 F.Supp. 338, 368 (N.D. Ga. 1984), *aff'd in part*, 753 F.2d 877, *aff'd sub nom. McCleskey v. Kemp*, 481 U.S. 279 (1987) ("The best models which Baldus was able to devise which account to any significant degree for the non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either" the prosecution's decision to seek the death penalty or the jury's decision to impose it).

<sup>23</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>24</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>25</sup> *Sumner v. Shuman*, 483 U.S. 66 (1987).

<sup>26</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality).

<sup>27</sup> *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *cf.* Model Penal Code § 210.6(4).

<sup>28</sup> *McKoy v. North Carolina*, 494 U.S. 443 (1990).

<sup>29</sup> Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1994*, at 181 (1995).

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double jeopardy to reach the converse result, reversing the forfeiture of money and other property involved in money laundering and in a conspiracy to aid and abet the manufacture of methamphetamines because the owners of the property had already been punished following their convictions for those crimes—life in prison and a ten-year term of supervised release in one case, life in prison and a five-year term of supervised release in the other.

In reaching their decisions, however, the two circuits had misread three recent opinions, Rehnquist says. In *United States v. Halper* (1989), the Court had held that a disproportionate civil penalty was punishment and thus implicated the Double Jeopardy Clause. In *United States v. Austin* (1993), the Court had held that civil forfeiture under the drug statute before it "constitutes 'payment to a sovereign as punishment for some offense' and as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." And in *Department of Revenue of Montana v. Kurth Ranch* (1994), the Court had held that a marijuana tax motivated by a "penal and prohibitory intent" makes the proceeding that imposes it on someone already convicted of possession "the functional equivalent of a successive criminal prosecution" in violation of the Double Jeopardy Clause.

But none of those cases, Rehnquist notes, involved *in rem* forfeitures for double jeopardy purposes. What the circuits should have done, he says, is follow three cases that begin with *Various Items of Personal Property v. United States* (1931) and end with *United States v. One Assortment of 89*

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Attorney's Office to answer a question as to how often it sought waivers of the *Petite* policy, but it refused to answer. The Court concluded that there was no evidence of a selective prosecution for any invidious reason, but it was "concerned about the selection of a defendant for federal prosecution after a state court jury acquittal, and on a charge for which he was convicted in state court."

Having worked through this analysis, Judge Harrington found that several factors "give rise to constitutional implications": (1) the substantial delay between the date of the offense and the return of the federal indictment; (2) a successive prosecution for firearms possession for which Stokes had already been convicted and sentenced and for which he would face a "disparate" sentence of life imprisonment without the possibility of parole; (3) "[i]n effect, a successive prosecution" for a murder of which he had been acquitted, but would now be tried under a preponderance of the evidence standard; and (4) "[a] form of actual 'selective' prosecution, in that the prosecutorial decision is the product of unfettered discretion." Finally, Judge Harrington held that "[a]lthough no one factor, by itself, may offend constitutional canons, the effect of all of the factors in the aggregate, in my judgment, violates the Due Process Clause." He explained: "Fair play is the essence of due process . . . . It is not fitting for the United States to be vindictive, as a spirit of vengeance is not in keeping with the precepts of balance and moderation which are the foundation of our legal tradition." Thus, finding the whole greater than the sum of its parts, Judge Harrington dismissed the indictment. An appeal to the First Circuit is pending.

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*Firearms* (1984). In *Various Items*, the Court laid down the rule: Because forfeiture is against "the property," which is "held guilty and condemned as though it were conscious instead of inanimate and insentient," it is "no part of the punishment for the criminal offense." Thus, double jeopardy does not apply. In *89 Firearms*--where the owner of the "defendant weapons" had already been acquitted of charges of dealing firearms without a license--the Court found that the government's subsequent forfeiture action did not violate the Double Jeopardy Clause because Congress intended forfeiture to be a remedial civil sanction, because forfeiture reached a broader range of conduct than its criminal analogue, and because it furthered such "broad remedial aims [as] discouraging unregulated commerce in firearms."

If this all sounds result-oriented, and not a little circular, it is no accident. The Court says, in effect, that forfeiture is civil and remedial, not punitive, because Congress and courts from time immemorial have said it is. More than circular, however, the argument is often incoherent. Thus, when the Court says that a forfeiture may be subject to the Double Jeopardy Clause if it is "so punitive" as to be equivalent to a criminal "proceeding" [sic]--as if punishment of *any* degree, as distinct from restitution, did not require the greater scrutiny of a criminal proceeding--we have yet another indication of a court without a systematic theory of remedies. Indeed, "remedial," for the Court, pertains not simply to righting or remedying wrongs--as in making victims whole--but to advancing public purposes like "discouraging unregulated commerce." In the end, it comes as no small relief to discover Justice Stevens noting, in dissent, that the Court's conclusion that forfeiture is punishment "for purposes of" the Excesses Fines Clause but not "for purposes of" the Double Jeopardy Clause makes "little sense."

The beauty of discerning only distinctions and differences, of course, is that you can find a reason for every result--or, less charitably, a principle for every fact pattern. Unlike the search for *organizing* principles, it is a method ideally suited for ad hoc jurisprudence. But perhaps the concurrence of Justice Kennedy best illuminates this law. Forfeiture is "not directed at those who carry out the crimes," Kennedy says, "but at owners [like Tina Bennis] who are culpable for the criminal misuse of the property." (And Kennedy dissented in *Bennis*!) Wrong on both counts, Kennedy then adds that forfeiture "does not depend upon or revive the fiction that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and

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receives the stigma of the forfeiture, not the property." Fortunately, the fiction today is gone. Only its implications remain, to give pain to property owners--but not for double jeopardy purposes.

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### Addendum

In response to Stefan Cassella's "Forfeiture Is Reasonable, and It Works," which is a lengthy criticism of my essay above, I should note first that my essay was written as a critical review of the three forfeiture opinions the Supreme Court handed down in its 1995 Term, not as a general critique of forfeiture law. (For that, see my "Can American Asset Forfeiture Law Be Justified?" 49 *New York Law School Law Review* 311 (1994).) Nevertheless, Mr. Cassella presents a general defense of forfeiture, using as his foil certain points I only mention above. Thus, I appreciate this opportunity to expand upon those points.

An "informed debate" is welcome, Mr. Cassella tells us, but not one "muddled by the misconceptions and plain old-fashioned misstatements that seem to pop up in every article critical of asset forfeiture," of which mine, "containing the usual parade of horrors, is a good example." (Sensitivity to criticism aside, "every" article?) "Greatly mistaken," "preposterous," "just plain wrong"--in the interest of injecting "a little truth and understanding into the debate," Mr. Cassella takes off the gloves. I am fortunate to be able to keep mine on as Mr. Cassella's arguments, once exposed, will do the work for me.

### Justification

In a free society, government power--especially the power to seize private property for forfeiture to the government--is not a given. It must be justified. Yet nothing is so clear in Mr. Cassella's essay as that he hasn't a clue about the business of justification. Thinking like the government agent he is, his only concern is with forfeiture's use as a "tool" in the war on crime--and in the endless war on drugs, in particular. From beginning to end his argument is pragmatic. Look at his title. It is as if the idea that what he is doing (or proposing) needs to be *justified* in anything more than a crude utilitarian way never crossed his mind. Indeed, because he does not go to the root of the matter--to the theory of forfeiture--

his argument turns upon itself in the end, as we shall see, its author oblivious to that result.

No one doubts that forfeiture is a useful tool against crime. Over the years, the rack, the thumbscrew, and the police state too have proven useful to that end. Usefulness aside, what disturbs so many about forfeiture is its implications for the rights of the innocent and the guilty alike. When forfeiture is used to confiscate the property of innocent people, to deny due process to both the innocent and the guilty, and to impose disproportionate sanctions on the guilty, one wants to know what, if anything, justifies it.

As a stab at that question--a mere stab--Mr. Cassella lists six "rationales" for forfeiture: to seize contraband, to abate nuisances, to take the instrumentalities of crime, to take the profit out of crime and return property to victims, deterrence, and punishment. Presumably, the justificatory force of those reasons is something close to "self-evident" for him, for he presents them with little dressing.

To be sure, two of the rationales may be close to self-evident. On the assumption that "contraband" makes sense in a free society--and even then, not everything on Mr. Cassella's list should be there--government forfeiture would seem to follow. Similarly, the return, through forfeiture, of ill-gotten goods--properly defined and with sufficient due process--presents little problem for the rights of owners--in fact, it enhances them.

But nuisance abatement through forfeiture? Ordinarily we don't take property for that purpose; we simply enjoin the offensive use, leaving the property with its owner, to use in some other way. As for "instrumentalities"--forfeiture's notorious "facilitation" doctrine--this boundless rationale is the source today of most of the outrage. Far from self-evident, it cries out for justification. And it does so especially when combined with the deterrence and punishment rationales. Those rationales have never been part of forfeiture's justification *in principle*, as the Court has repeatedly said--then denied in a logical pirouette that makes "little sense," as Justice Stevens rightly put it.

Indeed, to recur to *Bennis* above, what was the point of taking Mrs. Bennis's half-interest in her car? To deter her? From what? To punish her? For what? The gap from the premise that a car, plane, ranch, hotel, or ocean liner "facilitates" a crime to the conclusion that it is, therefore, forfeitable to the government is fairly yawning, not self-evident, and no argument from utility will bridge it--not, that is, if we're serious about justification.

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Rather than address that problem directly, however, Mr. Cassella gleans from my essay a "parade of horrors." "We are told," he says, (a) "that forfeiture is based on an absurd legal 'fiction' that the property is guilty of the crime, which means that property can be forfeited without proof that a crime was committed by a real live person;" (b) "that the government can seize property 'almost at will,' i.e., without due process, and that innocent people find the process so unfair that they walk away from their property without filing claims;" and (c) "that even when they do file claims, innocent owners just don't have any rights." Let's look closely to see whether Mr. Cassella has stated my objections correctly and whether his answers hold up.

### An Absurd Legal "Fiction"?

Mr. Cassella tells us, as if we needed instruction on the point, that "property doesn't commit crimes; people do." Just so. But why then file an action against the property? Ignoring the *in rem* history of forfeiture, Mr. Cassella would have us believe that "the legal 'fiction' that the property is 'guilty' of the crime is simply a shorthand for the way a civil forfeiture case is styled." Really? You mean that all these years, through "a long and unbroken line of cases...too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," as the *Bennis* Court put it, we've been wrong in believing that "the thing is here primarily considered as the offender"?

On one point, of course, Mr. Cassella is right: the fiction is an absurdity. But it's not a mere point of "style." It's the law. And Mr. Cassella himself is not above resorting to that law when it serves his purpose. Thus, he asks, "If all forfeitures involve the commission of a crime, and the vast majority involve an arrest or prosecution, why does the government do civil forfeiture at all?" Why not just do criminal forfeiture by including a forfeiture count in a criminal indictment? Why not?

The "most important" reason, he says, is because "criminal forfeiture is limited to the property of the defendant. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing [for the government]. Only civil forfeiture will reach the property." (original emphasis) That is a striking admission. Indeed, notice precisely what Mr. Cassella is saying here. Proceeding "normally," against the accused--remember, only people commit crimes--we can't reach the property of someone else. What a surprise! People get to keep their property unless they've done something to lose it. That's what we call the rule of law. Mr. Cassella, however, wants to get around that

rule: "if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane," even if it belongs to someone else. Why? If *A* violates the law, why take *B*'s property? Because the property "facilitates" the crime? We're right back where we started from--needing to justify the facilitation doctrine.

In fact, it is here, precisely, that Mr. Cassella's argument turns upon itself. He wants, rightly, to abandon the absurd "fiction" that the property is guilty. But he can't, because then he would have no reason--no justification--for seizing property that belongs to someone accused of no crime. Yet if he resorts to the facilitation doctrine--the very doctrine that needs to be justified, not assumed--then he's right back with the legal fiction that has always been thought to underpin the doctrine.

Mr. Cassella's argument, in short, is circular. At least the standard rationale for the facilitation doctrine makes a stab at justification by invoking the legal fiction that property that facilitates crime is "guilty"--however absurd that fiction may be. Mr. Cassella's approach abandons that fiction. But the price of doing so is to reveal facilitation forfeiture for the naked power it always was and still is: "*A* used *B*'s plane to commit a crime; whether or not we prosecute *A*, we want *B*'s plane." Why punish *B*? "We're not punishing *B* since the action is brought against the property, not *B*." And on and on, in a vicious circle of argument that no one any longer believes, if ever anyone did, even if the Court continues to parrot the rhetoric.

My point in raising the absurd "fiction" in the essay above, then, was not to defend it--far from it--but to shine light on the equally absurd facilitation doctrine it purports to support. That the facilitation doctrine rests on a house of cards is nowhere more evident than in the Court's strained efforts to apply it, as outlined above under "Disquieting Implications." Under the doctrine the Court has allowed the seizure of boats and even yachts. But ocean liners? "When such application shall be made it will be time enough to pronounce upon it," Chief Justice Rehnquist says. So much for the rule of law.

### Due Process?

Once the absurdity of the facilitation doctrine is exposed, those who want to salvage it invariably turn their attention to something the otherwise innocent owner may have done, some "guilt" of his, even though, strictly speaking, that is irrelevant to the doctrine--and efforts to address the question fit uneasily into *in rem* proceedings. But historically, a concern for innocent owners has come

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only very recently, through statute, where it has come at all. Before turning to those spotty statutory developments, however, we need to take up the disturbing procedural issues that Mr. Cassella has conflated in each of his three restatements of my objections to forfeiture.

He is right to say, of course, that property cannot be seized, exigent circumstances aside, "without proof that a crime was committed by a real live person." But that statement about "proof" overstates the matter by a wide margin, as we shall see. Moreover, as counterpoint, it misstates what I said. I never said that under current law no proof of any kind is required to seize property. Nor did I say that government's power to seize property "almost at will" meant "without due process"; it was not for nothing that I used the word "almost." Finally, Mr. Cassella has me saying that "officials can 'seize property, real or personal, without notice or hearing'"--leaving off the rest of the sentence, "upon an *ex parte* showing of mere probable cause to believe that the property has somehow been 'involved' in a crime."

Clearly, the issue here is not whether there is *any* process in a typical forfeiture action, but just *how much* and *what kind* of process should be due. More deeply, however, it is also whether, given the substantive law, process even matters--a point Mr. Cassella seems not to have grasped. To read him, one would think that the process now afforded defendants and nondefendants alike is just about right; yet we know that at every step of the way the Department has fought both procedural and substantive changes in forfeiture law. Against me, for example, Mr. Cassella cites the 1993 *Daniel Good* case, which requires that owners be given notice and an opportunity to be heard before real property can be seized; what he fails to note is that the Department argued against that result all the way to the Supreme Court.

To put the procedural and substantive concerns together in a single question, how could it be right--as it is today in many states and still is under some federal statutes--to seize a person's property through an *ex parte* proceeding at which the standard of proof is mere "probable cause" about the property's "involvement" in a crime--and afford that person no *ground* for subsequently reclaiming his property? To be sure, there is a "process"--*ex parte*--and it does require "proof"--at the lowest possible level, and not necessarily about anything the *owner* may have done. In a free society, however, it is hardly the process and the proof we should think sufficient to seize a person's property.

Mr. Cassella attempts to assure us, of course, that the owner can always contest a seizure. But that is not the case where no innocent owner defense is available. That was the whole point above, in my discussion of *Bennis*. Mr. Cassella has me making "a persuasive argument that the Constitution does not adequately protect innocent owners in civil forfeiture cases." I make no such argument. In fact, in my view the Constitution *does* protect innocent owners like Mrs. Bennis through a properly read Fourteenth Amendment (both the Privileges and Immunities and the Due Process Clauses), which would negate the facilitation doctrine. But that's not the point here. Rather, the point is that, given the facilitation doctrine, and the absence of an innocent owner defense, no process in the world could have saved Mrs. Bennis: however innocent she may have been, her property *did*, after all, "facilitate" the crime.

### Innocent Owners and Due Process

Given the substantive law, then, the sufficiency of any process that may be available is not the issue if no innocent owner defense is available: for whatever the process, there's nothing for owners to prove through it; we're back to the fiction; the *property* is guilty. But even when an innocent owner defense is available, both the substantive and the procedural law make it an uphill battle for owners to reclaim their property once the government has seized it.

There are two reasons for this. First, the standard innocent owner defense places the burden of proof on the owner, not on the government, and the standard is high: the owner must prove, not by a probable cause standard but by a preponderance of the evidence, that he neither consented to the use to which his property was put nor knew about its use. Mr. Cassella makes light of this burden of proving a negative. Yet in response to my claim that "hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them," which he says "is just plain wrong," the first case he cites is one in which the owner was *unable* to carry out his burden. (See also Seth Faison, "In Largest Takeover Under Narcotics Law, U.S. Seizes a Large New York City Hotel," *New York Times*, June 9, 1994, at A1, B3.)

But in all of this Mr. Cassella has utterly ignored the practical implications of this set up, which brings us to the second reason owners face an uphill battle getting their property back, even when an innocent owner defense is available. Let's be realistic: it's no small matter to go up against a government--federal, state, or local--that has just

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seized your property, especially if the seizure leaves you penniless, as it sometimes does, and especially if the cost of recovery might exceed the value of the property, as if often does. Is it any wonder that innocent owners often walk away from their losses? Mr. Cassella is simply oblivious to this point.

But there are still other practical impediments for innocent owners, the full measure of which Mr. Cassella himself brings out, without noticing it, in his discussion of the three types of forfeiture--administrative, civil, and criminal. If the owner does not challenge the seizure, Mr. Cassella tells us, his property forfeits to the government in an administrative, "default" proceeding. But if the owner does challenge the seizure, the government can get rough by filing a civil complaint against the property or, even worse, by including a forfeiture count in a criminal indictment. Think about it. "Complain about our seizure of your property and we'll file a civil complaint against it, putting you to the burden of proving your innocence; or perhaps we'll file a criminal indictment against you--however thin the evidence--or both. Why don't you go easy on yourself and just walk away?" Doesn't happen--

federal, state, or local? Lord Acton spoke to that matter. So much power in the hands of government, especially where departments literally keep the property, has got to corrupt. As Chairman Henry Hyde's book shows, again and again, it does.

In sum, Mr. Cassella paints a seemingly reasonable picture of a useful "tool" in the war on crime. Closer examination, however, shows forfeiture to be fraught with peril. Originating in this country with the practical problem of reaching distant owners in the customs context, its roots are far more remote than that. It has grown over the years--especially during the era of alcohol prohibition and, today, in the era of drug prohibition--into a weapon not simply against crime but against the rule of law itself. Yet a good part of what we do today through forfeiture can be done through more legitimate, more justifiable means. In the end, forfeiture does not need to be reformed. It needs to be relegated to the dustbin of history from which it came and replaced by sound principles of law. Government needs tools, to be sure, but in a free society they must be legitimate.



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