Policy Analysis

Cato Institute Policy Analysis No. 179: American Forfeiture Law: Property Owners Meet the Prosecutor

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Executive Summary

Forfeiture laws have become increasingly popular with state and federal law enforcement officials during the last 10 years. A subject once relegated to obscure passages in the musty recesses of lawbooks, and rarely invoked in practice, forfeiture has quickly become the darling of law enforcement. Since 1985, for example, the total value of federal asset seizures has increased over 1,500 percent--to over $2.4 billion,[1] including over $643 million for the Department of Justice in FY 1991 alone.[2] This bonanza for law enforcement officials, however, has become a Kafkaesque nightmare for some property owners, who have found themselves caught up in a world of bizarre legal doctrine, sometimes without the assets even to defend themselves.

A New Jersey couple, for example, found their home and their two cars seized by local police based upon an allegation that they had violated New Jersey law by stealing Express Mail packages containing inexpensive clothing from the neighbors' property.[3] Similarly, a substantial New Jersey construction company was seized--lock, stock, and bulldozer-- by state officials based upon a contractual dispute in which state officials alleged that the company had won, and performed, three municipal construction contracts upon which it was allegedly ineligible to bid.[4] According to the reasoning of the New Jersey attorney general's office in that case, if corporate property is used unlawfully, then all corporate property is subject to summary seizure by the government and subsequent forfeiture to the government.[5] In Florida, a sheriff's department adopted a forfeiture program that authorizes officials who stop and question people on the streets or highways because they look like suspected drug couriers to seize as suspected drug money any cash in amounts over $100 that such people may be carrying, regardless of whether drugs are found.

Nor has the federal government shrunk from engaging in sweeping forfeiture prosecutions. The most popular rationale--confiscating property that "facilitates" criminal conduct--has been used successfully to seize entire bank accounts based upon the deposit therein of any alleged proceeds of criminal activity. Similarly, federal undercover agents and informants are schooled in the financial importance of arranging a drug sale on or near valuable real estate so that the entire tract may be seized under a claim that the real estate "facilitated" the alleged unlawful activity. As informants are often rewarded with a percentage of the value of the assets they deliver in this way, they become very creative and successful in their trade.

Broad forfeiture claims by state and federal officials might be better justified, and enjoy wider public support, if their sting were visited only upon the guilty, those who have intentionally committed crimes. But the oldest and most frequently used form of forfeiture--civil forfeiture--is not targeted at criminally culpable property owners. Instead, as

discussed below, civil forfeiture laws apply indiscriminately to property, regardless of the innocence of the owner, and render it subject to forfeiture if it is used unlawfully by anyone. Thus, the family home is fair game for forfeiture if a son, relative, or friend were to use it unlawfully--say, by using the telephone to arrange a drug purchase. Moreover, a growing number of states, such as Texas, Florida, and New Jersey, apply their forfeiture laws to any criminal activity, meaning that property owners must police their property against all such activity, drug- related or not. With the broadened scope and use of forfeiture laws, property owners are increasingly being deputized to serve as agents of the state in preventing wide varieties of criminal conduct. And the price for failure is steep indeed--forfeiture of one's property to the government.

Moreover, by any measure, forfeiture laws provide the government with unique litigation advantages, benefits not enjoyed by other litigants in any other area of law. They generally permit the government to seize property first, for example, and then place the burden upon the owners to come forward to prove they are entitled to have their property returned. This power of immediate possession, usually through summary government action, provides the government with tangible bargaining advantages at the outset of any title dispute between the government and a property owner. If, as the adage goes, possession is nine-tenths of the law, the government can secure this advantage before it has any obligation to prove anything.

Under federal law the government can seize property based solely upon probable cause to believe that the property was used unlawfully. This probable cause standard for seizure allows the government to dispossess property owners based only upon hearsay or innuendo--"evidence" of insufficient reliability to be admissible in a court of law. The probable cause standard relieves the government of the burden of proving anyone's criminal guilt to obtain a forfeiture judgment over his property.

Perhaps the greatest advantage the forfeiture laws provide for law enforcement officials lies, paradoxically, in the fact that their legal justification simply defies logic. When asked to justify the extraordinary powers granted to them by such laws, law enforcement officials find themselves invoking peculiar legal fictions that date back to feudal times or earlier, wherein inanimate objects are given life and then forfeited to the government for "their" criminal misconduct. Forfeiture's justification hinges entirely upon "old, forgotten, far-off things and battles long ago."[6] As a result, appeals to reason may be unavailing as quirks of legal history are often successful modernday talismans capable of ending rational debate.

As forfeitures become increasingly popular with law enforcement officials, efforts have begun to expand government forfeiture powers beyond those justified solely by reference to historical fictions. In Arizona, for example, the attorney general's office has unabashedly proclaimed that the mission of Arizona's forfeiture laws is "'social engineering' accomplished through government intercession in commercial activity harmful to the economy as a whole."[7] When such a broad official charter for forfeiture is combined with the unique litigation advantages that forfeiture law already offers to law enforcement, a powerful engine of government power is unleashed.

In this study, I briefly discuss the history of forfeiture and how it has enhanced the power of government over people and their property in ways that are difficult to reconcile with long-cherished constitutional rights. Given the growing use and expansion of forfeiture laws, I argue that the time is ripe for a reevaluation of those laws to make them more consistent with both the Bill of Rights and sound public policy. To that end, I identify some core principles that should guide forfeiture reform and also identify specific reforms of existing law and practice that are consistent with those principles.

A Brief History of Forfeiture

Forfeiture laws were not popular in colonial America, if only because the British Crown was their primary beneficiary. Indeed, one of the earliest sparks of the colonial rebellion was kindled by the forfeiture of John Hancock's schooner Liberty for failure to pay unpopular customs duties on its cargo of Madeira wine. Boston attorney John Adams defended Hancock in that case, and his defense was fodder for the pamphleteers of the American Revolution.[8] Nonetheless, as customs duties were the primary source of government revenue in the early republic,[9] the first session of Congress enacted forfeiture as a civil sanction for failure to pay customs duties.[10]

Until 1970, however, all federal forfeitures were civil forfeitures[11]--that is, they were in rem proceedings, against the

property, premised on the legal fiction that the forfeited property was guilty of an offense and thereby became subject to seizure and forfeiture to the government. The "civil" label attached to such procedures offered several advantages for the government in its prosecution of forfeiture claims, not the least of which was a reduced burden of proof.[12]

In 1970 Congress enacted the first federal criminal forfeiture law in the form of the Racketeer Influenced and Corrupt Organizations (RICO) Act. Unlike civil forfeiture, criminal forfeiture was justified as a criminal punishment for the guilty, a punishment imposed through a criminal, in personam, proceeding directed against an individual for his alleged criminal act, not against an inanimate object through legal fiction. The fundamental distinctions between these two forms of forfeiture, civil and criminal, have both practical and legal significance for the government's ability to impose forfeiture and for the procedures that are constitutionally mandated.

Civil Forfeiture

Civil forfeitures have been defended on a variety of grounds, but the earliest and most pragmatic rationale was that they were needed "to guard the revenue laws from abuse,"[13] as most federal revenue during the early days of the republic were derived from customs duties and tariffs, which in turn were the first objects of civil forfeiture legislation.

The most persistent and the core rationale for civil forfeiture laws, however, rests on a personification theory under which inanimate objects are imbued with a personality and are then held accountable for "their" violation of applicable federal laws.[14] As a result of this fiction, courts have historically disregarded the owner's innocence; the forfeiture action has been deemed an action against the res, or thing, not against its owner.[15]

The Taint Doctrine. Historically, civil forfeitures were explained through a theory of taint--that is, the forfeited object had become tainted by its unlawful use.[16] Although it was an unusual legal doctrine, the taint rationale for civil forfeitures has survived to this day.

The Supreme Court has repeatedly, if begrudgingly, rejected modern constitutional challenges to civil forfeiture actions. In Goldsmith-Grant v. United States,[17] for example, the Court confronted a claim by a car dealer that he should not be required to forfeit his secured interest in an automobile that was used, after sale, to transport distilled spirits. While sympathetic, the Court was unmoved as it observed:

> If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the [forfeiture] section [of the statute] with the accepted tests of human conduct. Its words, taken literally, forfeit property though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which could be the foundation of due process of law required by the Constitution. . . . And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner, who was without guilt.

Regarded in this abstraction the argument is formidable; but there are other and militating considerations.[18]

The Goldsmith-Grant opinion then went on to justify such an anomalous and counterintuitive result by reference to the need to protect federal revenue, to common law doctrine from feudal times, and to the Bible. Finally, the opinion relied on 19th-century precedent, including Justice Joseph Story's opinion in The Palmyra case,[19] upholding such forfeitures against innocent owners because "the thing is primarily considered the offender."[20] It is that personification fiction--the giving of life to inanimate objects-- that is the most constant and persistent legal rationale for civil forfeitures.

The Personification Fiction. The personification fiction that animates civil forfeiture law has given rise to truly peculiar vignettes in courtrooms across this country. Property owners whose assets have been seized by government officials often try to press their claims for relief through traditional, well-respected, legal arguments, such as that they have not been accused of criminal conduct, that they are presumed by law to be innocent of wrongdoing, or that the government has taken their property without affording them any prior notice or hearing.

Unfortunately, those facially formidable legal claims, claims that normally would find ample support in the Constitution, prove unavailing. Instead, an otherwise rational judge--one who has earned his status through the exercise of careful, logical, and sober judgment--informs the property owner that it is his property, not he, that is being prosecuted by the government; that, in the eyes of the government, his property is a criminal perpetrator and that it is his property's rights (or lack thereof), not those of its human owner, that determine the sufficiency of the procedures the government can use to confiscate it.

More than one property owner has been baffled by this spectacle as he tries to invoke traditional legal arguments against such government action. Such an imaginative notion of transferred responsibility for misconduct seems more natural from a child with his hand in the cookie jar than from a learned judge. Otherwise rational judges are put in the awkward position of explaining that, because the forfeiture law views inanimate objects as sentient creatures capable of being bad actors, the constitutional protections normally afforded the property's owner are not available. Property owners, faced with such a systemwide suspension of disbelief, quickly realize that an appeal to reason is futile.

The power of these historical arguments is formidable, as the Supreme Court has acknowledged. They have been repeatedly used to cast aside fundamental notions of fairness that have otherwise guided the development of our system of justice. The notion, for example, that the innocence of a property owner is no defense to the forfeiture of his property to the government does violence to widely accepted common understandings of fair play and due process. As recently as 1974, however, the Supreme Court reaffirmed the triumph of forfeiture over protestations of owner innocence solely by reference to forfeiture's historical lineage.[21]

Why does this legal fiction survive, and even thrive? The answer is as simple as it is, in a free society, appalling: the personification fiction legally disarms property owners while significantly enhancing the power of law enforcement to confiscate property--a prescription for effective law enforcement at the expense of due process. Using this fiction, for example, property owners are deprived of most of the constitutional protections afforded those actually accused of breaking the law, such as the right to an indictment, the presumption of innocence, the right to effective assistance of counsel, the right not to be punished prior to an adjudication of guilt beyond a reasonable doubt, and the right not to suffer punishment disproportionate to misconduct. Conversely, the government is relieved of many of the constitutional and practical requirements that attend criminal prosecutions, in that it can obtain broad civil discovery, need not prove anyone's guilt, and can seize property based upon a finding of only probable cause, leaving property owners with the difficult and expensive burden of extracting their property from the government's custody.

Thus, owners of property seized by the government through civil forfeitures are afforded far less legal protection and due process than are criminal or even civil defendants. Some defend this disparity between the rights of property owners and those of criminal defendants by noting that criminal defendants often face consequences far more drastic than property loss, including the stigma of conviction and incarceration. Yet, if the rights of property owners are guaranteed by the Constitution, as they are, they cannot simply be ignored for the convenience of the state, which in effect is what civil forfeiture has permitted.

The Innocent-Owner Defense. Recognizing these inequities, Congress and a number of state legislatures ameliorated the harshness of traditional civil forfeiture doctrine during the 1980s by creating forfeiture exemptions for innocent property owners. In so doing, they endorsed a welcome public policy that the innocent should not suffer property loss as a result of broad forfeiture statutes. After all, law enforcement is not advanced by depriving innocent owners of their property.

Notwithstanding these changes, however, in many jurisdictions, proof of "innocence" has come to mean a great deal more than mere proof that a property owner is not a criminal. Indeed, the owner must prove instead that he lacked both knowledge of, and control over the property's unlawful use. Thus, civil forfeiture not only makes a property owner his brother's keeper but compels him to prevent the unlawful use of his property by his brother, or anyone else for that matter. In many respects, this situation only exacerbates the disparity in the law's treatment of the criminally accused and the nonaccused property owner. To obtain a criminal forfeiture, the government must prove a defendant's intentional criminal conduct. To do that, it must prove both a bad act (actus rea) and a criminal intent (mens rea); mere knowledge of criminal activity by others is ordinarily not sufficient to justify conviction, as one must knowingly participate in a criminal venture to become a criminal. By contrast, to be exempt from civil seizure and forfeiture, a

property owner must prove a negative: that is, he must prove he lacked any knowledge (mens rea) of the property's unlawful use, even though mere knowledge of criminal conduct is typically insufficient to establish criminal culpability under criminal law.

This allocation of the burden of proof to property owners is all the more onerous because many courts equate actual knowledge, for exemption purposes, with willful blindness. Thus, to prove an innocent-owner exemption to forfeiture, a property owner must prove he lacked actual knowledge of the unlawful use of his property. He also must prove that he did not know of facts indicating that there was a high probability that his property was involved in illegal conduct, and that he did not deliberately avoid learning the truth of the matter.[22] Thus, to forestall forfeiture through a claim of innocence, a property owner must prove that he is not criminally culpable and also that he lacked any knowledge of the alleged criminal conduct. This is a sort of "super innocence" that even the criminal law does not require of citizens, as it authorizes civil forfeiture of property for mere knowledge (mens rea), broadly defined, or inaction (the failure to prevent others from crime).

The Relation-Back Doctrine. Another significant legal fiction applicable to forfeitures is known as the relation-back doctrine. Under this doctrine the government's title to forfeitable property vests at the time the property was used unlawfully, and the government's title is superior to that of any subsequent purchaser, transferee, or owner of the property. Because of the relation-back doctrine, property that is tainted by unlawful acts in, say, 1986 remains forfeitable today even against someone who purchased it in 1990. In 1814 Justice Story characterized this doctrine as "monstrous," criticized it as "founded probably on feudal principles, or the barbaric character of the times," and predicted "that great embarrassments will arise to the commercial interests of the country; and no man, whatever may be his caution or diligence, can guard himself from injury and perhaps ruin."[23] Notwithstanding those warnings by perhaps the most prolific judicial expositor of forfeiture law, the relation-back doctrine is today firmly rooted in federal forfeiture statutes.

The impact of the relation-back doctrine is easy to comprehend. Using it, the government can invalidate numerous asset transfers, however legitimate, by linking the history of an asset to some unlawful act that occurred while the asset was in the custody of an earlier owner or user. In short, the relation-back doctrine affords the government a type of continuing hidden lien or title claim to property that is not discernible through normal commercial channels.

As noted above, Congress has enacted selective innocent-owner defenses to forfeiture to provide owners of certain types of assets with an exemption.[24] Despite such clear efforts by Congress,[25] however, the Department of Justice has argued in federal courts that the relation-back doctrine trumps an innocent-owner defense, contending that an innocent owner is not entitled to relief from forfeiture if, under the relation-back doctrine, his property is subject to forfeiture because of an unlawful act by someone else prior to the present owner's acquisition of the property.

The Department of Justice feels so strongly about this issue that it recently sought and obtained a hearing before the Supreme Court to try to reverse a lower federal court ruling that would have allowed innocent property owners the opportunity to exempt their property from forfeiture notwithstanding the relation-back doctrine. In the solicitor general's brief seeking Supreme Court review, he asserted that:

> The title that the United States acquires under [the relation-back provision] is immediate, unqualified, and irrevocable. [The relation-back doctrine] leaves no room for the creation, by means of a later transfer, of an interest in drug proceeds that is superior to the title conferred on the government.[26]

As for the harsh effects that such a rule of law creates-- the forced deprivation of property innocently obtained or owned--the department urged the Supreme Court simply to trust it to provide forfeiture relief to those it deems worthy under its unreviewable discretion to remit or mitigate forfeitures.[27] In short, the Department of Justice is urging the Court to disregard the express statutory rights of innocent owners and to leave those owners instead to the mercy of the department.

Unreviewable Petitions For Mercy. Historically, and until the recent passage of these narrow innocent-owner defenses, the principal way for aggrieved property owners to obtain relief from a federal forfeiture has been for them to apply for remission or mitigation of the forfeiture. Such pleas are granted, however, only at the unreviewable discretion of

the attorney general or seizing agency; property owners have no legal right to relief as their petitions are merely pleas for mercy. And they are rarely granted.[28] More importantly, the Department of Justice, which has issued regulations setting standards for obtaining forfeiture relief by this administrative process, has set a standard that is more stringent than is required under most statutory innocent-owner exemptions. Thus, petitions for remission or mitigation of forfeiture are justified, under applicable regulations, only when property owners can satisfy the statutory innocent-owner criteria and also prove that they took all reasonable steps beforehand to prevent the unlawful use of their property.

Criminal Forfeiture

Since 1970 Congress has steadily increased the types of criminal offenses for which criminal forfeiture is a sanction. Unlike civil forfeiture, criminal forfeiture is justified as a criminal punishment; it is imposed in a criminal in personam proceeding directed against an individual for his alleged misconduct, not in an in rem proceeding directed against an inanimate object through legal fiction. Accordingly, a defendant in a criminal forfeiture prosecution is entitled to all the procedural protections associated with the criminal process.[29] Moreover, criminal forfeiture law is not premised on a taint theory but on a punitive theory whereby forfeiture serves the important penal interests associated with the criminal process.[30] As the U.S. Court of Appeals for the Fifth Circuit observed in upholding a substantial criminal forfeiture, "property forfeited under RICO need not be 'guilty'."[31] Rather, the scope of criminal forfeiture is measured by the penal objectives intended by the legislature. With RICO, for example, courts have readily applied RICO's broad forfeiture language to forfeit legitimately acquired assets to further the purgative goals that Congress designed for RICO forfeitures--to eliminate the economic influence of racketeers over legitimate businesses.[32]

Thus, in many respects, criminal forfeiture is broader in scope than civil forfeiture, as law enforcement can reach "untainted" assets--that is, assets that were legitimately acquired or lawfully used. Some courts have entertained Eighth Amendment challenges--challenges invoking the amendment's protections against excessive fines and disproportionate punishments--to such broad criminal forfeitures.[33] And some have observed that Eighth Amendment concerns are most acute when the government seeks to forfeit such untainted assets under a purgative rationale such as that found in RICO.[34] The unstated premise of such constitutional analysis is that criminal forfeiture has a punitive intent and purpose, one that is subject to the restrictions of the Eighth Amendment. By contrast, several federal opinions have concluded that Eighth Amendment proportionality protections simply do not apply to civil forfeitures in that they are civil, not criminal and theoretically are not punitive.[35]

Expanding the Reach of Forfeiture Laws

During the last two decades, both federal and state forfeiture law has expanded by leaps and bounds. Unfortunately, the impulse to expand the type and amount of property subject to forfeiture has not been matched by legislative concern for the rights of innocent property owners who are the collateral casualties of the forfeiture campaign.

Reaching Beyond the "Profits of Crime"

The political drive to apply forfeiture laws to an ever expanding array of criminal conduct is often accompanied by jingoistic appeals to "take the profit out of crime." If the forfeiture laws reached only the profits of crime, they would cause a fraction of the mischief they now cause, as the only significant issue would be one of defining "profits of crime." Today, however, forfeiture laws reach far beyond such profits. Those who defend them on the ground that their purpose is to "take the profit out of crime" simply ignore their true breadth.

On the civil side, for example, property subject to forfeiture includes that which "facilitates" unlawful conduct.[36] The use of even a small part of a piece of realty can render an entire tract forfeitable.[37] Under such a "facilitation" forfeiture claim, the government was recently able to seize all of the assets in a bank account on the theory that the legitimate funds in the account provided a "cover" for the deposit of forfeitable funds and thus rendered all of the money in the account subject to forfeiture.[38]

Similarly, the scope of criminal forfeiture is substantially broader than the "profits of crime." Under federal criminal statutes such as RICO, a convicted defendant must forfeit any property interest, however legitimately acquired or used, if that interest affords the defendant a source of influence over an alleged RICO "enterprise"--a broad term that

can encompass any legitimate business entity. Originally meant to enable law enforcement officials to purge the financial influence of organized crime in legitimate businesses, such "enterprise" forfeitures have since been used to impose drastic forfeitures upon any defendant convicted of a RICO violation having a connection to a legitimate business. In United States v. Porcelli, for example, a RICO defendant convicted of failing to pay New York sales taxes due from his gas station franchise was ordered to forfeit not only an amount equal to the delinquent tax obligation but also his 29 separate corporations through which he owned and operated the chain of gas stations.[39]

Broad Criminal Pretrial Freeze Orders

Congress augmented the broad scope of criminal forfeitures under RICO and the Drug Kingpin Statute[40] with authorization to seek pretrial restraining orders--sometimes known as asset freeze orders--to prevent a defendant from using, transferring, or dissipating his assets prior to trial. The apparent need for pretrial seizure orders stems from the different procedures in civil and criminal forfeiture cases. A civil forfeiture case begins with the seizure (arrest) of the offending piece of property; the "punishment" of criminal forfeiture, on the other hand, cannot be imposed until after a defendant is convicted. In criminal forfeiture cases, therefore, the government cannot seize property prior to conviction as it has no title or punitive interest in a defendant's assets prior to conviction. The occasional need for freeze orders during the period prior to verdict in order to preserve the status quo is apparent, especially with perishable assets. Although the use of pretrial restraining orders may be reasonable in certain circumstances, their impact can be devastating, especially when coupled with the relation-back doctrine.

Pretrial freeze orders in criminal cases can deny a presumptively innocent defendant the use of his assets to pay necessary living expenses or even the costs of defending against the government's prosecution. The relation-back doctrine compounds the defendant's problems by sending a warning signal to all who have previously dealt with him and to those who must deal with him in the future, that they deal at their peril. When a forfeiture claim is included in an indictment, the defendant may become a commercial leper: those who have previously dealt with the defendant cannot be sure that the defendant can perform existing contractual obligations or honor future commitments, and the cloud of a government title-claim will hover over past and future transactions.

Oddly enough, even the severe English common law would not have tolerated this harsh result. Under that law, the relation-back doctrine was limited to land; it did not affect a criminal defendant's chattels. As Blackstone observed:

Therefore, a traitor or felon may bona fide sale any of his chattels, real or personal, for the sustenance of himself and his family between the fact and conviction; for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony.[41]

Thus, the English common law's refusal to apply the relation-back doctrine to personal property was a practical, if humanitarian, concession to the interim needs of the accused to support his dependents while awaiting trial, as well as a tacit recognition of the obvious unfairness of applying the relation-back doctrine to third parties who deal with an accused during this time frame. In the stampede to expand the reach of forfeiture law, however, Congress in 1984 extended the relation-back doctrine to criminal forfeitures.

The mere return of a forfeiture claim in a criminal indictment, therefore, can disable a defendant. For business associates or partners of the defendant, the consequences can be equally disastrous. Even though not accused, their assets can be restrained,[42] and their prior transactions invalidated as a result of the relation-back doctrine. Moreover, typical criminal forfeiture statutes bar affected third-party property owners from intervening in the criminal case or filing suit to resolve their situation prior to the completion of the criminal prosecution.[43]

Fee Forfeiture

In 1989, in an opinion that dismayed much of the legal community, the Supreme Court sustained the pretrial use of criminal forfeiture laws to prevent a presumptively innocent defendant from paying for his defense counsel.[44] The Supreme Court's fee forfeiture opinions are remarkable not only for their result but for the reasoning employed by the majority to reach that result.

As noted earlier, criminal forfeiture was introduced into federal law in 1970 as a RICO sanction.[45] By 1989 Congress had enacted criminal forfeiture as a sanction for a number of other criminal offenses,[46] including all drug offenses.[47] But despite this expansion in its application, the purpose of criminal forfeiture remained constant--to punish criminals for their conduct.[48] In 1989, however, the Supreme Court's fee forfeiture opinions supplemented the penal purposes that had led to the introduction of criminal forfeiture in 1970 by adding as objectives revenue raising for the Department of Justice and restitution for crime victims.[49]

This remarkable expansion in the objectives of criminal forfeiture cannot be traced to any congressional act or to any practice of the department. The new "restitutionary" objective, for example, was never authorized under RICO's forfeiture provisions; nor has it ever been implemented in practice by the department. Simply stated, the Department of Justice does not use the forfeiture laws to provide restitution to victims of criminal conduct,[50] however worthy that objective might be. As a statutory matter, the U.S. Court of Appeals for the Second Circuit had previously stated it plainly: "Forfeiture under RICO is a punitive, not a restitutive, measure."[51] Moreover, in its original statute, Congress had expressly provided a civil restitutive remedy for RICO victims in the form of a claim for treble damages against defendants.[52] That arrangement contained no provision for government financial involvement in meeting the legitimate restitution needs of victims.[53] Although Congress in 1984 authorized the Department of Justice to amend its regulations to enable victims to seek restitution from forfeited assets through the administrative petition-for-remission process, the department has never promulgated any such regulatory changes. In fact, the department has stead fastly, and successfully, fought against claims by crime victims to participate in forfeitures awarded in criminal forfeiture cases. Thus, this newly discovered "restitutionary" purpose for criminal forfeiture was merely a deus ex machina that the Supreme Court created to bolster its conclusion regarding attorney fee forfeiture in cases that were, after all, drug cases in the first place, and hence problematic as victim restitution cases.

Similarly, the Supreme Court's recognition of a government "pecuniary interest" in maximizing criminal forfeiture to use forfeiture proceeds for law enforcement purposes has no basis in the legislative history of criminal forfeiture. The creation of an Asset Forfeiture Fund in 1984 was a congressional reaction to the chronic mismanagement of seized assets by government agencies, which had led to a situation in which "the sale of forfeited property realizes less than the expenses incurred by the government in storing, maintaining, and selling the property, [and] the net loss must be carried by the agency's budget."[54]

The Asset Forfeiture Fund was created to ensure better management of seized assets and to reduce the financial burden of this management on the seizing agency. Thus, the fund was intended as a means toward efficiently facilitating the ends of forfeiture, not as an end in itself. According to the majority opinion in Caplin & Drysdale, however, the government appears to have a legitimate financial interest in maximizing forfeiture solely for revenue raising purposes--a goal not traditionally associated with our criminal justice system, and one that raises serious questions about whether perverse law enforcement incentives are being created.

Abandoning the Taint Limitation on Civil Forfeitures

If civil forfeiture is at all justified, its proper scope, one imagines, is a matter for legislative bodies to determine as they enact laws that describe the specie of property subject to civil forfeiture by reason of its relationship to specified unlawful activity--sometimes described as the property's "nexus" to unlawful activity.[55] Common nexus provisions use limiting language such as property that "facilitates"[56] certain offenses or property that is used "in furtherance of" unlawful activity.[57] Hence, determining whether certain assets are subject to civil forfeiture will often involve a factual inquiry into whether or not the asset's alleged use falls within the nexus language chosen by the legislature.

At some point, however, the nexus between property and criminal activity is so attenuated that it simply strains credulity to say that the property is "tainted" by that activity. Yet, some states are today authorizing just such a result--civil forfeiture of property untainted by any direct connection to unlawful conduct. The real purpose of such forfeitures is apparent: they attempt to impose a nominally civil sanction not on tainted property but rather directly on a property owner for his criminal conduct.

And in doing so, of course, they avoid the strict constitutional protections that are applicable to criminal forfeitures. It is here, at the edges of civil forfeiture law, that current jurisprudence offers little guidance. However uncompelling in

their own right, old and time-honored civil forfeiture rationales--such as a property's "guilt in the wrong"[58]--offer no support whatever for extending the scope of civil forfeiture beyond tainted property directly used in criminal conduct.

In the words of Justice Stephen J. Field, in his dissent to an 1870 Supreme Court opinion upholding the confiscation of property owned by former Confederate soldiers after the Civil War, such a forfeiture seeks confiscation of property "without any reference to the uses to which the property is applied, or the condition in which it is found, but whilst so to speak it is innocent and passive, and removed at a distance from the owner and the sphere of his action, on the ground of the personal guilt of the owner."[59] With the forfeiture of untainted property, the oft-invoked nostrum that civil forfeiture is merely remedial is no longer persuasive, while the punitive aim is as transparent today as it was to Justice Field in 1870.

Many states continue to track federal law by recognizing a distinction between criminal forfeiture actions, with their potentially broader scope, and civil forfeitures.[60] However, other states, such as Arizona,[61] have abandoned the traditional distinction between criminal and civil forfeitures and allow the imposition of civil forfeitures, with their reduced procedural protections, on wholly untainted property. The failure of these states to adopt the traditional distinction can be explained, perhaps, by the fact that states have never exercised customs responsibilities and therefore have had no need to develop civil forfeiture as an unusual customs enforcement tool. Instead, these states have typically used civil forfeitures in accordance with their modern rationale--as an adjunct to criminal law enforcement.

The Arizona forfeiture statute purports to be a logical extension of this trend. Its advocates have described it as "a stride in the evolution of a 'civil justice system' to complement the 'criminal justice system' through judicial intervention in anti-social behavior."[62] They add that it represents "the leading edge of civil remedies for economic injustices."[63] The attractiveness to state law enforcement of following Arizona's lead is obvious: broadening the scope of forfeiture, while narrowing available procedural protections, will undoubtedly strengthen law enforcement and also will enrich the coffers of state law enforcement for which forfeited property is earmarked. Absent some constitutional barrier to this practice, its future seems bright.

Righting the Wrongs of Forfeiture

As the preceding discussion indicates, forfeiture laws today are broad and getting broader, causing unfair and needless injury to property owners. Indeed, this trend is all but admitted by law enforcement officials, whose principal argument against forfeiture reform is that law enforcement does not or will not enforce forfeiture laws to their literal extremes.[64] Needless to say, this "trust us" argument is incompatible with the central tenet of our legal system--that ours is a government of law, not of men. If the law does not protect property owners from unjust confiscation of their property, it is but a short step to unjust acts against their persons. At the least, the trust us argument rings especially hollow when offered by government officials whose agencies are the direct financial beneficiaries of expanding forfeiture efforts.

If we are to right the wrongs of forfeiture, however, we have to return to first principles, not to the stable of legal fictions that have led to the system we have today. That means taking a candid look at many of those fictions. Those who hold, for example, to the canard that civil forfeitures are "civil" because they are remedial, not punitive, are simply deluding themselves. The property owner who loses his property because of his own or another's criminal conduct knows full well that civil forfeiture is punitive, not remedial. No wrong is being remedied--in particular, no victim of crime is being compensated by the criminal. Instead, the criminal's--or innocent owner's--property is being taken by the government, plain and simple. Similarly, the fiction through which this is done--personification--must itself be jettisoned as it only distracts us from the real issues.

At the same time, forfeiture can play an important role in taking the financial incentive out of crime, especially so-called financial crime. Forfeitures directed at the true "profits of crime," for example, can reduce the lure of criminal opportunities. If forfeiture laws are narrowly targeted toward that end, with a commensurate effort to eliminate adverse collateral damages to innocent property owners, they can play a constructive role in criminal law enforcement.

Plainly, the simplest and most intellectually honest way to accommodate both the interest of law enforcement and the constitutional restraints that surround that enforcement is to use forfeiture only in criminal cases. Because forfeiture

would follow only upon conviction of a crime, that would eliminate forfeiture by innocent third parties or by those found to be not guilty. Moreover, shifting the burden of proof to the government in a criminal prosecution would ensure the use of only competent evidence. Thus, property owners would not be burdened with the task of proving their "superinnocence"--that is, their lack of knowledge of the acts of others.

Yet, even if this fundamental change were made, existing criminal forfeiture laws would need to be revised to ensure that they comport with procedural due process--especially in affording individuals the means to defend themselves--and avoid financial injury to nonaccused third-party owners. Nonetheless, if federal and state forfeiture authority were limited to criminal forfeitures, many of the legitimate grievances of property owners would be eliminated. Finally, the eradication of civil forfeitures would relieve the legal system of the unattractive task of maintaining the legal fictions that only undermine respect for law generally.

So far reaching and principled a reform of forfeiture law would be resisted, of course, not only by law enforcement officials but by many legislators as well, notwithstanding the draconian sanctions that are visited daily upon property owners by that law. Accordingly, it is worth considering a few second-best reforms. In doing so, however, at least three principles should guide us.

First, and foremost, innocent owners should not be harmed by forfeiture laws. The laws should be modified where necessary to ensure both that innocent property owners are not injured by their application and that the burden of justifying forfeiture rests squarely on the government.

Second, as a corollary of the first, forfeiture laws should not rely primarily upon the unreviewable discretion of law enforcement officials to protect the legitimate interests of property owners. Many existing forfeiture laws leave the task of discriminating between property owners deserving of forfeiture to the largely unguided discretion of law enforcement officials. Property owners must be able to rely upon their existing legal rights, not on the mercy of law enforcement agents, to protect against unwarranted property loss through forfeiture.

Third, forfeiture should be a law enforcement weapon, not a revenue raising device for law enforcement. To that end, the fruits of successful forfeiture prosecutions should be subject to the legislative appropriations process, not left as booty with the seizing agency. This last principle will perhaps encourage greater public accountability. More importantly, however, it will remove the actual or potential financial incentives that forfeiture offers law enforcement agencies to distort the exercise of enforcement discretion. As a federal judge recently noted, the vast quantities of assets seized under the forfeiture laws "leads some observers to question whether we are seeing fair and effective law enforcement or an insatiable appetite for a source of increased agency revenue."[65] In addition, subjecting the fruits of forfeiture to legislative control, as opposed to the exclusive use of law enforcement agencies, will eliminate the irrationalities that can easily occur when the funds generated have no necessary economic relationship to legitimate enforcement needs.

Although forfeiture reform might be guided by additional principles, these three should be common ground for all sides. Moreover, translating them into specific legislative proposals is not terribly difficult. In fact, the National Conference of Commissioners on Uniform State Law has already identified specific proposals that are consistent with such principles. Following is a list and brief discussion of those proposals.

Eliminate the Relation-Back Doctrine

The sole purpose of the relation-back doctrine is to give the government priority in a title fight with property owners who acquire property after it has been "tainted" by unlawful conduct. Assuming the irrational taint doctrine remains, the principal, if not exclusive, object of the relation-back doctrine is to prevent fraudulent or collusive transfers aimed at frustrating the government's interest in the tainted property.

With the advent of the innocent-owner defense, however, the justification for the relation-back doctrine disappears. Currently, to obtain an exemption from forfeiture, property owners who acquire tainted property must prove their "innocence," or lack of knowledge of or consent to the unlawful conduct. If owners can prove their innocence, forfeiture policy should dictate that their property interests will not be forfeited, regardless of when the government fictively obtained title pursuant to the relation-back doctrine. In short, if innocence--defined broadly as total ignorance

of the criminal conduct--justifies exemption from forfeiture, then the relation-back doctrine is unnecessary because those who would knowingly participate in a collusive transfer of tainted property are not eligible for the innocent-owner defense; their property remains tainted.

If the relation-back doctrine were only superfluous, its elimination might not warrant tinkering with the forfeiture laws. Unfortunately, the mischief caused by the doctrine justifies its prompt elimination for three independent reasons: it is unnecessary, it can harm innocent owners, and it causes needless uncertainty in commercial transactions. As indicated above, the Department of Justice has taken the position before the Supreme Court that the relation-back doctrine trumps innocent owners, meaning that those who innocently acquire tainted property, by purchase, inheritance, honest labor, or gift, have acquired nothing because title vested earlier with the government. This position violates what should be the first principle of forfeiture-- innocent property owners should not be harmed.

Moreover, the relation-back doctrine is anathema to commerce in property. Commerce in real and personal property is governed by a series of laws aimed at ensuring predictability and reliability in commercial transactions, especially in a commercial world driven by extensions of credit. A linchpin of commercial practices is the public filing or recording of ownership interests in property or credit, thus placing all who deal with property on notice of property interests.

The relation-back doctrine, with its secret attachment of a hidden government lien on property, upsets the carefully designed public legal systems by which all participants in commerce guide their affairs and protect their interests in property. Needless to say, criminals don't file timely descriptions of their criminal conduct in a house with the recorder of deeds office; the purchaser of the house, however, is left to guess as to whether somewhere in the chain of title, the government obtained title without giving notice to anyone.

Make Civil Forfeitures Proportional

Under current law, conduct that leads to civil forfeiture ranges in culpability from negligence to mere knowledge of criminal conduct by others, to actual criminal conduct on the part of the property owner. Criminal forfeiture, requires proof, of course, of greater culpability--that an owner knowingly used his property in a criminal offense. But, at least in criminal prosecutions, the Eighth Amendment prohibits the imposition of disproportionate forfeitures on the convicted felon. Unfortunately, because of the judiciary's steadfast refusal to acknowledge that civil forfeitures have a penal purpose, courts have held that the Eighth Amendment protection against disproportionate punishment is unavailable to property owners in civil forfeiture proceedings. Apart from that myth, this discrepancy cannot be justified.

If the worst offenders--criminals--are entitled to have forfeitures leavened by a proportionality limitation, commonsense suggests that less culpable owners--including those with no criminal culpability whatsoever--should receive similar protection against suffering disproportionate punishment under the guise of civil forfeiture. Indeed, after noting that it could not hold that a proportionality limitation was constitutionally compelled for civil forfeitures, the U.S. Court of Appeals for the Eighth Circuit recently urged Congress to enact a statutory proportionality limitation on civil forfeitures.[66] As Congress has previously provided express proportionality limits on criminal forfeitures in obscenity prosecutions,[67] extension of such protection to all civil forfeitures could serve the same end--to mitigate harsh forfeitures. Law enforcement officials simply have no legitimate purpose in imposing disproportionate forfeitures, whether characterized as "civil" or "criminal." Certainly, their need for revenue cannot justify such disproportionate forfeiture. Imposing statutory proportionality limits, therefore, would hinder no legitimate law enforcement needs.

Shift the Burden of Proof, by a Preponderance of Competent Evidence, to the Government

Under federal forfeiture law, and that of several states, to obtain forfeiture the government need only prove that it has "probable cause" to believe that property was used unlawfully. Probable cause is a fairly accommodating standard of proof, lying slightly above a hunch but far below the standard necessary to prove any fact in a court of law. In civil judicial proceedings, the least stringent standard of proof is "by a preponderance of the evidence"-- meaning that the evidence indicates that an assertion is more likely to be true than not. Probable cause of criminal conduct, on the other hand, is the minimum showing necessary to justify searches under the Fourth Amendment or allegations (as distinct from proof) in a criminal case.

Because federal courts over the past decade have shown increasing willingness to authorize police searches, the probable cause standard has gradually been eroded as a substantial barrier to obtaining court approval for searches and seizures. A showing of probable cause can be made, for example, through the use of hearsay or other "evidence" of insufficient reliability to be admissible in a court proceeding. Hence, by linking the government's ability to obtain forfeiture solely to its ability to establish probable cause that property was used unlawfully, the forfeiture laws permit the forfeiture of property upon a de minimus evidentiary showing, one far below that imposed upon any plaintiff in a civil proceeding.

Simply put, there is no justification for relieving the government of the burden of proof that any other civil plaintiff must shoulder--that of proving its case by a preponderance of competent admissible evidence. Indeed, when property owners come forward to prove their innocence in a forfeiture exemption plea, they must do so by a preponderance of the evidence, including proof solely by admissible evidence. Doubtlessly, the government enjoys the probable cause standard because it lightens its burden. But such a de minimis standard increases the risk that property owners will wrongly lose their property to forfeiture.

Federal courts have largely accepted, without scrutiny, the probable cause standard for civil forfeitures. Recently, however, a federal judge, writing in dissent, carefully examined whether a probable cause standard for civil forfeiture violated due process by not providing sufficient protection for property owners. In United States v. $12,390.00, the U.S. Court of Appeals for the Eighth Circuit affirmed what has become commonplace--the seizure and forfeiture of money based solely on the inadmissible hearsay of informants that the money was related to drugs after a search that netted neither drugs nor arrests.[68] In his well-reasoned dissent, Judge Arlen Beam wrote:

> [T]he current allocation of burdens and standards of proof requires that the claimant [owner] prove a negative, that the property was not used in or to facilitate illegal activity, while the government must prove almost nothing. This cre ates a great risk of an erroneous, irreversible deprivation [of property]. . . . The allocation of burdens and standards of proof . . . is of greater importance since it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.[69]

Judge Beam is clearly right. Although a probable cause standard may be adequate to justify making allegations, it is hardly adequate to justify seizing and forfeiting property to the government.

Law Enforcement's Opposition to Reform

Again, the foregoing proposed reforms are second-best, being aimed at mitigating an otherwise intolerable body of law. Nevertheless, they have been vigorously opposed by the Department of Justice, the National Association of Attorneys General, and the National District Attorneys Association.

Each of the proposals was contained in the recent draft uniform statute that received the preliminary support of the Uniform Law Commission.[70] In 1991, however, the three aforementioned law enforcement groups summarily withdrew from the deliberations of the commission because they considered these reforms totally unacceptable. Indeed, to fight against the reforms, they have drafted their own alternative model forfeiture bill, based essentially on the Arizona statute, which they have labeled the "Model Asset Forfeiture Act." That act, of course, does not contain any of the offending reform measures; and it proposes to expand forfeiture laws to further the "social engineering" goals that have been espoused by the Arizona attorney general's office.

As forfeiture becomes an ever larger part of law enforcement, it is important to remember that there are institutional forces at work that are every bit as strong today as they were in colonial America, when forfeiture was not only an enforcement weapon for British taxes but a means for financing British administration of the colonies. Today, the addition of $643 million from forfeitures to the Department of Justice's 1991 budget alone should convey the

importance of forfeiture to the department--and should make understandable its desire to maintain the status quo. That desire is no less intense at the state level across the country.

Conclusion

As the injustice of modern forfeiture law becomes ever more clear and widespread, it is time to reexamine its roots and its rationale. With judicial approval, forfeiture laws have been applied in ways that strain, if not violate, our fundamental constitutional guarantees. Meanwhile, law enforcement officials, smitten with the tactical advantages and financial attractions of forfeiture, are trying to expand its reach, making of it a generalized tool for social engineering. Such efforts should be vigorously resisted. If private property is the foundation of a free society, as the republic's Founders repeatedly wrote, then modern forfeiture law is an affront, and a threat, to that very foundation.

Notes

[1] See United States v. $12,390.00, 956 F.2d 801, 807 (8th Cir. 1992) (Beam, J., dissenting); Department of Justice, Annual Report of the Department of Justice Asset Forfeiture Program 1991 (foreword of Attorney General William Barr).

[2] Ibid., p. 15.

[3] State v. Real Property known as 451 Rutherford Avenue, Superior Court of Sussex County, New Jersey, docket no. S.S.X-L-120-91.

[4] State v. City Construction Development, Inc., Superior Court of Hudson County, New Jersey, docket no. W-0021126-89.

[5] Ibid. Transcript of Hearing, at 62-63 (December 22, 1989).

[6] United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 461 (7th Cir. 1980).

[7] Cameron Holmes, "History and Purpose of Arizona Forfei ture under A.R.S. sections 13-4301," at 1 (1990), reprinted in ABA National Institute on Forfeitures and Asset Freezes (1990) (Mr. Holmes is an Assistant Attorney General for Arizona).

[8] See Legal Papers of John Adams, ed. L. Wroth and H. Zubel, (1965), pp. 106-47

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[9] In the early days of the republic, customs duties ac counted for approximately 70 to 80 percent of federal reve nue. Bureau of the Census, Historical Statistics of the United States, Doc. 33, 86th Cong., 1st sess. 712 (1960).

[10] See Act of July 31, 1989, sections 12, 36, 1 Stat. 39, 47; and Act of August 4, 1970, I 13, 22, 27, 67, 1 Stat. 157, 161, 163, 176.

[11] See Measures Relating to Organized Crime: Hearings Be fore the Subcommittee on Crime of the Senate Judiciary, 91st Cong. 1st sess. 407 (1969) (statement of Deputy Attorney General Kleindienst); see also S. Rep. 225, 98th Cong., 1st sess. 82 (1983). See, generally, Terrance Reed and Joseph Gill, "RICO Forfeitures, Forfeitable 'Interests,' and Proce dural Due Process," North Carolina Law Review 62 (1983): 57, 59-69.

[12] Civil forfeitures have frequently been characterized as remedial, thereby justifying a reduced burden of proof. See, for example, Glup v. United States, 523 F.2d 557, 561 (8th Cir. 1975) (citing cases).

[13] United States v. 1960 Bags of Coffee, 12 U.S. 398, 406 (1814) (Story, J., dissenting).

[14] United States v. United States Coin and Currency, 401 F.2d 715, 719-20 (1971); The Palmyra, 25 U.S. (12 Wheat) 1, 14 (1827) (Story, J.). See O. Holmes, The Common Law, ed. Howe (1963); pp. 23-26.

[15] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974).

[16] As described by Justice Story, one of the Supreme Court's most prolific early expositors of civil forfeiture law, when property, in a forfeiture proceeding, is held not to have been used in violation of the law, "the taint of forfeiture is completely removed, and cannot be reannexed to it. Gelston v. Hoyt, 16 U.S. 246, 318 (1818) (emphasis added). See also United States v. 1960 Bags of Coffee, 12 U.S. 398, 406 (1814) (Story, J., dissenting) (describing "the secret taint of forfeiture" attaching to goods used in violation of customs laws).

[17] 254 U.S. 505 (1921).

[18] Ibid.

[19] The Palmyra, 25 U.S. (12 Wheat) 1 (1827).

[20] Goldsmith v. Grant, at 511.

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

[22] See, for example, United States v. Bechell, 724 F.2d 855, 856 (9th Cir. 1984) (defining willful blindness).

[23] United States v. 1960 Bags of Coffee, 12 U.S. 398, 415 (1814) (Story, J., dissenting).

[24] See, for example, 21 U.S.C. sections 881(a)(4)(C)(conve yances), 881(a)(6) (money and negotiable instruments). These innocent-owner exemptions were enacted, respectively, as part of the Anti-Drug Abuse Act of 1988, P. L. 100-690, 102 Stat. 418, and the Psychotropic Substance Act of 1978, Congressional Record (1978) vol. 124, p. 36,948. See, gen erally, Michael Goldsmith and Mark Linderman, "Asset For feiture and Third Party Rights: The Need for Further Law Reform," Duke Law Journal (1989): 1224, 1272-75.

[25] See, for example, Congressional Record vol. 124, p. 23,056 (Daily ed., July 27, 1978).

[26] Solicitor General's Brief, p. 17 in United States v. A Parcel of Land Buildings, Appurtenances and Improvements Known as 92 Buena Vista Avenue, No. 91-781 (1992).

[27] Ibid., p. 22.

[28] See, for example, United States v. Edwards, 368 F.2d 722, 724 (4th Cir. 1966) ("It is the invariable policy of the Treasury Secretary to deny such claims for remission or forfeiture. . . .").

[29] See, for example, Terrance Reed, "Criminal Forfeiture under the Comprehensive Forfeiture Act of 1984: Raising the Stakes", American Criminal Law Review 22 (1985): 707.

[30] See United States v. Kravitz, 738 F.2d 102, 106 (3rd Cir. 1984), cert. denied, 470 U.S. 1052 (1985); United States v. Lizza Industries, 775 F.2d 492, 498 (2d Cir. 1985), cert. denied, 475 U.S. 1082 (1986

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[31] United States v. Cauble, 706 F.2d 1322, 1350 (5th Cir. 1983), cert. denied, 465 U.S. 1005, (1984). Accord United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987) (RICO "forfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeer ing activity").

[32] See Cauble, 706 F.2d at 1350; Busher, 817 F.2d at 1413; United States v. Marubeni America Corp., 611 F.2d 763, 769 n. 12 (9th Cir. 1980).

[33] See, for example, Busher; United States v. McKeithen, 822 F.2d 310, 314-15 (2d Cir. 1987).

[34] See United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), cert. denied, 109 S. Ct. 1164 (1989); see also United States v. Regan, 726 F. Supp. 447 (S.D.N.Y. 1989).

[35] See, for example, United States v. One Parcel of Proper ty, 964 F.2d 814, 818 (8th Cir. 1992), United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988), cert. denied, 110 S. Ct. 364 (1989)

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[36] See, for example, 21 U.S.C. section 881(7) (authorizing forfeiture of real property that is "used, in any manner or part, to commit, or to facilitate the commission" of any drug offense). See, generally, United States v. Approxi mately 50 Acres of Real Property, 920 F.2d 900 (11th Cir. 1991); United States v. Parcels of Real Property, 913 F.2d 1 (1st Cir. 1990).

[37] See, for example, United States v. Real Property and Residence, 921 F.2d 1551, 1557 (11th Cir. 1991) (use of parked car in driveway for controlled purchase of cocaine rendered entire property subject to forfeiture); United States v. Reynolds, 856 F.2d 675 (4th Cir. 1988)(30-acre parcel subject to forfeiture although only house, driveway, and swimming pool used for drug transaction).

[38] See United States v. All Monies ($477,048.22), 754 F. Supp. 1467 (D. Hawaii 1991).

[39] 865 F.2d 1352 (2d Cir. 1989).

[40] 21 U.S.C. sections 848, 853.

[41] Blackstone, Commentaries 4 (1803): 387-88.

[42] See United States v. Regan, 858 F.2d 115 (2d Cir. 1988).

[43] See, for example, 18 U.S.C. section 1963(i); 21 U.S.C. section 853(k); 18 U.S.C. section 982(b)(1)(A).

[44] Caplin & Drysdale v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989).

[45] See Measures Relating to Organized Crime, p. 407 (pro viding Department of Justice support for "revival of the concept of forfeiture as a criminal penalty" in proposed RICO bill); see also S. Rep. 225, 98th Cong., 1st Sess. 82 (1983) (stating that "[f]rom that time [1790] until 1970 there was no criminal forfeiture provision in the United States Code"). See, generally, Reed and Gill.

[46] See, for example, 18 U.S.C. section 982 (1988) (money laundering or currency reporting violations); ibid., section 1467 (offenses relating to obscene matter); ibid., section 2253 (sexual exploitation of children or transporting child pornography); ibid., section 793(h) (transferring or commu nicating national defense information).

[47] 21 U.S.C. section 853.

[48] See Organized Crime Control: Hearings on S. 30 and Re lated Proposals before Subcommittee No. 5 of the House Judi ciary Committee, 91st Cong., 2d sess. 107 (1970) (statement of Sen. John L. McClellan); see also United States v. Lizza Industry, Inc., 775 F.2d 492, 498 (2d Cir. 1985) (stating that "[f]orfeiture under RICO is a punitive, not a restitu tive, measure"), cert. denied, 475 U.S. 1082 (1986); United States v. Rubin, 559 F.2d 975, 992 (5th Cir.), vacated and remanded, 439 U.S. 810 (1978), reinstated in relevant part, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979).

[49] Caplin & Drysdale, at 2654-55.

[50] See 28 C.F.R. section 9 (1989) (regulations governing remission or mitigation of criminal forfeitures; no refer ence to restitution as a purpose of civil or criminal for feiture mitigation or remission decisions).

[51] United States v. Lizza Industries, 775 F.2d 492, 498 (2d Cir. 1985).

[52] 18 U.S.C. section 1964(c) (1988).

[53] See 18 U.S.C. section 3663.

[54] S. Rep. 225, at 197.

[55] See generally D. Smith, Prosecution and Defense of For feiture Cases, para. 3.03 (1991 ed.)

[56] See, for example, 21 U.S.C. section 881(a)(4).

[57] See, for example, N.J. Stat. Ann. 2C:64-1a(2).

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

[59] Miller v. United States, 78 U.S. (11 Wall.) 268, 322 (1870) (Field, J., dissenting).

[60] Compare 2C N.J.S.A. 64-1 with 2C N.J.S.A. 41-2.

[61] See, for example, A.R.S. sections 13-4301-15, 13- 2314(N), 1-253.

[62] Holmes.

[63] Ibid.

[64] See, for example, United States Attorneys Manual sec tions 9-110.414 (Federal government's "policy is not to seek the fullest forfeiture permissible under the law where that forfeiture would be disproportionate to the defendant's crime;" government "will not seek through use of the rela tion-back doctrine to take from third parties assets legiti mately transferred to them").

[65] United States v. $12,390.00, 956 F.2d 801, 807 n. 6 (8th Cir. 1992) (Beam, J., dissenting).

[66] See United States v. One Parcel of Property Located at 508 Depot Street, 964 F.2d 814, 818 (8th Cir. 1992).

[67] See 18 U.S.C. section 1467(a)(3).

[68] 956 F.2d 801 (8th Cir. 1992).

[69] Ibid., at 811 (Beam, J., dissenting).

[70] Under the rules of the Conference, a bill must be read and approved twice before it becomes an approved uniform act for distribution to the state legislatures for their consid eration. The draft forfeiture bill that was submitted to the full conference in 1991 was approved upon its first reading but it must still be given a second reading before formally becoming a uniform act of the Conference.