

# **RESTORING CIVILITY—THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000: BABY STEPS TOWARDS A MORE CIVILIZED CIVIL FORFEITURE SYSTEM**

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## **INTRODUCTION**

Starting in 1970, the United States employed civil forfeiture, a civil *in rem* proceeding, to combat the nation's drug problems by striking at the proceeds or instrumentalities of narcotics crimes. However, the government's ability, via the civil forfeiture statutes, to seize property on mere probable cause and, for two decades, without notice, provoked many concerns.<sup>1</sup> Charlotte Juide described her experience with the United States' civil forfeiture laws as:

On Friday morning, April 27, 1990 . . . I was woken up by men shouting inside my apartment. I did not give anyone permission to enter my apartment before these people came in.

At least one man came into my room while I was in bed. He had a gun drawn which he pointed directly at my head. He demanded that I get out of bed and pack up some things and get out of the apartment immediately. I was afraid. I had to go to the bathroom and when I asked the man if I could go to the bathroom, he first went into my bathroom and looked around. He said he was looking for weapons. He came out and said I could use the bathroom now, but he would not let me shut the door. He stayed just outside the bathroom door while I used the toilet. I think he was watching me the whole time I was on the toilet.<sup>2</sup>

Ms. Juide, a public housing tenant, further noted:

Before my apartment was entered by force on the morning of April 27, 1990, I was not notified that the government was planning to seize my apartment. I was not told that any complaint for forfeiture had been filed against my apartment or that I could demand a hearing before the U.S. Marshalls and [that] local police could forcibly come into my apartment

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1. Another problem, not explicitly considered here, is the right to counsel. Although the court in *United States v. Sardone*, 94 F.3d 1233 (9th Cir. 1996), held that there was no right to effective assistance of counsel in civil forfeiture proceedings, the Civil Asset Forfeiture Reform Act properly recognizes that significant property interests are involved in forfeiture proceedings against an individual's primary residence and provides for the appointment of counsel from the Legal Services Corporation. Civil Asset Forfeiture Reform Act of 2000, Pub L. No. 106-185, § (b), 114 Stat. 202, 205 (2000) (codified at 18 U.S.C. § 983(b)).

2. Affidavit of Charlotte Juide, May 11, 1990, ¶¶ 6, 7.

and throw me out on the street.<sup>3</sup>

Ms. Juide's experience with our nation's civil laws process was, unfortunately, not unique and therefore helps to illustrate that these laws were ripe for reform. This Note examines several of the serious problems that have persisted for years, and in some cases, decades in the United States' civil forfeiture laws. This Note considers the federal, drug-related civil forfeiture laws under which the majority of drug-related civil forfeitures occur. These forfeitures typically occur under 21 U.S.C. § 881(a) and usually involve conveyances (cars, trucks, and things that go),<sup>4</sup> money and negotiable securities,<sup>5</sup> and real property.<sup>6</sup> This Note then examines the Civil Asset Forfeiture Reform Act of 2000 (Reform Act), which has made some significant progress towards making these laws more equitable. The Note does not deal with civil forfeiture or criminal forfeiture under state law or under federal statutes other than 21 § U.S.C. 881(a).

Toward this end, Part I of this Note first examines the history of forfeiture laws in general, and United States' civil forfeiture laws in particular. In Part II, this Note identifies several of the major, systemic problems that existed prior to the reform of the civil forfeiture laws. Specifically, this Note singles out (a) lack of notice, (b) the elements of an "innocent owner" defense, (c) improper burdens of proof, (d) a split in the federal circuit courts regarding the proper test for violations of the Eighth Amendment's Excessive Fines Clause, and (e) the government's problematic motivation in conducting civil forfeiture proceedings. In Part III, this Note provides a general overview of the Civil Asset Forfeiture Reform Act of 2000 and, in Part IV, examines the ways in which the Reform Act does and does not remedy the problems discussed in Part II. Finally, drawing on Part IV, Part V of this Note concludes by reviewing the problems yet to be fully addressed in the civil forfeiture laws, and reviews the suggestions made in Part IV.

This Note ultimately argues that the Reform Act fails to fully solve three problems in the civil forfeiture laws. First, the Act fails to completely equalize the burdens of proof required of the government and innocent owners. Next, the Reform Act fails to adopt the proper inquiry under the Excessive Fines Clause. Rather, the Reform Act adopts only a proportionality inquiry as opposed to a multi-factored approach that considers both proportionality and instrumentality. Finally, in an effort to solve the post-illegal act transferee problem, the act makes it impossible for heirs, spouses, and minor children to protect their property.

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3. *Id.* at ¶ 10.

4. 21 U.S.C. § 881(a)(4) (2000).

5. *Id.* at § 881(a)(6).

6. *Id.* at § 881(a)(7). See also Jimmy Gurule, *Introduction: The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 157-58 (1995).

## I. OVERVIEW OF CIVIL FORFEITURE LAWS PRIOR TO THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000: GENERAL BACKGROUND INFORMATION

### A. *Forfeiture of Property Involved in Crimes Has a Long History*

The history of civil forfeiture law is not merely an esoteric exercise. The U.S. Supreme Court's major decisions on civil forfeiture each contain significant investigations into the history of this legal procedure.<sup>7</sup> Forfeiture of property involved in wrongful acts has a long and, many would say, ancient history. In the common law era, the basis for forfeiture was thought to rest in the Bible. Thus, *Exodus* 21:28 provides: "If an ox gores a man or woman to death, the ox will be stoned and its meat will not be eaten, but the owner of the ox will not be liable."<sup>8</sup> This passage was cited by Coke in his treatment of the deodand<sup>9</sup> (a mistranslation of *deo dandum*, "a thing that must be offered to God"<sup>10</sup>) and subsequently noted

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7. See, e.g., *Austin v. United States*, 509 U.S. 602 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. 427 & 429 Hall Street*, 74 F.3d 1165 (11th Cir. 1996) (reaching as far back as the Magna Carta to find that a proportionality prong was necessarily a part of any claim under the Eighth Amendment). But see *Austin v. United States*, 509 U.S. 602, 628-29 (1993) (Kennedy, J., concurring.) Justice Kennedy observed that

we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved. I see something of that in the Court's opinion here, for in its eagerness to discover a unified theory of forfeitures, it recites a consistent rationale of personal punishment that neither the cases nor other narratives of the common law suggest.

*Id.* See also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). In this speech Holmes famously observed that

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

*Id.* at 469.

8. *Exodus* 21:28 (New Jerusalem Bible).

9. It is a matter of no small moment that, later, Blackstone discusses the deodand, and this form of forfeiture, in a section on the king's revenue. Thus he says, "[t]he next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences." 1 WILLIAM BLACKSTONE, COMMENTARIES 289. The United States government and the several states have been accused of using civil forfeiture not merely as a restitutive mechanism but also to punish and to raise revenue. See, e.g., HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 38-40, 53 (1995). Indeed, the link between civil forfeiture and government revenue has always been a cozy one. During the Nineteenth Century, before the days of federal income tax, custom duties accounted for more than eighty percent of the federal government's revenue. In those days, civil forfeiture was the primary method of enforcing these custom duties and thus served as an important protector of government revenue. See Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 940 n.137 (1991).

10. 1 BOUVIER'S LAW DICTIONARY 844 (8th ed. 1914).

by Blackstone.<sup>11</sup> In fact, modern civil forfeiture is typically traced back to the deodand,<sup>12</sup> which was “[a]ny personal chattel whatever, animate or inanimate, which is the immediate cause of the death of a human creature. It was forfeited to the king to be distributed in alms by his high almoner ‘for the appeasing,’ says Coke, ‘of God’s wrath.’”<sup>13</sup> The deodand is itself a fairly ancient concept and its use in the common law system dates to at least 1292.<sup>14</sup> It was finally abolished in 1846. According to Blackstone, at common law there were eight ways that real property could be forfeited.<sup>15</sup> Only one of these ways, the first of Blackstone’s eight categories, statutory forfeiture, made its way into American law and, in 1970, it took the form of 21 U.S.C. § 881(a).<sup>16</sup> Thus, in *United States v. Bajakajian*, the Court observed “that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking.”<sup>17</sup> The Court noted that the Senate Judiciary Committee admitted that the revival of these common law proceedings “represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.”<sup>18</sup>

### B. U.S. Forfeiture Law—Prior to Reform

The statutory basis for the federal, drug-related civil forfeitures discussed in this Note is 21 U.S.C. § 881(a). It is under this section that the majority of drug-related civil forfeitures occur; the properties most often seized are conveyances, money and negotiable securities, and real property.<sup>19</sup> Section 881(a) was first

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11. See 1 BLACKSTONE, *supra* note 9, at 291; 3 COKE INSTITUTES 57-58; see also Oliver Wendell Holmes, Jr., *The Common Law*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 127 (Sheldon M. Movick, ed., Univ. of Chicago Press 1995).

12. See, e.g., *Calero-Toledo*, 416 U.S. at 681; Gurule, *supra* note 6, at 156.

13. 1 BOUVIER’S LAW DICTIONARY, *supra* note 10, at 844.

14. 4 OXFORD ENGLISH DICTIONARY 467-68 (2d ed. 1989).

15. The eight ways, which often dealt with religion, according to Blackstone, were crimes and misdemeanors (the deodand and other specific crimes such as treason and *praemunire* (*praemunire facis*—maintaining papal sovereignty in England and thus denying the supremacy of the sovereign over the Church of England)), 4 BLACKSTONE, *supra* note 9, ch. 8; 3 BOUVIER’S LAW DICTIONARY, *supra* note 10, at 2651, alienation of land contrary to prescribed laws of the land (this method was often used to combat the church’s attempt to accumulate land and power), “non-presentation to a benefice, when forfeiture is denominated a lapse” (that is, if the owner does not confer the benefice on a minister, his right to the property lapses), simony (the sale or purchase of ecclesiastical preferments, benefits, or emoluments), non-performance of conditions, waste of a property such that it damages the interests of those holding the remainder or reversion interests, breach of copyhold customs (that is, breach of those duties the copyholder owed the lord), and bankruptcy. 2 BLACKSTONE, *supra* note 9, at 267-86.

16. Pub. L. No. 91-513, § 511, 84 Stat. 1276 (1970).

17. 524 U.S. 321, 332 n.7 (1998).

18. S. Rep. No. 91-617, at 79 (1969), quoted in *Bajakajian*, 524 U.S. at 332 n.7.

19. See Gurule, *supra* note 6, at 157-58.

enacted in 1970 as part of the Comprehensive Drug Control Act of 1970.<sup>20</sup> It provided:

- (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
  - (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.
  - (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.
  - (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).
  - (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—
    - (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III; and
    - (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.
  - (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.<sup>21</sup>

As first enacted, § 881(a) was a fairly modest law and provided for the forfeiture of conveyances only; it did not permit the forfeiture of money, negotiable securities, or real property. Over the years, § 881 was amended several times in important ways that made it a significantly more powerful law-enforcement tool.<sup>22</sup> The 1978 amendment<sup>23</sup> added paragraph six, which allows “[a]ll moneys,

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20. Pub. L. No. 91-513, § 511, 84 Stat. 1276 (1970).

21. *Id.* (codified at 21 U.S.C. § 881(a) (1970)).

22. The statutory scheme has been amended a number of times in minor ways as well: Pub. L. No. 96-132, § 14, 93 Stat. 1048 (1979) (this amendment made minor changes to the statute's language); Pub. L. No. 99-570, 100 Stat. 3207 (1986) (same); Pub. L. No. 99-646, 100 Stat. 3618 (1986) (same); Pub. L. No. 101-189, 103 Stat. 1569 (1989) (same); Pub. L. No. 101-647, 104 Stat. 4855 (1990) (added subsections ten (drug paraphernalia) and eleven (firearms) to § 881(a)); Pub. L. No. 102-239, 105 Stat. 1912 (1991) (made minor changes); Pub. L. No. 103-447, 108 Stat. 4693

negotiable instruments, securities, or other things of value furnished . . . in exchange for a controlled substance" to be forfeited. Section 881 was amended in 1984<sup>24</sup> to add paragraph (a)(7), which allowed for the forfeiture of real property. Another important change made by the 1984 amendment was to provide that the proceeds of civil forfeiture be deposited into special forfeiture funds at the Department of Justice and the Department of Treasury. Previously funds were deposited into the U.S. Treasury's general fund.<sup>25</sup> Section 881 was amended again in 1988 as part of the Anti-Drug Abuse Act of 1988.<sup>26</sup> This change permitted forfeitures of leasehold interests and added subparagraph (a)(4)(C), another innocent owner defense. In April 2000, the Civil Asset Forfeiture Reform Act of 2000<sup>27</sup> substantially rewrote the federal civil forfeiture laws. This amendment is one of the primary subjects of this Note and is considered in Part III. Finally, the U.S.A. Patriot Act of 2001<sup>28</sup> exempted certain anti-terrorism laws from the civil forfeiture procedures,<sup>29</sup> but provides that owners of property "that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists<sup>30</sup> may make use of the new civil forfeiture laws and other laws, including the Administrative Procedure Act to claim property.<sup>31</sup>

In its final form prior to the Reform Act, § 881(a) provided that the following types of property were subject to forfeiture (paragraphs 4, 6, and 7 are most pertinent):

- (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
  - (1) All controlled substances which have been manufactured, distributed,

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(1994) (same); Pub. L. No. 104-237, 110 Stat. 3101 (1996) (same).

23. Pub. L. No. 95-633, § 301(a), 92 Stat. 3777 (1978).

24. Pub. L. No. 98-473, §§ 306, 309, 518, 98 Stat. 2050, 2051, 2075 (1984). An issue not expressly considered in this Note is the "relation-back doctrine," which was added to the scheme in 1984 and provides that title vests in the United States on the commission of the illegal acts that subject the property to forfeiture.

25. The special forfeiture funds provide a unique mechanism whereby the proceeds of property seized by local police agencies are returned more or less directly to them. See e.g., Brant C. Hadaway, Comment: *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81 (2000). Hadaway, and others, identify this mechanism as the root of many of the egregious civil forfeiture excesses.

26. Pub. L. No. 100-690, § 5105, 102 Stat. 4301 (1988).

27. Pub. L. No. 106-185, 114 Stat. 202 (2000).

28. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 316, 115 Stat. 309-10 (Oct. 26, 2001).

29. 18 U.S.C. § 983(i)(2)(D) (2002).

30. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 316(a), 115 Stat. 309-10 (Oct. 26, 2001); 18 U.S.C. § 983(a) (2002).

31. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, § 316(c)(1)(A)-(C), 115 Stat. 309-10 (Oct. 26, 2001).

dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this

paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tabletting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.<sup>32</sup>

The civil forfeiture laws have been subject to a wide variety of criticism and this Note examines (a) lack of notice, (b) the elements of an “innocent owner” defense, (c) improper burdens of proof, (d) a split in the federal circuit courts regarding the proper test for violations of the Eighth Amendment’s Excessive Fines Clause, and (e) the government’s problematic motivation in conducting civil forfeiture proceedings.

## II. SPECIFIC CRITICISMS OF CIVIL FORFEITURE LAWS

### A. Notice

The fact that property could be subject to forfeiture without notice was a serious problem and resulted in certain obvious injustices; hence, Charlotte Juide’s experience with armed men intruding into her bedroom. Prior to *United States v. James Daniel Good Real Property*,<sup>33</sup> the civil forfeiture laws required no notice for the forfeiture of any type of property. This situation arose from the U.S. Supreme Court’s holding in *Calero-Toledo* that the government could seize property without affording prior notice or hearing (at least in the case of chattels).<sup>34</sup> In *James Daniel Good Real Property*, the United States filed suit seeking to forfeit James Daniel Good’s house and the surrounding property he owned in August 1989.<sup>35</sup> This *in rem* suit was based on Good’s conviction for

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32. 21 U.S.C. § 881(a) (2000).

33. 510 U.S. 43, 62 (1993) (“Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”)

34. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-80 (1974) (noting that conveyances were items likely to be removed from the grasp of law enforcement).

35. *James Daniel Good Real Property*, 510 U.S. at 46-47.

promoting a harmful drug in the second degree following a January 1985 search of his home. In an *ex parte* proceeding, the property was declared forfeit and then seized in late August 1989 (some four years later). Good contested the forfeiture, but the district court granted the government's motion for summary judgment. The court of appeals later affirmed the forfeiture, reversed on other grounds, and remanded the case for further proceedings. The U.S. Supreme Court finally struck down the forfeiture, holding that

the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.<sup>36</sup>

Nonetheless, the Supreme Court's holding in *Good* does not necessarily apply to other forms of property that are easily moved or easily disposed.<sup>37</sup> This means that property is often still seized with no notice, which raises significant due process concerns. For instance, in *United States v. \$506,231 in U.S. Currency*,<sup>38</sup> the Seventh Circuit rebuked the government after the Chicago Police and the United States seized and attempted to declare forfeit "half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity."<sup>39</sup> The Seventh Circuit further admonished the government:

As has likely been obvious from the tone of this opinion, we believe the government's conduct in forfeiture cases leaves much to be desired. We are certainly not the first court to be "enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for the due process that is buried in those statutes."<sup>40</sup>

The concerns about due process inherent in the lack of notice frequently afforded property owners presents a difficult issue. In part, the issue is tied to the low burden of proof required under the pre-Reform Act laws, which allowed property to be seized on mere probable cause. It seems likely the government's interest in securing possession of conveyances and other easily disposable items

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36. *Id.* at 62.

37. In all fairness, it does seem difficult to reconcile desires for additional notice to the forfeiture of conveyances and other easily disposed of property.

38. 125 F.3d 442 (7th Cir. 1997).

39. *Id.* at 454; *accord United States v. Currency, U.S. \$42,500.00*, 283 F.3d 977, 981 (9th Cir. 2002) ("A large amount of money standing alone, however, is insufficient to establish probable cause.").

40. 125 F.3d at 442 (quoting *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992)).

means that these items will always be able to be seized without notice; it is simply too easy to drive, fly, or sail such items away. On the other hand, given the importance of property rights in America, the requirement that the government provide notice before the seizure of real property, absent exigent circumstances, is the right rule.

### B. *Innocent Owner Defense*

One of the most troubling parts of civil forfeiture law has long been the worry that the property of innocent owners could be forfeited based on third-party conduct that the owner did not know of and/or could not reasonably foresee. Although at the common law there was usually no innocent owner provision, an innocent owner provision has been part of § 881(a) since it was enacted. Further, since the U.S. Supreme Court decided *Calero-Toledo* in 1974, it was widely assumed, based on language in that case, that such a provision was mandated by the Constitution. In *Calero-Toledo*, the Puerto Rican government initiated forfeiture proceedings against a \$19,800 rental yacht following the discovery of one marijuana cigarette that belonged to the individual renting the yacht. The Court upheld the forfeiture even though all parties conceded the owner "had no knowledge that its property was being used in connection with or in violation of (Puerto Rican Law)."⁴¹ However, the Court said it would be difficult to reject a constitutional claim where

an owner . . . proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.<sup>42</sup>

Based on this pronouncement, most interested parties assumed an innocent owner defense was based on the Constitution; that is, until 1996, when the Supreme Court decided *Bennis v. Michigan*.<sup>43</sup>

In *Bennis*, the Court upheld the forfeiture of a car owned by Bennis and her husband. The forfeiture was based on her husband's conviction for engaging in gross indecency with a prostitute. The Court held that Bennis was not entitled to an innocent owner defense even though she did not know her husband would use the vehicle to violate Michigan's laws and that the forfeiture did not violate Bennis' due process rights.<sup>44</sup> That decision, that an innocent owner defense is not constitutionally required, has generated a good deal of concern and comment.

For instance, Justice Thomas, in his concurring opinion, noted that "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is

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41. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 (1974).

42. *Id.* at 689-90 (footnote omitted).

43. 516 U.S. 442 (1996).

44. *Id.* at 446-47.

unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”<sup>45</sup> In his dissent, Justice Stevens went further and echoed the concerns that absent a robust innocent owner defense, “[t]he logic of the Court’s analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts.”<sup>46</sup> The logic of Justice Stevens’ point and the paucity of the majority’s holding was not lost on the media. For example, the *Chicago Tribune* asked,

Can the government now seize a hotel or a football stadium merely because the owners failed to prevent illegal acts that they didn’t condone and knew nothing about? Can it confiscate your house because, while you were out for the evening, your teenager was caught smoking dope on the patio? It’s hard to see why not.<sup>47</sup>

It thus appears that, despite the Supreme Court’s admonition that “[i]n our jurisprudence guilt is personal,”<sup>48</sup> an innocent owner is not constitutionally entitled to an innocent owner defense. That an innocent owner should be constitutionally entitled to such a defense because “[f]undamental fairness prohibits the punishment of innocent people”<sup>49</sup> is a matter beyond the scope of this Note.<sup>50</sup> However, at least one court<sup>51</sup> has distinguished *Bennis*, noting the car was an instrumentality of the crime and its value was essentially de minimis (it was very old). It is thus far from a settled matter that there is not a constitutionally mandated innocent owner defense.

Prior to the Reform Act, the federal innocent owner defense was a matter of some confusion primarily for two reasons. First, the statutory innocent owner provision differed based on what type of property was seized. Second, with

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45. *Id.* at 456 (Thomas, J., concurring).

46. *Id.* at 458 (Stevens, J., dissenting).

47. Stephen Chapman, *Almost-Blind Justice: Sometimes, Even the Innocent are Guilty*, CHI.

TRIB., Mar. 7, 1996, at 27.

48. *Scales v. United States*, 367 U.S. 203, 224 (1961). Blackstone’s discussion of criminal law contains the oft-cited phrase that “to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.” 4 BLACKSTONE, *supra* note 9, at 21. Under Blackstone’s reasoning, guilt is also personal since it is not possible for an individual who has not personally acted to be punished since the unlawful act is missing. Though Blackstone speaks specifically to criminal law, the relationship between civil and criminal proceedings is addressed *infra*. See *infra* notes 73-93 and accompanying text.

49. *Bennis*, 516 U.S. at 466 (Stevens, J., dissenting).

50. See Barclay Thomas Johnson, *The Severest Justice is Not the Best Policy: The One Strike Policy In Public Housing*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 234, 263 (2001) (arguing that it violates substantive due process rights to evict (or in this case forfeit) leaseholds (in this case other property) based on third-party criminal activity).

51. *Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir.) (en banc), *reversed*, Dep’t of Housing and Urban Development v. Rucker, 122 S. Ct. 1230 (2002) (reversing on all grounds but not dealing with *Bennis v. Michigan*).

respect to real property, the circuits were split on what § 881(a)(7)'s innocent owner defense actually required.

As to the first reason, prior to its amendment in 1988, with respect to conveyances, a number of courts held that to come within § 881(a)(4)(B)'s innocent owner provision<sup>52</sup> the conveyance must be stolen or otherwise unlawfully in the user's possession. It was thus not enough that the owner did not know of, or consent to, the use.<sup>53</sup> The difference between this and the innocent owner defense for real property is that *most* courts allow an innocent owner to establish his or her claim by showing lack of knowledge *or* consent.<sup>54</sup>

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52. After the 1988 amendment, § 881(a)(4) had three provisions exempting (A) common carriers, (B) stolen conveyances, and (C) innocent owners:

- (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;
- (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
- (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

53. The different interpretations are apparently based on the wording and punctuation of §§ 881(a)(4)(C) and 881(a)(7). Section 881(a)(4)(C) protected owners whose conveyances were used "without the knowledge, consent, or willful blindness of the owner." In contrast, § 881(a)(7) protected owners whose property was involved in criminal acts "committed or omitted without the knowledge or consent of that owner." The different interpretation is dubious for three reasons. First, the "or" of § 881(a)(4)(C) should be read disjunctively because, like § 881(a)(7), which has no willful blindness requirement, the "or," in the absence of the willful blindness requirement, would then fall between "knowledge" and "consent" as it does in § 881(a)(7). Moreover, the "or willful blindness" requirement is, of itself, a heightened burden on the owner that independently, and in conjunction with knowledge or consent, raises the burden on the owner to almost a negligence standard. Second, a number of courts have read § 881(a)(7) to include a negligence standard that is not unlike the "willful blindness" requirement. Thus, even if lack of knowledge or, more typically, lack of consent is proved, the owner must prove he or she did all that would reasonably be expected to prevent the acts. Since § 881(a)(7), a clearly disjunctive provision, is reasonably read to include a negligence standard, § 881(a)(4)(C) with its already present negligence or "willful blindness" standard, should be read that way as well. Finally, the conjunctive reading of § 881(a)(4)(C) would make it merely redundant. If an owner can only save his or her conveyance by proving he or she did not know, consent, and was not willfully blind of the use, he or she can essentially save the conveyance only if it was stolen. Such an interpretation would mean § 881(a)(4)(C) is superfluous since § 881(a)(4)(B) already covers that situation.

54. See *infra* note 62 and accompanying text.

This interpretation of the initial § 881(a)(4) statute was followed in *United States v. "Monkey."*<sup>55</sup> In that case, the Fifth Circuit held that it was not enough that the property, in this case a fishing boat named "Monkey," was used for an unauthorized purpose (to carry drugs); the user's possession must also be unlawful.<sup>56</sup> Hence, any time the conveyance is given to the party (even if the use exceeds the conditions under which it is given) the use is lawful. Despite this rather harsh interpretation, § 881(a)(4) was occasionally interpreted, based on *Calero-Toledo*'s dicta, to allow an innocent owner to avoid forfeiture if he or she proved that he or she was uninvolved with and unaware of the wrongful activity, and did all that could reasonably be expected to avoid the illegal use of the vehicle.<sup>57</sup> This interpretation was, more or less, included when § 881(a)(4) was amended in 1988 to add subparagraph (C), which protects owners whose conveyances are used "without the knowledge, consent, or willful blindness of the owner."<sup>58</sup> Since its addition to the statutory scheme, § 881(a)(4)(C) has typically been interpreted to provide the same protections as § 881(a)(7),<sup>59</sup> raising the question: what protection did that provision actually provide?

The innocent owner defense provided in § 881(a)(7) has split the circuits and even split courts within some circuits.<sup>60</sup> The specific language provides for the forfeiture of "[a]ll real property . . . (including any leasehold interest) . . . except that no property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."<sup>61</sup> The disagreement concerns the language "committed or omitted without the knowledge *or* consent of that owner," and whether that language should be read disjunctively (as opposed to conjunctively), and whether the provisions should be interpreted to include a negligence standard. The greater number of courts answered both questions in the affirmative.

Thus, the weight of authority held that under § 881(a)(7) an owner could avoid forfeiture by proving that he or she either did not have actual knowledge of the activities or, if he or she did have knowledge, did not consent.<sup>62</sup> Further,

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55. 725 F.2d 1007 (5th Cir. 1984).

56. *Id.* at 1012.

57. One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 762 (8th Cir. 1986).

58. 21 U.S.C. § 881(a)(4)(C) (1999).

59. See, e.g., *United States v. One 1985 Mercedes Benz Auto.*, 716 F. Supp. 211 (E.D. N.C. 1989).

60. Thus, the Eleventh Circuit felt compelled to observe that with regard to whether § 881(a)(7) should be read conjunctively or disjunctively, "[t]he law in this circuit is not clear." *United States v. 6640 S.W. 48th St.*, 41 F.3d 1448, 1452 (11th Cir. 1995). Noting that "Eleventh Circuit case law is less than clear on whether a disjunctive or conjunctive reading applies to the 'without knowledge or consent' language of the innocent-owner defense," the Eleventh Circuit embraced the disjunctive reading of the old § 881(a)(7) late in 2001. *United States v. Cleckler*, 270 F.3d 1331, 1334 (11th Cir. 2001).

61. 21 U.S.C. § 881(a)(7) (2000).

62. See, e.g., *United States v. 121 Allen Place*, 75 F.3d 118 (2d Cir. 1996); *United States*

most courts hold that an owner must also not engage in willful blindness<sup>63</sup> and that he or she must have done "all that reasonably could be expected to prevent the illegal activity once he [or she] learned of it."<sup>64</sup> The negligence standard seems to come from *Calero-Toledo* where, in dictum, the Court noted that there might be constitutional questions raised by the forfeiture of "an owner who proved not only that he was unininvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."<sup>65</sup> Notwithstanding this majority position, at least one circuit adopted the conjunctive reading that lack of both knowledge *and* consent must be proved by the person claiming innocent owner status.<sup>66</sup> That the Reform Act adopts the majority position suggests that this position is the one Congress originally intended and recommends further analysis to be provided in Parts III and IV.

### C. Burden of Proof

Other than the innocent owner questions, perhaps the most problematic pre-Reform Act part of the civil forfeiture statute was the inequitable burden of proof. Under this scheme, all property was deemed forfeit once the government showed probable cause that the property was used to facilitate a narcotics crime or was derived from a narcotics crime. Since probable cause could be established with as little as a confidential informant's tip, the potential for abuse and disastrous consequences was staggering. For example, in Boston, thirteen members of the S.W.A.T. team raided Rev. Accelynne Williams' apartment

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v. 1012 Germantown Rd., 963 F.2d 1496 (11th Cir. 1992); United States v. 7326 Highway 45 N., 965 F.2d 311, 315 (7th Cir. 1992) (noting the circuits are split but taking no position); United States v. 141st St. Corp., 911 F.2d 870 (2d Cir. 1990); United States v. 6109 Grubb Rd., 886 F.2d 618 (3d Cir. 1989); United States v. Lots 12,13,14, & 15, Keeton Heights Subdivision, 869 F.2d 942, 947 (6th Cir. 1989) (holding also that a negligence standard does not apply).

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

64. *141st St. Corp.*, 911 F.2d at 878-79 (noting that the disjunctive reading was the only logical one because in order to consent (or not consent) to the narcotics activity, an individual must have actual knowledge of it). See also United States v. 418 57th St., 922 F.2d 129, 132 (2d Cir. 1990) (consent is "failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use"); United States v. 15621 S.W. 209th Ave., 699 F. Supp. 1531, 1534 (S.D. Fla. 1988), *aff'd*, 894 F.2d 1511 (11th Cir. 1990) (an innocent owner is one who did not know of the property's connection to drug trafficking and took every reasonable precaution to prevent the property's use in drug trafficking). But see *Lots 12, 13, 14, & 15, Keeton Heights Subdivision*, 869 F.2d at 947 (negligence standard does not apply).

65. *Calero-Toledo* v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974).

66. United States v. 10936 Oak Run Circle, 9 F.3d 74, 76 (9th Cir. 1993) (knowledge that property was acquired through drug proceeds bars owner from asserting innocent owner defense); United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) (a district court in *United States v. 5935 Acres of Land*, 752 F. Supp. 359, 362 (D.C. Haw. 1990), later described the holding as dictum).

searching for drugs and guns, but found none.<sup>67</sup> Rev. Williams, who was seventy-five years old, died of a heart attack after being “secured” on the floor by three police officers. As it turned out, the confidential informant who provided the probable cause had been drunk the night he visited a drug den and was mistaken about the identity and location of the malefactors. The police, of course, not being required to meet a higher standard of proof than probable cause, did not investigate further.<sup>68</sup> Had Rev. Williams survived, the burden would have been on him to prove that his property was not subject to forfeiture.

This low burden of proof and the use of confidential informants presents other problems for those challenging the seizures. Thus, with respect to testimony before the House Judiciary Committee concerning the civil forfeiture laws, one House Report noted

[t]he Committee has heard testimony from the executor of an estate who was placed, along with the beneficiaries of a house, in the position of having to fight a seizure based on “an unnamed person in prison (having) told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent . . . on an unspecified date in December 1988.”<sup>69</sup>

In such a situation, the familiar problem of proving a negative becomes nearly insurmountable. It is much easier for the government to prove that such an event *might* (the statute only required probable cause) have happened than for the owner to prove, by a preponderance of evidence, that this chain of events never happened. The situation also raises the question of whether such a standard is constitutionally adequate.

The Second Circuit addressed this question specifically when it observed, “*Good* and *Austin* reopen the question of whether the quantum of evidence the government needs to show in order to obtain a warrant in rem allowing seizure—probable cause—suffices to meet the requirements of due process.”<sup>70</sup> The Civil Asset Forfeiture Reform Act addresses the burden of proof concerns by raising the government’s burden to a preponderance of the evidence. This Note revisits the due process concerns raised by the burden of proof allocations

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67. HYDE, *supra* note 9, at 47-48 (Rep. Hyde collects a number of other horror stories).

68. See Sara Rimer, *Minister Who Sought Peace Dies in a Botched Drug Raid*, N.Y. TIMES, Mar. 28, 1994, at A4.

69. H.R. Rep. No. 106-192, at 1b n.67 (referring to *United States v. Good*, 510 U.S. 43 (1993); *Austin v. United States*, 509 U.S. 602 (1993)).

70. *United States v. 194 Quaker Farms Rd.*, 85 F.3d 985, 990 (2d Cir.), cert. denied, 519 U.S. 932 (1996). *Accord United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425 (9th Cir. 1997) (quoting *194 Quaker Farms Rd.*, 85 F.3d at 990); *United States v. Four Contiguous Parcels of Real Property*, 1999 WL 701914 (6th Cir. 1999) (Clay, J., dissenting) (“Because I believe that the allocation of the burden of proof in a civil forfeiture case under 19 U.S.C. § 1615 [a similar statute] violates the Due Process Clause of the Fifth Amendment, I respectfully dissent.”). *But see United States v. \$129,727.00 U.S. Currency*, 129 F.3d 486 (9th Cir. 1997) (rejecting as dictum the circuit’s earlier statements in *\$49,576.00 U.S. Currency*).

in Part IV.C.

#### *D. Eighth Amendment's Excessive Fines Clause*

Another area of confusion in the civil forfeiture laws is the role of the Eighth Amendment's Excessive Fines Clause.<sup>71</sup> The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>72</sup> The forfeiture of significant property interests for minor narcotics crimes can raise Excessive Fines Concerns. Information presented and analyzed in this section will be raised again in Part IV, where this Note will discuss why the Reform Act does not fully address Eighth Amendment concerns.

When a relatively minor narcotics crime leads to civil forfeiture proceedings, especially where the government proceeds against a primary residence, an analysis of whether the forfeiture is constitutionally excessive is appropriate. This vein of analysis has had a fitful and confusing existence in civil forfeiture law for three major reasons. First, courts have only rarely struck down a forfeiture as excessive, making it difficult to know where the lines are drawn. Second, it was, for many years, not clear that the Excessive Fines Clause applied at all to civil forfeiture. Third, because the Supreme Court has not specified a

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71. The Eighth Amendment is lifted almost verbatim from the English Bill of Rights granted on William and Mary's accession to the English throne in 1689, following the Glorious Revolution. 5 THE FOUNDER'S CONSTITUTION 369 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting Bill of Rights, 1689, 1 W. & M., c.2, § 10 (Eng.)) ("That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."). This section of the English Bill of Rights seems to have originated in the *Case of Titus Oates* where Titus was sentenced to the following punishments for perjury: a fine of 1000 marks on each indictment; to be stripped of his Canonical Habits; stand in the Pillory and walk around Westminster declaring his crime with a bag over his head; stand in the Pillory again a week later, be whipped from Aldgate to Newgate on a Wednesday, be whipped from Newgate to Tyburn by the hangman (on Friday); and stand in the Pillory every April 24 for the rest of his life, stand in the Pillory every August 9 for the rest of his life, stand in the Pillory every August 10 for the rest of his life, stand in the Pillory on August 11 for the rest of his life, and stand in the Pillory on September 2 for the rest of his life. The dissenting Lords found

the said judgments [to be] barbarous, inhuman, and unchristian . . . It is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons then assembled . . . whereby it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

*Id.* at 368 (quoting 10 How. St. Tr. 1079, 1316 (K.B. 1685)). That Mr. Oates' sentence was cruel is difficult to dispute; it was also literally rather unusual given that he was required to "for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts of Westminster-hall) declaring your crime." *Id.* (quoting *Case of Titus Oates*, 10 How. St. Tr. at 1316).

72. U.S. CONST. amend. VIII.

test for what constitutes an excessive fine, there is no consensus as to what test should be used to determine whether a forfeiture violates the Excessive Fines Clause.

As noted, courts have been extremely reluctant to strike down forfeitures and have used any number of reasons to uphold them. Thus, in *United States v. 38 Whalers Cove Drive*, the court allowed the forfeiture of a \$145,000 condominium (in which the plaintiff had \$68,000 in equity) based on one \$250 drug sale.<sup>73</sup> The court noted that “[t]he Eighth Amendment proscribes only extreme punishments. Even assuming that the entire amount of the forfeiture here is punishment, it does not violate the outer confines set by the Eighth Amendment.”<sup>74</sup> The court reasoned that the fine was not excessive since the claimant could have faced fines ranging from \$50,000 (under New York law) to \$1 million (under federal law). However, the court in *Whalers Cove* did find that the Eighth Amendment applied to civil forfeiture, which the Supreme Court affirmed the following year in *United States v. Austin*.<sup>75</sup>

In *Austin*, the Supreme Court held that “forfeiture generally and statutory *in rem* forfeiture in particular, historically have been understood, at least in part, as punishment”<sup>76</sup> and that “[w]e therefore conclude that forfeiture under these provisions 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.”<sup>77</sup> In *Austin*, the claimant’s autobody shop and mobile home were subject to forfeiture following his conviction for possessing cocaine with intent to distribute. Although the Supreme Court found that the Excessive Fines Clause was applicable, it chose not to set forth a multifactor test for what is excessive, saying that “[p]rudence dictates that we allow the lower courts to consider that question in the first instance.”<sup>78</sup>

Because the majority refused to set a test, Justice Scalia’s concurring opinion, which is one of the Supreme Court’s few pronouncements on the subject, has been particularly important in post-*Austin* Excessive Fines Clause civil forfeiture jurisprudence. Justice Scalia thought that some guidance was in order for the lower courts because *in rem* forfeiture has a unique relationship to the property that was unlike the traditional Excessive Fines analysis for monetary fines and *in personam* forfeiture. Thus, Justice Scalia said the test of excessiveness for statutory *in rem* forfeitures should focus “not [on] how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.”<sup>79</sup> This test has been described as an instrumentality test and is based on the notion that *in rem* forfeiture proceeds

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73. *United States v. 38 Whalers Cove Drive*, 954 F.2d 29 (2d Cir. 1991).

74. *Id.* at 38.

75. 509 U.S. 602 (1993).

76. *United States v. Austin*, 509 U.S. 602, 618 (1993).

77. *Id.* at 622 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

78. *Id.* at 622-23 (emphasis omitted).

79. *Id.* at 628 (emphasis omitted) (Scalia, J., concurring).

against property using the fiction that the property is guilty of the offense. Thus, it mattered not whether the property was expensive and the offense small, but rather whether the property was actually involved.<sup>80</sup>

A second, oft-cited Supreme Court case dealing with forfeiture and the Excessive Fines Clause is *United States v. Bajakajian*.<sup>81</sup> *Bajakajian* simultaneously complicates and clarifies the analysis for several reasons. First, though *Bajakajian* was resolved under the Excessive Fines clause, it arose under criminal forfeiture statutes and under different factual circumstances.<sup>82</sup>

In *Bajakajian*, customs inspectors discovered Hosep Bajakajian and his family preparing to board an international flight with \$357,144 in U.S. currency that Bajakajian failed to report as required under 31 U.S.C. § 5316(a)(1)(A).<sup>83</sup> Although it is legal to transport that amount, or any amount, of currency, it is illegal to fail to report the transport of more than \$10,000 in “monetary instruments.” The funds involved in such a failure to report are then subject to forfeiture under 18 U.S.C. § 982(a)(1).<sup>84</sup> Though Bajakajian pled guilty to the offense, the government did not seek to punish him criminally and instead proceeded against the money under 18 U.S.C. § 982(a)(1). The district court found that all \$357,144 was involved in the offense, and therefore subject to forfeiture, but held that “such forfeiture would be ‘extraordinarily harsh’ and ‘grossly disproportionate to the offense in question,’ and that it would therefore violate the Excessive Fines Clause.”<sup>85</sup> The district court therefore ordered forfeiture of only \$15,000, which the court of appeals affirmed.<sup>86</sup> The Supreme Court affirmed the court of appeals decision holding that “a punitive forfeiture

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80. An important point, to be sure. But, after all, it is the *Excessive Fines Clause* that is at issue. As this section suggests, this means that a proportionality inquiry is necessary as well. See *infra* notes 118-19 and accompanying text.

81. 524 U.S. 321 (1998).

82. The funds were lawfully acquired and were being transported to repay a lawful debt. The district court also found that Bajakajian “failed to report that he was taking the currency out of the United States because of fear stemming from ‘cultural differences’: [Bajakajian was] a member of the Armenian minority in Syria, [and] had a ‘distrust for the Government.’” *Id.* at 326.

83. 31 U.S.C. § 5316(a)(1) (1994) requires that

a person or an agent or bailee of the person shall file a report . . . when the person, agent, or bailee knowingly—(1) transports, is about to transport, or has transported, monetary instruments of more than \$10,000 at one time—(A) from a place in the United States to or through a place outside the United States.

*Id.*

84. 18 U.S.C. § 982(a)(1) (2000) provides,

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section . . . 5316 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

*Id.*

85. *Bajakajian*, 524 U.S. at 326.

86. *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996).

violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.”<sup>87</sup>

Second, the Court’s emphasis on the instrumentality distinction is crucial, but not readily elucidated—especially since the holding identifies proportionality as the sole test to be used. Justice Thomas, writing for the majority, observed that the proceeding was against Bajakajian himself and was not an *in rem* suit against the money. Thus, the money that would have been forfeited was not necessarily the specific money (i.e., the instrumentality) involved in the offense (as would be a car involved in a drug transaction or the property on which marijuana was grown in *United States v. Milbrand*<sup>88</sup>). Any instrumentality inquiry was, for this reason, entirely beside the point. Further, in this case, the forfeiture was the only punishment because no severe criminal punishment was sought by the government.<sup>89</sup> This is unlike other narcotics-related forfeitures where the forfeiture might be a secondary punishment.<sup>90</sup> At most, the case suggests proportionality is the sole test for cases such as *Bajakajian*, where the proceeding is *in personam* and forfeiture does not necessarily involve an instrumentality of the crime. Even the majority in *Bajakajian* recognized that ordinarily an instrumentality inquiry is so important that “[a] forfeiture that reaches beyond this strict historical limitation [of the instrumentality inquiry] is ipso facto punitive and therefore subject to review under the Excessive Fines Clause.”<sup>91</sup>

Third, the opinion, when left unexamined, strongly suggests that an excessive fines inquiry should consider only proportionality. In fact, the Court held, “We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”<sup>92</sup> Thus, but for the differences suggested, the case strongly suggests that an excessive fines analysis should include both a proportionality and an instrumentality inquiry. Because this case was not a statutory *in rem* proceeding, however, it ultimately does not answer or clarify the Court’s position on what test is appropriate for excessive fines inquiries in statutory *in rem* forfeitures. Nor does *Bajakajian* address Justice Scalia’s point in *Austin* that an Excessive Fines analysis should

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87. *Bajakajian*, 524 U.S. at 334.

88. 58 F.3d 841, 848 (2d Cir. 1995) (holding that forfeiture of an eighty-five acre parcel of land owned by offender’s mother did not violate the Excessive Fines Clause because value of property forfeited was not excessive in comparison to the offense (1362 marijuana plants found on property), there was a close relationship between the offense and the property, and the mother “would have to have been blind not to have been aware of her son’s marijuana activities”).

89. The government decided not to press for severe criminal sanctions and sought instead to take possession of Bajakajian’s \$357,144, which raises the specter of improper motivation. The distinction the majority seems to have been driving at was between civil *in rem* forfeitures and criminal forfeitures.

90. See *United States v. Wagoner County Real Estate*, 278 F.3d 1091, 1100 (10th Cir. 2002) (“There are significant distinctions between *Bajakajian* and [civil forfeiture cases].”).

91. *Bajakajian*, 524 U.S. at 333 n.8 (emphasis omitted).

92. *Id.* at 334.

consider only instrumentality.<sup>93</sup>

Finally, the composition of the *Bajakajian* majority (Justice Thomas joined the “liberal” wing of the Court as the fifth vote) muddies the waters when one tries to predict what the Court might decide under § 881(a). Whether the Court will be willing to find an Excessive Fines Clause violation in a case involving drug dealers as opposed to oppressed immigrants is an open question.

Given the lack of clarity (or void<sup>94</sup>) in the Supreme Court’s analysis of the proper manner by which to analyze a forfeiture under the Excessive Fines Clause, it is not surprising that the lower courts are split on what test is applicable when a challenge is raised to a forfeiture under the Eighth Amendment. The split has largely centered on Justice Scalia’s concurring opinion in *Austin* where he sets forth an instrumentality test.<sup>95</sup> The courts have largely moved away from such a single-minded approach that focuses solely on either instrumentality or proportionality. For instance, the Tenth Circuit thought it necessary to “supplement” the “*Bajakajian* standard” and add a “factually intensive” inquiry that focused on the property’s role as an instrumentality in the crime.<sup>96</sup> The majority of courts make use of some form of multi-factored test often combining (implicitly or explicitly) instrumentality with proportionality.

At least six circuits have adopted some version of a test that combines instrumentality and proportionality in a multifactored balancing test. The test typically considers:

- (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.<sup>97</sup>

The test offered by the court in *Milbrand* is a nuanced one that offers clear advantages over a test inquiring solely into instrumentality or proportionality.

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93. *United States v. Austin*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring).

94. *Wagoner County Real Estate*, 278 F.3d at 1091 n.7. The rule of law would benefit from a clear rule from the Court on how to deal with these cases. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

95. *Austin*, 509 U.S. at 608 (Scalia, J., concurring).

96. *Wagoner County Real Estate*, 278 F.3d at 1191.

97. *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). See also *Wagoner County Real Estate*, 278 F.3d at 1091; *United States v. 3819 N.W. Thurman St., Portland, Ore.*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 25 Sandra Court*, 135 F.3d 462 (7th Cir. 1998); *United States v. 6040 Wentworth Ave. S.*, 123 F.3d 685 (8th Cir. 1997); *United States v. N. Half of the Southwest Quarter of Section Thirteen*, 106 F.3d 336 (10th Cir. 1997); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. RR #1*, 14 F.3d 864 (3d Cir. 1994).

For its part, the Fourth Circuit has endorsed the instrumentality approach following both *United States v. Austin* and *United States v. Bajakajian*. In *United States v. Chandler*,<sup>98</sup> the court held that a “three-part instrumentality test . . . considers (1) the nexus between the offense and the property and the extent of the property’s role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder.”<sup>99</sup> The Fourth Circuit also enunciated five factors that courts might also take into account during such an inquiry:

(1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.<sup>100</sup>

The court’s endorsement of the instrumentality test rested heavily on Justice Scalia’s concurrence in *Austin*. The court brushed aside concerns about excessiveness, saying “a concern about excessiveness may be tempered by the pragmatic possibility of separating offensive property from nonimplicated property, when the offending property is readily separable.”<sup>101</sup> The court apparently drew its inspiration for this suggestion from Justice Scalia’s concurrence in *Austin*, where he observed that

[e]ven in the case of deodands, juries were careful to confiscate only the instrument of death and not more. Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death.<sup>102</sup>

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98. 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). A common misperception is that *United States v. Shifflett*, No. 97-4021, 1998 U.S. App. LEXIS 23908 (4th Cir. Sept. 24, 1998), an unpublished opinion, overrules *Chandler*. It does not because *Shifflett* deals with *in personam* criminal forfeitures pursuant to 21 U.S.C. § 853(a) and is therefore clearly distinguishable from *Chandler*. *Id.* at \*17. In a later opinion, *United States v. Ahmad*, 213 F.3d 805 (4th Cir.), *cert. denied*, 531 U.S. 1014 (2000), the Fourth Circuit endorsed the instrumentality approach and distinguished *Bajakajian* saying that “not only did the *Bajakajian* Court recognize as the well-established rule that true civil *in rem* instrumentality forfeitures are exempt from the excessive fines analysis, but it also did nothing to change or limit this rule.” *Id.* at 814.

99. *Chandler*, 36 F.3d at 365.

100. *Id.*

101. *Id.* at 364. The court finally noted that “to sustain a forfeiture against an Eighth Amendment challenge, the court must be able to conclude, under the totality of circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been, had the offensive conduct been carried out as intended.” *Id.* at 365.

102. *United States v. Austin*, 509 U.S. 602, 628 (1993) (citing 1 BLACKSTONE, *supra* note

The suggestion, as innovative as it is, seems fairly inapplicable to the whole of civil forfeiture, where parcels of property, cash and cash equivalents, and conveyances are at issue. It is one thing to take only the wheel of an immobile cart (or, say, a tractor today), but it is an entirely different matter to attempt to divide a parcel of property (or bank account) partially tainted by drug money that the government seeks to declare forfeit under § 881(a).<sup>103</sup> It is unclear how the Fourth Circuit would deal with situations that are likely to arise today where each spouse has a property interest in property held in common. Such was not the case when the deodand was the method used to seize property.

The Fourth Circuit thought a proportionality prong was inapplicable because the Supreme Court had been only lukewarm about a strict proportionality inquiry, holding that “the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”<sup>104</sup> The Fourth Circuit also said that a proportionality inquiry was “not applicable when considering the excessiveness of a forfeiture of specifically identified property”<sup>105</sup> because the statute does not contain a limitation on the value of the property forfeited (unlike a fine or prison sentence), nor is such constitutional limitation supported by the history of the Eighth Amendment.<sup>106</sup>

In a later opinion that followed *Bajakajian*, *United States v. Ahmad*,<sup>107</sup> the Fourth Circuit reaffirmed the supremacy of the instrumentality approach. Proportionality, the court thought, was simply not applicable wherever the property is an instrumentality. Notwithstanding *Bajakajian*’s admonitions that proportionality was proper way to judge an Excessive Fines Clause claim, the Fourth Circuit distinguished the case because the forfeiture “did not constitute an instrumentality forfeiture.”<sup>108</sup> Therefore, said the court, “not only did the *Bajakajian* Court recognize as the well-established rule that true civil in rem instrumentality forfeitures are exempt from the excessive fines analysis, but it also did nothing to change or limit this rule.”<sup>109</sup> Thus, at least in the Fourth Circuit, whenever the property is an instrumentality, a forfeiture can never be

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9, at 301-02) (Scalia, J., concurring).

103. See, for example, the messy case of *United States v. 2525 Leroy Lane*, 910 F.2d 343 (6th Cir. 1990), in which the court labored to divide what part of a marital estate an innocent spouse was entitled to and just how to divide and secure the government’s interest in the forfeited part of the estate.

104. *Chandler*, 36 F.3d at 365 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (holding that a life sentence without possibility of parole for possession of 672 grams of cocaine was not constitutionally infirm under the Eighth Amendment)).

105. *Id.* at 365-66.

106. *Id.* at 366.

107. 213 F.3d 805 (4th Cir.), *cert. denied*, 531 U.S. 1014 (2000).

108. *Id.* at 814.

109. *Id.*

excessive.<sup>110</sup>

In contrast to the Fourth Circuit, the Eleventh Circuit held in *United States v. 427 & 429 Hall Street*,<sup>111</sup> that “the appropriate inquiry with respect to the Excessive Fines Clause is, and is only, a proportionality test.”<sup>112</sup> The court looked as far back as the Magna Carta<sup>113</sup> to find that a proportionality prong was necessarily a part of any excessive fines analysis. Based on this history, a court should ask: “Given the offense for which the owner is being punished, is the fine (imposed by civil forfeiture) excessive?”<sup>114</sup>

The multifactor test is the superior one. The test inquires into the two important prongs (instrumentality and proportionality) to provide those constitutionally based protections that are necessary. The instrumentality inquiry is necessary because, as Justice Scalia observed in *Austin*, modern civil forfeiture is based on the fiction that the object proceeded against is guilty of the crime (which is based on the deodand). Given this fiction, it thus makes little sense to allow the government to proceed against property that was not involved in the crime (i.e., was not an instrumentality). Hence, even the Supreme Court in *Bajakajian* observed that “[a] forfeiture that reaches beyond this strict historical limitation [of the instrumentality inquiry] is ipso facto punitive and therefore subject to review under the Excessive Fines Clause.”<sup>115</sup> One might argue, as did the Eleventh Circuit in *United States v. 427 & 429 Hall Street*, that an instrumentality inquiry is inherent in the statute and therefore unnecessary under an Excessive Fines Clause inquiry.<sup>116</sup> The point is well taken; nonetheless, the inquiry for whether a deprivation of a property interest is constitutionally valid is determined not by the content of the statute, but by the Constitution itself.<sup>117</sup>

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110. The *Ahmad* Court did hold, in the alternative, that the forfeiture was not “grossly disproportional.” *Ahmad*, 213 F.3d at 815.

111. 74 F.3d 1165 (11th Cir. 1996). *Accord* *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304 (11th Cir. 1999).

112. 74 F.3d at 1170.

113. Section 20 of the Magna Carta provides that:

A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villain shall be amerced saving his wainage; if they fall into our merch. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

J.C. HOLT, MAGNA CARTA 457 (2d ed. 1992).

114. *427 & 429 Hall St.*, 74 F.3d at 1172.

115. *United States v. Bajakajian*, 524 U.S. 321, 333 n.8 (1998) (emphasis added).

116. *See 427 & 429 Hall St.*, 74 F.3d at 1171 n.9 (observing that an instrumentality test is unnecessary because § 881(a)(7) only authorizes the forfeiture of property “which is used, or intended to be used, in any manner or part’ to facilitate a violation of the Controlled Substances Act.”).

117. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985) (citing *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring)) (“As our cases have

A proportionality inquiry is also necessary because a forfeiture that passes the instrumentality test might well be unconstitutional because it is grossly disproportionate to the crime. Such a scenario is easy to imagine when a relatively minor crime involves a very valuable piece of property. That a proportionality prong is necessary and required under the Excessive Fines Clause is eminently logical—it is, after all, the *Excessive Fines Clause*. The multifactor balancing test would then inquire into both prongs, as did the Second Circuit's version of that test in *Milbrand*:

- (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.<sup>118</sup>

In civil forfeiture proceedings under § 881(a), using only a proportionality inquiry is not enough because the proceedings are not merely punitive. Civil forfeiture is also remedial and preventative. A forfeiture strikes at the instrumentalities used to facilitate criminal activity and thus attempts to prevent future criminal activity. A forfeiture is remedial because, to some extent, it compensates for the crimes already committed. Hence, the House Judiciary Committee noted:

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. 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 [the illegal activity] down.<sup>119</sup>

When forfeitures are explicitly aimed at the instrumentalities of the crime in an effort to prevent future crimes and remedy past wrongs, an instrumentality inquiry is necessary. In such a case, a forfeiture could be "excessive" within the

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consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.")).

118. *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995). See also *United States v. Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002); *United States v. 3819 N.W. Thurman St.*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 25 Sandra Court*, 135 F.3d 462 (7th Cir. 1998); *United States v. 6040 Wentworth Ave. S.*, 123 F.3d 685 (8th Cir. 1997); *United States v. N. Half of the Southwest Quarter of Section Thirteen*, 106 F.3d 336 (10th Cir. 1997); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. RR #1*, 14 F.3d 864 (3d Cir. 1994).

119. H.R. REP. NO. 106-192, at 4 (1999).

meaning of the Excessive Fines Clause either because it is grossly disproportionate, or because there is little or no nexus between the offense and the property—a two-pronged inquiry is therefore necessary.

#### *E. Problematic Motivations*

The next criticism often leveled against the civil forfeiture laws is the problematic motivations the government faces when it is permitted to keep the property it proceeds against.<sup>120</sup> Courts and commentators have worried that the government may be tempted to “fill its coffers” by seizing property for minor offenses.<sup>121</sup> Thus, Justice Thomas observed in *Bennis v. Michigan* that “[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”<sup>122</sup> That the government actually views civil forfeiture as a way to increase revenue is reflected by a 1990 memo sent by the U.S. Attorney General to U.S. Attorneys regarding the increase of forfeitures to reach budgetary projections. The memo noted, “[w]e must significantly increase production to reach our budget target.”<sup>123</sup> Justice Thomas, it seems, was not far from the truth.<sup>124</sup>

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120. Even in mainstream media the issue arises. Hence, on the television drama *J.A.G.*, when Admiral Chegwidden’s car is found to contain enough drugs to be subject to civil forfeiture (he loaned it to a love interest’s son), he asks a subordinate what the police department used to do with seized vehicles when the subordinate was a police officer. The reply was that they sold them to his brother in-law (the sheriff) for \$500. *J.A.G.: The Princess and the Petty Officer* (CBS television broadcast, Nov. 14, 2000) (J.A.G. Episode Guide, available at <http://www.paramount.com/television/jag/episodeguide/index.htm>).

121. *Rucker v. Davis*, 237 F.3d 1113, 1125 (9th Cir.) (en banc), *reversed*, Dep’t of Housing and Urban Development v. Rucker, 122 S. Ct. 1230 (2002).

122. *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

123. 38 United States Attorney’s Bulletin 180 (1990) (noting that “the President’s budget for FY 1990 projects forfeiture deposits of \$470 million. Through the first nine months of the year, deposits total \$314 million. We must significantly increase production to reach our budget target.”).

124. At the local level, this desire to raise funds using civil forfeiture has had literally deadly consequences. For instance, in California, Donald Scott was shot and killed by police raiding his ranch in Malibu. The police were allegedly searching for marijuana plants, but found none. The District Attorney for Ventura County later concluded that “the Los Angeles County Sheriff’s Department was motivated, at least in part, by a desire to seize and forfeit the ranch for the government.” Office of the District Attorney, Ventura County, Cal., *Report on the Death of Donald Scott*, Mar. 30, 1993, at 61, available at <http://www.fear.org/chron/scott.txt>. Mr. Scott’s ranch was apparently worth some five million dollars. See also Michael Fessier, Jr., *Trail’s End Deep in a Wild Canyon West of Malibu, a Controversial Law Brought Together a Zealous Sheriff’s Deputy and an Eccentric Recluse. A Few Seconds Later, Donald Scott Was Dead*, L.A. TIMES MAGAZINE, Aug. 1, 1993, available at 1993 WL 2288211.

Given these concerns, it is not surprising to learn that forfeiture was traditionally viewed as one source of the king's revenue. Blackstone observes during his discussion of the king's revenue that "[t]he next branch of the king's ordinary revenue [consists] in forfeitures of lands and goods for offences."<sup>125</sup> This view seems to have carried over to the United States, and in 1998 the federal government seized \$449 million in assets and had \$1 billion on deposit.<sup>126</sup> As Part III shows, it is yet unclear to what extent the Reform Act deals with these issues.

### III. THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

#### A. Generally

That the federal civil forfeiture laws were ripe for reform should be obvious. The second major part of this Note focuses on the ultimate outcome of those reform efforts: the Civil Asset Forfeiture Reform Act of 2000,<sup>127</sup> sponsored by Rep. Henry Hyde. Rep. Hyde first introduced legislation to reform the statutory scheme in June of 1993,<sup>128</sup> which, coincidentally, was several months after the major newspaper in his district, *The Chicago Tribune*, began to raise questions about the propriety of civil forfeiture.<sup>129</sup> The bill was co-sponsored by, among others, Rep. Barney Frank (D-MA), and enjoyed wide bipartisan support and was endorsed by several groups, including the ABA, ACLU, and National Association of Criminal Defense Lawyers.<sup>130</sup> The ultimate outcome of these efforts was the Reform Act that became law in April 2000.

The Reform Act makes five important changes to the civil forfeiture laws that concern this Note.<sup>131</sup> First, the Act contains new requirements that the government obey certain procedural norms and provides penalties for failure to

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125. 1 BLACKSTONE, *supra* note 9, at 289.

126. H.R. REP. NO. 106-192, at 3 (1999). *See also* HYDE, *supra* note 9 (Rep. Henry Hyde notes many other abuses in his book). One might argue that this is a fairly small amount of money for the federal government and a sum that is fairly unlikely to give anyone motives to act improperly. That \$449 million is, after all, less than one-quarter of one-tenth of one percent of the United States' \$1.8 trillion budget (or roughly one-third of the cost of one Arleigh Burke Class Guided Missile Destroyer).

127. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).

128. H.R. 2417, 103rd Cong. (1993).

129. *See, e.g.*, Stephen Chapman, *Seizing Property: Law Enforcement's Dangerous Weapon*, CHI. TRIB., Mar. 7, 1993, at 3; *What Other Newspapers are Saying*, CHI. TRIB., Feb. 27, 1993, at 21 (noting an article in the *Albuquerque Journal* entitled, *Innocent People Become Government Victims*, dealing with the excesses of civil forfeiture).

130. *See* Rhonda McMillion, *Fairness in Civil Forfeiture: ABA Backs Bill That Seeks to Avoid Punishing "Innocent" Property Owners*, 82 A.B.A. J. 102 (1996).

131. For a complete treatment of all the changes made by the Act see Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97 (2001).

obey these norms.<sup>132</sup> For instance, within sixty days of the seizure the government must notify owners that their property has been seized and is subject to forfeiture. If the government does not notify the owners, the property must be returned.<sup>133</sup> These provisions include certain procedures that specifically deal with the seizure of real property<sup>134</sup> and that essentially codify the Supreme Court's decision in *United States v. Good*.<sup>135</sup> Thus, situations like Charlotte Juide's would no longer take place since, absent exigent circumstances, the government may not proceed against real property without first providing notice.<sup>136</sup> Importantly, the government may not deprive owners and occupants of their property prior to a judicial determination that the property is subject to forfeiture.<sup>137</sup>

Second, the Act contains new provisions for appointing counsel for indigent defendants from the local legal services corporation.<sup>138</sup> Although the court is given discretion to appoint counsel in most cases, when the property in question is a primary residence the court is required to appoint counsel when "a person with standing to contest the forfeiture of property . . . is financially unable to obtain representation by counsel."<sup>139</sup> Importantly, when counsel is appointed, the government is required to pay "reasonable attorney fees and costs . . . regardless of the outcome of the case."<sup>140</sup>

Third, the Act makes important changes to the burden of proof required to prove forfeiture.<sup>141</sup> The government must now "establish, by a preponderance of

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132. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No 106-185, § 2, 114 Stat. 202, 203 (2000) (codified as amended at 18 U.S.C. § 983(a)(1) (2000)).

133. *Id.* (codified as amended at 18 U.S.C. § 983(a)(1)(F) (2000)). *See also* provisions codified at 18 U.S.C. 983(e), which provide that a person may have a forfeiture set aside if the government "knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide that party with notice."

134. Pub. L. No. 106-185, § 7, 114 Stat. 202, 214-15 (2000) (codified as amended at 18 U.S.C. § 985 (2000)).

135. 513 U.S. 43 (1993).

136. But courts have typically been lax about applying notice provisions, and, in any event, the Reform Act allows forfeitures that have been judicially set aside for lack of notice to be refiled by the government. *See* 18 U.S.C. § 983(e)(2)(A) (2002); *United States v. Marolf*, 277 F.3d 1156 (9th Cir. 2002); *United States v. \$39,480 in the United States Currency*, 190 F. Supp. 2d 929 (W.D. Tex. 2002) (refusing to strictly construe ninety-day limit on filing of complaint for forfeiture where government filed notice one day late).

137. Pub. L. No. 106-185, § 7, 114 Stat. 202, 214-15 (2000) (codified as amended at 18 U.S.C. § 985 (2000)).

138. Pub. L. No 106-185, § 2, 114 Stat. 202, 205 (2000) (codified as amended at 18 U.S.C. § 983(b) (2000)).

139. *Id.* (codified as amended at 18 U.S.C. § 983(b)(2)(A) (2000)).

140. Pub. L. No 106-185, § 2, 114 Stat. 202, 205-6 (2000) (codified as amended at 18 U.S.C. § 983(c) (2000)).

141. Pub. L. No 106-185, § 2, 114 Stat. 202, 205 (2000) (codified as amended at 18 U.S.C. § 983(b)(2)(A) (2000)).

the evidence, that the property is subject to forfeiture.”<sup>142</sup> Previously, as observed *supra*, the fact that the government was able to seize property on only probable cause caused many courts and commentators to question the constitutionality of the law.<sup>143</sup>

Fourth, the innocent owner provision has been largely retained, but is set forth more explicitly.<sup>144</sup> As examined below, the Reform Act makes some attempt to clarify and elaborate the state of the law. Finally, the Reform Act contains provisions that allow a claimant to petition the presiding court for a determination of whether the forfeiture violates the Excessive Fines Clause of the Eighth Amendment.<sup>145</sup> The court is then required to reduce or eliminate the forfeiture if the claimant shows, by a preponderance of the evidence, that the forfeiture is “grossly disproportional.”<sup>146</sup>

### B. Cases and Commentary

Thus far, no particularly relevant cases dealing with the Act have been decided, with few notable exceptions. In *United States v. Duke*,<sup>147</sup> the Seventh Circuit observed that although the Civil Asset Forfeiture Reform Act fixes a five-year statute of limitations, this provision was not applicable to Duke’s case because the Reform Act applied only to proceedings commenced after August 23, 2000. In *United States v. Hooper*,<sup>148</sup> the court noted that the Reform Act establishes an exception for a primary residence but only if “the property is not, and is not traceable to, the proceeds of any criminal offense”<sup>149</sup>—since the claimants property was the proceeds of criminal offenses.<sup>150</sup>

There has been relatively little relevant commentary on the Reform Act. Brant C. Hadaway offers a somewhat pessimistic overview of the Civil Asset Forfeiture Reform Act.<sup>151</sup> Hadaway’s study usefully examines the link between

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142. *Id.* (codified as amended at 18 U.S.C. § 983(c)(1) (2000)).

143. See *supra* notes 69-71 and accompanying text.

144. Pub. L. No 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(d) (2000)).

145. Pub. L. No 106-185, § 2, 114 Stat. 202, 209-10 (2000) (codified as amended at 18 U.S.C. § 983(g) (2000)).

146. Pub. L. No 106-185, § 2, 114 Stat. 202, 210 (2000) (codified as amended at 18 U.S.C. § 983(g)(4) (2000)).

147. 229 F.3d 627 (7th Cir. 2000).

148. 229 F.3d 818 (9th Cir. 2000).

149. *Id.* at 823.

150. Other notable cases deal with whether the Act should apply to pending cases commenced before the Act was passed and became effective. *Compare United States v. Section 9, Town 29 N., Range 1*, 241 F.3d 796 (6th Cir. 2001) (remanding case for application of Civil Asset Forfeiture Reform Act to case commenced before Act was passed), *with United States v. Lot Numbered One (1) of the Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001) (rejecting application of Civil Asset Forfeiture Reform Act to case commenced before Act was passed).

151. Hadaway, *supra* note 25. See also Barry L. Johnson, *Purging the Cruel and Unusual:*

government overreaching in civil forfeiture cases and the monetary incentives the civil forfeiture system provides to government entities, especially the police. Hadaway concludes that "despite its laudable procedural reforms, [the Civil Asset Forfeiture Reform Act] leaves a lot of business yet to be done."<sup>152</sup> Ultimately, however, his suggestion that "ending the drug war . . . is the only rational way to reform civil asset forfeiture" belies the rather Libertarian point that private, "consensual behavior" cannot, or should not, be the basis for criminal wrongs.<sup>153</sup> While the "war on drugs" is increasingly recognized as a manifest failure, it seems exceedingly unlikely that politicians, or the public, will let go of their popular straw man, the drug dealer. With the wholesale disassembling of the "war on drugs" some distance in the future, meaningful reform can still strike at the improper incentives the civil forfeiture system gives to law enforcement agencies. Raising the burden of proof to clear and convincing evidence, as discussed *infra*, would go a long way towards limiting civil forfeiture's use as a tool for raising revenue.<sup>154</sup> Completely cutting the financial cord between civil forfeiture and local law enforcement agencies is simply politically impractical and ultimately unwise. The U.S. Supreme Court has recognized that there is a legitimate reason to return seized property to the police:

[T]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.<sup>155</sup>

The link between the government and the profits from illegal activities should be regulated; it should not be abolished.

#### IV. WAYS IN WHICH THE CIVIL ASSET FORFEITURE REFORM ACT DOES AND DOES NOT SOLVE THE PROBLEMS IDENTIFIED

Rep. Hyde's Civil Asset Forfeiture Reform Act is a major step forward. In many ways it cures or attempts to cure the most serious problems inherent in the civil forfeiture laws. However, in several ways it is unclear whether the Reform Act is up to the task of curing civil forfeiture's ills.

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*The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461 (2000).

152. Hadaway, *supra* note 25, at 113.

153. *Id.*

154. See discussion *infra* Part IV.C.

155. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989) (citation and footnote omitted).

### *A. Problematic Motivations*

First, the Reform Act does not specifically address the issue of the government's problematic motivations. There are, it is true, provisions in the Reform Act for "Enhanced Visibility of the Asset Forfeiture Program,"<sup>156</sup> which purport to raise civil forfeiture's profile in order to subject it to public and government scrutiny. Changes such as the new burden of proof and the requirement to pay the attorney fees and costs of indigent defendants will make civil forfeiture a less attractive option for government and should therefore cut back on any tendency by the government to use it as a way to "fill its coffers." Only time will tell if the Reform Act makes changes that sufficiently staunch the government's desire to seize property for its own gain.

### *B. Eighth Amendment's Excessive Fines Clause*

Next, the Reform Act codifies an Eighth Amendment inquiry and places the burden of proof on the defendant to show, by a preponderance of the evidence, that the forfeiture was grossly disproportional to the gravity of the offense.<sup>157</sup> By basing the inquiry on a comparison of the gravity of the offense to the value of the property, the Reform Act resolves the circuit split in favor of using only a proportionality test to determine when a forfeiture is unconstitutional under the Eighth Amendment. As the Act stands now, however, it does not fully realize those protections that the Eighth Amendment affords citizens. Since the test announced by those circuits adopting a proportionality and instrumentality test is constitutionally mandated, those circuits should continue to use that test until the statutory scheme is amended.

A one-pronged proportionality test is appropriate only where, as in *Bajakajian*, the purpose of the civil forfeiture is to punish. Where the sole goal of the forfeiture proceeding is to punish, it makes sense that the only relevant question is: whether the fine is grossly disproportionate to the offense.<sup>158</sup> Further, in cases such as *Bajakajian*, the subject of the forfeiture is necessarily the object of the offense (hence, there is always a nexus between the crime and the property—an instrumentality inquiry is pointless in these cases). However, this same argument does not hold under civil forfeiture cases proceedings under § 881(a).

In proceedings under § 881(a), proportionality is not enough because the proceedings are not merely punitive, they are also remedial and preventative. Thus, the House Report on the Reform Act explicitly stated,

Forfeiture is also used to abate nuisances and to take the

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156. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No 106-185, § 19, 114 Stat. 202, 223-24 (2000) (codified as amended at 28 U.S.C. § 524 (2000)).

157. Pub. L. No 106-185, § 2, 114 Stat. 202, 209-10 (2000) (codified as amended at 18 U.S.C. § 983(g) (2000)).

158. *See supra* text accompanying notes 88-89.

instrumentalities of crime out of circulation. 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 [the illegal activity] 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 being used 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.<sup>159</sup>

Where forfeitures are explicitly aimed at the instrumentalities of the crime in an effort to prevent future crimes, and where the forfeiture is aimed at the instrumentalities or proceeds of the crime in an effort to remedy the wrongs done, an instrumentality inquiry is necessary. While the Judiciary Committee's example of a crack house leaves little question as to whether the house is an instrumentality, the situation is often not so clear. More often, the forfeiture action involves property that had a fleeting association with the crime or was purchased with the proceeds of a crime. In these cases, the fine the government seeks to impose via civil forfeiture could be excessive either because it is grossly disproportionate, or because there is little or no nexus between the offense and the property. In the latter case, the instrumentality requirement serves to protect property not closely associated with the criminal offense (i.e., that property an individual could not reasonably suspect was subject to forfeiture).

### C. Burden of Proof

Potentially, the most important part of the Reform Act is the change it makes to the government's burden of proof. By requiring the government to meet a preponderance of the evidence standard, the Act makes it less likely that civil liberties will be infringed on the basis of an accusation made by a confidential informant. Thus, the changes to the Act remedy the most glaring inequities, but do not go far enough. In a country based on the cry of life, liberty, and property, it is surprising that, barely two centuries after its founding, the government should be able to deprive its citizens of their core constitutional right to property based on a mere preponderance of the evidence.<sup>160</sup> Further, the Supreme Court has recognized for more than a century that a forfeiture is "quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."<sup>161</sup> The *Boyd* Court noted that all

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159. H.R. REP. No. 106-192, at 4 (1999).

160. Rep. Henry Hyde first introduced legislation to reform the civil forfeiture laws in 1993 (H.R. 2417, 103d Cong. (1st Sess. 1993)). This version of the bill would have changed the burden of proof to clear and convincing evidence. H.R. 2417, 103rd Cong. § 4 (1st Sess. 1993).

161. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 634 (1886)). Boyd also stands for the rule that in such quasi-criminal actions that would deprive a person of significant property rights, our criminal constitutional protections apply.

"suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi-criminal nature."<sup>162</sup> Given the punitive and quasi-criminal nature of civil forfeiture proceedings, a higher standard of proof is appropriate. The fact that a number of states have adopted such an approach suggests that higher burdens of proof do not overly burden police and prosecutors.

In both Nevada and Florida, the government is required to meet a higher standard than a mere preponderance of the evidence. The Nevada Supreme Court has held that in civil forfeiture cases the government's burden must be "[p]roof beyond a reasonable doubt . . . in order that the innocent not be permanently deprived of that property."<sup>163</sup> Such a statement hints at the *Matthews v. Eldridge*<sup>164</sup> inquiry that courts should engage in to determine whether more process is necessary before depriving an individual of his or her rights. Under *Matthews v. Eldridge*, a court considers:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>165</sup>

Under the test, it is clear that the first prong weighs heavily in favor of additional procedure. The right to property (whether real property or chattels) is a fundamental one and one upon which this nation was established. In fact, property rights have often been considered the most fundamental right—the right on which all others are based.<sup>166</sup>

Under the second prong, there is significant reason to believe that there is an unacceptable risk of error that exists that innocent parties will be deprived of property, and that raising the burden would mitigate this risk. It is not enough to say that those parties who really are innocent have an opportunity to prove their innocence because a negative is enormously difficult to prove. The difficulty of proving a negative essentially puts a much heavier burden of proof on the owner.<sup>167</sup> The burden should be on the government, and an innocent party should

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162. *Boyd v. United States*, 116 U.S. 616, 634 (1886).

163. A 1983 *Volkswagen v. County of Washoe*, 699 P.2d 108, 109 (Nev. 1985).

164. 424 U.S. 319 (1976).

165. *Id.* at 335.

166. See, e.g., JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (1992); RICHARD PIPES, PROPERTY AND FREEDOM (1999). Even Machiavelli accords property some special importance; though he made the point in a slightly different manner saying, "[b]ut above all, [the Prince] must abstain from the property of others, because men forget the death of a father more quickly than the loss of a patrimony." NICCOLO MACHIAVELLI, THE PRINCE 67 (Harvey C. Mansfield trans., 2d ed. 1998) (1513).

167. On first blush, of course, it appears the parties have equal burdens. However, that is far from the truth. It is significantly easier for the government to prove it is more likely than not that

not be left to negate a set of facts like those the House Judiciary Committee described:

The Committee has heard testimony from the executor of an estate who was placed, along with the beneficiaries of a house, in the position of having to fight a seizure based on “an unnamed person in prison (having) told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of the decedent . . . on an unspecified date in December 1988.”<sup>168</sup>

Raising the government’s burden of proof would prevent a significant number of individuals from being forced to meet this heightened burden or face losing property.

The final prong also weighs in favor of raising the burden of proof. The government has a significant interest in combating criminal narcotics activity in an efficient and effective manner. Civil forfeiture of property used to facilitate these crimes and property that is the proceeds of these crimes is an effective way to combat criminal drug activity. However, this method is effective only insofar as it is not overbroad and does not strike at the truly innocent. If innocent persons are swept into these proceedings, the government’s interest in effective law enforcement is actually retarded. Those individuals who would otherwise assist law enforcement to discover and root out drug activity will be unwilling to become involved for fear of losing their property for having even a passing association with the criminal activity. Under these circumstances, as Justice Thomas noted, “forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”<sup>169</sup>

Raising the burden of proof combats this problem in two ways. First, by raising the government’s burden of proof going forward, one ensures from the start that we are substantially more certain that the property is actually subject to forfeiture before forcing an allegedly innocent party to prove the property is not subject to forfeiture. After the government has shown by at least clear and convincing evidence that the property is subject to civil forfeiture, it makes sense to force the party claiming innocence to meet the burden by a preponderance of the evidence. Second, forfeiture has long been recognized as a quasi-criminal proceeding. Thus, the U.S. Supreme Court held civil forfeiture is “quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.”<sup>170</sup> Though proof beyond a reasonable

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the property was in some way used to facilitate a narcotics crime, or is the proceeds of a narcotics crime, than it is for the owner to prove the property was *never* used to facilitate a narcotics crime and is not, in any way, the proceeds of a narcotics crime.

168. H.R. REP. NO. 106-192 at n.67 (1999).

169. *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

170. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (citing *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

doubt may not be appropriate for these proceedings; a standard such as clear and convincing evidence certainly fits. Given the quasi-criminal and punitive nature of a civil forfeiture proceeding, the government should be forced to meet a higher burden than a mere preponderance of the evidence. To decide otherwise would simply not reflect the value our society places on private property and invites heavy-handed government actions.

Recognizing the importance of property rights in the United States and the quasi-criminal nature of forfeiture actions, even the House Judiciary Committee Report acknowledged that something higher than preponderance of the evidence is necessary. “The general civil standard of proof[,] preponderance of the evidence[,] is too low a standard to assign to the government in this type of case. A higher standard of proof is needed that recognizes that in reality the government is alleging that a crime has taken place.”<sup>171</sup> The Committee thus recognized that the nature of a civil forfeiture proceeding meant that a preponderance standard is simply inequitable. It also provided a reason for not seeking the criminal standard of beyond a reasonable doubt. The Committee noted that “[s]ince civil forfeiture doesn’t threaten imprisonment, proof beyond a reasonable doubt is not necessary. The intermediate standard, clear and convincing evidence, is more appropriate.”<sup>172</sup> This accords with a sizeable number of states that require proof beyond a preponderance of the evidence.

The Florida, Louisiana, and Nevada Supreme Courts<sup>173</sup> have all held, based on these or similar concerns, that more than a mere preponderance of evidence is necessary. Thus, in *Department of Law Enforcement v. Real Property*, the Florida Supreme Court noted that, “‘due proof’ under the Act constitutionally means that the government may not take an individual’s property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime.”<sup>174</sup> Further, California, New York, and Wisconsin all provide for higher burdens of proof by statute. For instance, New York requires that “if the action is not grounded upon [a] conviction, it shall be necessary in the action for the claiming authority to prove the commission of a pre-conviction forfeiture crime by clear and convincing evidence.”<sup>175</sup> It thus becomes difficult to argue that such a standard

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171. H.R. REP. NO. 106-192, at 12 (1999).

172. *Id.* at 13 (footnote omitted).

173. *Dep’t of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991); *State v. Manuel*, 426 So. 2d 140, 148 (La. 1983) (“At trial of the forfeiture proceeding, of course, the state must prove each element of its case beyond a reasonable doubt because forfeiture proceedings are quasi-criminal.”); *A 1983 Volkswagen v. County of Washoe*, 699 P.2d 108, 109 (Nev. 1985) (recognizing the quasi-criminal nature of forfeiture actions stating “[p]roof beyond a reasonable doubt is therefore appropriate in order that the innocent not be permanently deprived of their property.”).

174. 588 So. 2d at 968.

175. N.Y. C.P.L.R. § 1311(1)(b) (2000) (subsection (3)(b)(i) also provides, with some exceptions, that in actions against a non-criminal defendant the “claiming authority” must meet a clear and convincing burden of proof). *Accord CAL. HEALTH & SAFETY CODE § 11488.4(i)(l)*

is unworkable or unduly burdensome.

In sum, there are four major reasons that support a higher burden of proof. First, the value placed on private property in America and throughout American history requires that the government bear the heavier burden when seizing property in civil forfeiture cases. Under the present system, because the property owner must negate the government's case, he or she has a heavier burden. Second, the due process concerns reflected in the *Matthews v. Eldridge* test<sup>176</sup> point to an unacceptable risk that innocent parties will be erroneously deprived of their property. Raising the government's burden of proof will reduce this danger. Third, the quasi-criminal nature of civil forfeiture demands that the government be forced to prove the property is subject to forfeiture by something more than a mere preponderance of the evidence. Finally, the fact that a number of states, either judicially or via statute, have adopted a higher standard suggests this is a workable standard that protects individual rights and helps fight crime.

#### *D. The Innocent Owner Provision*

Another important part of the Reform Act concerns the changes it makes to the innocent owner provisions. The Reform Act replaces the separate "innocent owner" provisions of §§ 881(a)(4), (6) and (7) with one innocent owner provision that applies to all federal civil forfeitures. The Act does not, however, specifically identify which pre-Reform Act test should be used (disjunctive, disjunctive with negligence standard, or conjunctive reading). However, a close look at the Act's language readily yields an answer. As it now reads, the Reform Act provides,

- the term "innocent owner" means an owner who—  
(i) did not know of the conduct giving rise to forfeiture; or  
(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.  
(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law—  
(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and  
(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.  
(iii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical

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(2000) (reasonable doubt); Wis. STAT. § 973.076(3) (2000).

176. 424 U.S. 319, 335 (1976).

danger.<sup>177</sup>

The plain language of the Reform Act suggests that it adopts what was the “knowledge or consent” (disjunctive) reading of § 881(a)(7) and other statutes. The Act also plainly adopts the negligence standard used by several courts prior to the passage of the Reform Act. Although subparagraph (A) refers only to actual knowledge and a negligence standard and makes no mention of consent, subparagraph (B)(II) refers to revoking consent for the offender’s use of the property. The Act thus rejects the position that some courts have taken with regard to conveyances and other chattels, that the use of the property for activity leading to forfeiture must be illegal (i.e., the car must have been stolen or taken without permission). One cannot simply argue, as Bennis did, that she did not know her husband would use the car to engage in sexual activity with a prostitute.<sup>178</sup> A plain meaning reading of the Reform Act seems to reject that position.

That the “knowledge or consent” test with a negligence standard was the one Congress intended to enact is supported by two other points. First, the Judiciary Committee Report on the Reform Act notes that the bill rejects the conjunctive reading, saying, “the [innocent owner] protections of the [sections] using the ‘committed or omitted’ language have been seriously eroded by a number of federal courts ruling that qualifying owners must have had no knowledge of and provided no consent to the prohibited use of the property.”<sup>179</sup> Further, the Committee specifically said that the purpose of this innocent owner defense was to provide “a meaningful innocent owner defense [which] is required by fundamental fairness.”<sup>180</sup> Thus, under the Civil Asset Forfeiture Reform Act, an innocent owner can now avoid forfeiture by proving either lack of knowledge or lack of consent so long as he or she was not negligent in discovering the illegal use of his or her property.

The Reform Act also makes an attempt to solve the post-illegal act transferee problem. The post-illegal act transferee problem arose based on a disjunctive reading of the innocent owner provisions as informed by the U.S. Supreme Court’s opinion in *92 Buena Vista Ave.*<sup>181</sup> There the Court held that the innocent owner defense is not limited to bona fide purchasers and that the innocent owner provisions are not nullified by the relation-back doctrine.<sup>182</sup> Thus, when the

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177. 18 U.S.C. § 983(d)(2) (2000).

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

179. H.R. REP. NO. 106-192, at 15 (1999).

180. *Id.*

181. 507 U.S. 111 (1993). The post-illegal act transferee problem is perhaps best demonstrated in *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994). In *One 1973 Rolls Royce*, the Third Circuit held that the transferee’s knowledge about whether the property was used to facilitate a drug crime is evaluated at the time of the crime and not at the time of the transfer. Thus, criminals could transfer a wide range of property even if the transferee knew, at the time of the transfer, that the property was used to facilitate a crime.

182. *92 Buena Vista Ave.*, 507 U.S. at 126-27 (the relation-back doctrine would vest title in

innocent owner provision is read disjunctively, someone to whom property is transferred after the offending acts would be able, in most cases, to claim he or she did not consent to the illegal acts. A bad actor would then be able to insulate many properties by simply transferring property to third parties after the offending acts. A major problem, to be sure.

The Reform Act attempted to solve this problem by defining after-conduct innocent owners narrowly. Thus, the only individuals who qualify as after-conduct innocent owners are those considered to be bona fide purchasers for value and those who were reasonably without cause to believe that the property was subject to forfeiture.<sup>183</sup> Congress, as expressed in the House Judiciary Committee report, sought to make two exceptions to this narrow definition: where the owner acquired the interest through probate or inheritance and, at the time of acquisition, was reasonably without cause to believe that the property was subject to forfeiture, and where the owner is the spouse or minor child and the property is used as a primary residence, but the spouse or minor child must have been reasonably without cause to believe that the property was subject to forfeiture at the time the interest was acquired.<sup>184</sup>

The final, duly enacted version of the Reform Act, in an effort to make these intentions a reality, therefore provides:

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property—

- (i) was a bona fide purchaser or seller for value . . . and
- (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if —

- (i) the property is the primary residence of the claimant;
- (ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;
- (iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and
- (iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the

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the government on the occurrence of the illegal acts subjecting the property to the forfeiture—thereby making it impossible to transfer the property even to a bona fide purchaser for value without notice).

183. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(d)(3)(A) (2000)).

184. H.R. REP. NO. 106-192, at 16 (2000).

spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate . . .<sup>185</sup>

These changes, embodied in the newly enacted § 983(d)(3), go too far because subsection (3)(B) will be interpreted as a list of elements that require that the property not be, and not be “traceable to, the proceeds of any criminal offense.”<sup>186</sup> In fact, the Ninth Circuit has already interpreted this provision in such a manner. In *United States v. Hooper*,<sup>187</sup> the claimants were the spouses of two men who pled guilty to federal narcotics offenses. The spouses alleged that they innocently acquired community property rights in certain assets that were to be forfeited to the federal government because the assets were admittedly used to facilitate narcotics activity or were the proceeds of that activity; the property included vehicles, cash, and a business.<sup>188</sup> The Ninth Circuit noted that, even if it applied,<sup>189</sup> the newly enacted Reform Act would not save the spouses’ property because the primary residence could be retained only if it was “not, and is not traceable to, the proceeds of any criminal offense.”<sup>190</sup>

This innocent owner defense was supposed to allow heirs, spouses, and minor children who “were reasonably without cause to believe that the property was subject to forfeiture”<sup>191</sup> to redeem property whether or not the property was the proceeds of any criminal offense or is traceable to the proceeds of any criminal offense. However, by writing the statute as it did, Congress made it impossible to protect precisely the three types of transferees (heirs, spouses, and minor children) it originally expressed an interest in protecting. Subsection (B)

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185. 18 U.S.C. § 983(d)(3) (2002). Subsection 983(d)(3) suffers from a number of problems. This subsection makes an effort to solve the post-illegal act transferee problem, but likely goes too far. These problems become clear when one imagines a scenario where a court attempts to decide whether property is subject to forfeiture when the former spouse’s property (a car, house, and retirement funds) are the proceeds of criminal activities but were awarded to him or her in divorce proceedings.

186. *Id.* at § 983(d)(3)(B)(iii).

187. 229 F.3d 818 (9th Cir. 2000).

188. *Id.*.

189. The Civil Asset Forfeiture Reform Act did not apply because this civil forfeiture case began before the Act became effective in August 2000.

190. *Hooper*, 229 F.3d at 223. See Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 K.Y. L.J. 653, 703 (2001) (Cassella, the Assistant Chief of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice and principal drafter of the Department of Justice’s asset forfeiture proposals, notes that the government objected to any exception for heirs and spouses and that the final provision was a compromise that forces the claimant to prove each element).

191. The whole point, after all, of establishing an innocent owner defense is that the property is not subject to forfeiture even if it was involved in the offense or was the proceeds of a criminal offense.

works to remove the protection since the language plainly reads as a list of elements, one of which requires that "the property is not, and is not traceable to, the proceeds of any criminal offense."<sup>192</sup> Thus, under the newly enacted § 983(d)(3), heirs, spouses, and minor children essentially have protection from forfeiture only when the government made a mistake and the property really was not the proceeds of, or traceable to, a criminal offense, in which case, there is little point to providing the defense since the property would not be subject to forfeiture at all. Section 983(d)(3)(B)(iii) therefore nullifies the protections subsection (B) sought to add and makes them meaningless. The vast majority of the problems could, however, be solved by deleting § 983(d)(3)(B)(iii) and inserting "who was reasonably without cause to believe that the property was subject to forfeiture at the time he or she acquired his or her interest" after "claimant" in § 983(d)(3)(B).

With this correction to the statutory language, those innocent owners (heirs, spouses, and minor children) originally destined for protection under the Reform Act would receive that protection. According these persons protection from civil forfeiture helps to make the forfeiture laws more precise and keeps the laws from being overbroad. With regard to heirs, there is little danger of heirs being involved since the statute already provides that these individuals cannot keep the property if they knew or could have known the property was subject to forfeiture. Human nature and logic also protect the government's interest because, as the Judiciary Committee pointed out, there is relatively little danger of criminals committing suicide in order to protect property or other ill-gotten gains.<sup>193</sup> With regard to spouses and minor children, the statute protects against their involvement since they cannot protect property if they knew or reasonably should have known the property was subject to forfeiture. To remove these protections and permit the government to take the homes in which spouses and minor children live would do relatively little to further the government's efforts to combat criminal drug activity<sup>194</sup> and it would, as the Supreme Court noted in *Calero-Toledo*, "be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."<sup>195</sup>

## CONCLUSION

This Note has examined this nation's civil forfeiture laws prior to the Civil

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192. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 202, 206 (2000) (codified as amended at 18 U.S.C. § 983(a)(3)(B)(iii) (2000)).

193. H.R. REP. NO. 106-192, at 16 (1999). *But see United States v. 221 Dana Ave.*, 261 F.3d 65 (1st Cir. 2001). In *221 Dana Ave.*, the husband committed suicide shortly after being arrested and drafting a will that left to his wife the property he had been using to distribute narcotics. The parties admitted that the wife learned of these activities only after her husband was arrested. Nevertheless, the point remains that once the wrongdoer commits suicide she is unable to enjoy the fruits of the criminal activity and little is gained by punishing the innocent family members.

194. 416 U.S. 663 (1974).

195. *Id.* at 690.

Asset Forfeiture Reform Act and has examined the reforms made by the Act. The Reform Act makes a number of important changes by providing greater procedural norms, representation for indigent property owners, and a common and clarified innocent owner defense for all civil forfeiture cases. Ultimately, however, the Reform Act fails to fully solve three problems presently inherent in the civil forfeiture laws.

First, the Act fails to completely equalize the burdens of proof required by the government and innocent owners. Although the government's burden of proof has been raised, the fact that the property owner is required to completely negate the government's allegations means that he or she must, in reality, meet a much higher standard. Therefore, the government's burden of proof should, as the House Judiciary Committee noted, be raised to the clear and convincing standard. This standard not only redresses the inequities inherent in the current burdens of proof but also takes into account the fact that civil forfeiture is a quasi-criminal action in which the government is essentially alleging a crime was committed. The government should be held to a high burden of proof.

Next, the Reform Act fails to adopt the proper inquiry under the Excessive Fines Clause and instead only uses a proportionality inquiry. In civil forfeiture proceedings under § 881(a), proportionality is not enough because the proceedings are not merely punitive; they are also remedial and preventative. Where forfeitures are explicitly aimed at the instrumentalities of the crime in an effort to prevent future crimes, and where the forfeiture is aimed at the instrumentalities or proceeds of the crime in an effort to remedy the wrongs, an instrumentality inquiry is necessary. In such a case, a forfeiture could be excessive either because it is grossly disproportionate, or because there is little or no nexus between the offense and the property—a two-pronged inquiry is therefore necessary.

Finally, in an effort to solve the post-illegal act transferee problem, the act makes it impossible for heirs, spouses, and minor children to protect their property. As written, the act makes the defenses intended to help heirs, spouses, and minor children pointless. These provisions should be rewritten to put into place the defenses that would protect this group of post-illegal act transferees. Taking property from this group does relatively little to further the "war on drugs" and is "unduly oppressive."