

## CIVIL FORFEITURE: A FICTION THAT OFFENDS DUE PROCESS

*“Our civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be both offended and concerned by the abuse of individual rights which happens sometimes under these laws.”<sup>1</sup>*

### I. INTRODUCTION

It began as any other day for Billy Munnerlyn, successful operator of an air charter service located in Las Vegas, Nevada.<sup>2</sup> Albert Wright, a businessman, booked a flight to Ontario, California. When the airplane landed, DEA agents suddenly arrested Wright and Munnerlyn, seizing Wright’s luggage and the \$2.7 million it contained.<sup>3</sup> The DEA also confiscated Munnerlyn’s plane, the \$8,500 charter fee, and all of his business records.<sup>4</sup> Why? Unknown to Munnerlyn, Wright was a convicted cocaine dealer.<sup>5</sup> Although criminal charges were dropped against both parties, Munnerlyn spent \$85,000 in legal fees to fight the government’s civil asset forfeiture action against his plane.<sup>6</sup> He raised the money by selling three other airplanes.<sup>7</sup> In the course of recovering the plane, Munnerlyn won a jury verdict in Los Angeles, only to have it reversed by a U.S. district judge.<sup>8</sup> Eventually, Munnerlyn was forced to settle with the government, “paying \$7,000 for the return of his plane,” only to discover “that DEA agents had caused about \$100,000 worth of damage to the aircraft.”<sup>9</sup> For Billy Munnerlyn, the American dream came crashing to a tragic end. “Unable to raise enough money to restart his air charter business, he had to declare personal bankruptcy. He is now driving a truck for a living.”<sup>10</sup>

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<sup>1</sup> 145 CONG. REC. H4851-01, H4852 (daily ed. June 24, 1999) (statement of Rep. Pryce), available in 1999 WL 419754.

<sup>2</sup> See H.R. REP. NO. 106-192 (1999), available in 1999 WL 406892.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* Civil forfeitures proceed against the property itself and often without regard to the guilt or innocence of its owner. See Roger Pilon, Vice President for Legal Affairs, Cato Institute, Statement Before the Criminal Justice Subcommittee of the United States Senate Judiciary Committee (July 21, 1999) (transcript available on Cato’s website at <<http://www.cato.org/testimony/ct-rp072199.html>>).

<sup>7</sup> See H.R. REP. NO. 106-192.

<sup>8</sup> See *id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

This note uncovers fundamental deficiencies in our civil asset forfeiture scheme that lead to deprivation of property without due process of law. Section II traces the historical development of civil asset forfeiture. Section III queries whether historic underpinnings or any other reason justifies civil forfeiture as practiced today. Section IV provides a brief review of contemporary forfeiture procedure, which serves as the background for Section V's assessment of whether current practice offends traditional notions of due process. Section VI suggests that current practice has created an uncontrolled economic engine and an irresolvable conflict between self-interested parties. Section VII discusses several promising remedies contained in the Civil Asset Forfeiture Reform Act.<sup>11</sup> Section VIII explores whether H.R. 1658 goes far enough. Finally, Section IX concludes that current forfeiture practice is unjustified in its denial of basic due process rights.

## II. THE HISTORY OF CIVIL FORFEITURE: AN INAUSPICIOUS BEGINNING

The concept of forfeiture has ancient roots. Civil asset forfeiture is based upon the legal fiction of personified property.<sup>12</sup> Under this fiction, the property itself is viewed as guilty and subject to punishment.<sup>13</sup> The owner's actual guilt or innocence is irrelevant.<sup>14</sup> Accordingly, cases proceed *in rem* against the property.<sup>15</sup> Several sources contributed to the development of this curious legal fiction: pre-Christian Greek and Roman law, biblical law, and early English law.<sup>16</sup> According to Representative Henry Hyde of Illinois, it was a routine practice in ancient Athens and the pre-Christian Roman Empire to seize the property of those opposed to the ruler.<sup>17</sup> Other pre-Judeo-Christian forfeiture practices flowed purely from the superstitious belief that religious expiation was required of instruments of death.<sup>18</sup> It follows that modern American forfeiture law precariously rests on the twin pillars of authoritarianism and animism,<sup>19</sup> an inauspicious beginning for a practice used today to deprive individuals of homes, businesses, cars, airplanes, and cash.

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<sup>11</sup> H.R. 1658, 106th Cong. (1999). See *supra* note 118 for an update on this Act.

<sup>12</sup> See Pilon, *supra* note 6.

<sup>13</sup> See *id.*

<sup>14</sup> See Melissa A. Rolland, Comment, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and United States v. Bajakajian*, 74 NOTRE DAME L. REV. 1371, 1372 (1999).

<sup>15</sup> See Pilon, *supra* note 6.

<sup>16</sup> See *id.*

<sup>17</sup> See HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 17 (1995).

<sup>18</sup> See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974).

<sup>19</sup> See Pilon, *supra* note 6.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>20</sup> the Supreme Court located the origin of forfeiture in biblical practices: “[i]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten.”<sup>21</sup> This concept was broadened and changed in a unique way by early English law. Under the English medieval law of “deodand,” inanimate as well as animate objects were subjected to punishment.<sup>22</sup> Under deodand laws, any property causing the death of a person was subject to forfeiture.<sup>23</sup> While the object itself was not necessarily seized, its value was assessed and remitted to the king as a forfeiture.<sup>24</sup> Whereas biblical law prevented anyone from benefiting from the guilty property (“his flesh shall not be eaten”), under English law the property was forfeited to the crown.<sup>25</sup>

For a legal concept predicated upon religious superstition, deodand proved remarkably resilient. This practice was finally abolished in England in the mid-nineteenth century, and Lord Campbell declared that it was a “wonder that a law so extremely absurd and inconvenient should have remained in force [so long].”<sup>26</sup>

The deodand was never imported as a legal practice in the United States.<sup>27</sup> Nevertheless, the United States embraced the concept of forfeiture. “The earliest American cases justifying a civil forfeiture proceeding *in rem* involved actions for the forfeiture of ships . . . . The *in rem* posture of the admiralty forfeiture proceeding is another inheritance from English law.”<sup>28</sup> Under English law, owners of vessels were often located overseas and “thus not subject to the jurisdiction of English courts.”<sup>29</sup> Styling the action *in rem* enabled England to enforce its admiralty laws against the vessel.<sup>30</sup> Hyde states that English admiralty law is the “immediate wellspring of American civil asset forfeiture law and procedure” and notes that, like the deodand, it is “also firmly rooted in the English fiction that invests inanimate objects . . . with both life

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<sup>20</sup> 416 U.S. 663 (1974).

<sup>21</sup> *Id.* at 681 n.17 (quoting *Exodus* 21:28).

<sup>22</sup> See HYDE, *supra* note 17, at 18.

<sup>23</sup> See Rolland, *supra* note 14, at 1372.

<sup>24</sup> See Tamarar Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 928-29 (1991).

<sup>25</sup> See HYDE, *supra* note 17, at 18.

<sup>26</sup> Piety, *supra* note 24 at 931.

<sup>27</sup> See Scott A. Nelson, Comment, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY'S L.J. 157, 163 (1994).

<sup>28</sup> Piety, *supra* note 24, at 935.

<sup>29</sup> Rolland, *supra* note 14, at 1372-73.

<sup>30</sup> See *id.*

and personal responsibility.<sup>31</sup> The use of civil forfeiture slowly expanded during the Civil War and the Prohibition Era.<sup>32</sup> Finally, the use of civil forfeiture exploded in the 1980s as civil forfeiture became a tool in the war on drugs.<sup>33</sup>

This brief survey of civil asset forfeiture's history demonstrates two things. First, it explains the origins of our current legal practices. For example, the ancient philosophical view that property could be guilty and in need of expiation explains courts' continued rejection of an owner's innocence as a defense to forfeiture. Second, it illustrates that civil asset forfeiture, at least originally, relied heavily upon authoritarian practices and superstitious notions for its justification. This suggests that perhaps it is time to reexamine civil asset forfeiture in light of the constitutional ideals cherished by our society.

### III. THE PERPETUATION OF ANCIENT FORM

Finding its origin in the Old Testament and in medieval doctrine, in the idea that animals and even inanimate objects involved in wrongdoing could [be] sacrificed in atonement or forfeited to the Crown, modern forfeiture law, filtered through early American admiralty and customs law, has simply carried forward, uncritically, the practice of charging things.<sup>34</sup>

Good intentions, however noble, cannot support unjust results. Likewise, no matter how effective, laws that violate fundamental constitutional protections cannot be upheld; the constitutional ideal of due process will not countenance a police state.

Private ownership of property is a fundamental right upon which the existence of our society depends. John Adams stated, "Property is surely a right of mankind as real as liberty. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."<sup>35</sup> Noah Webster stated, "Let the people have property, and they will have power."<sup>36</sup> In turn, John Locke lists property among the liberties that government must secure along with

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<sup>31</sup> HYDE, *supra* note 17, at 20.

<sup>32</sup> See Rolland, *supra* note 14, at 1373-74.

<sup>33</sup> See Joy Chatman, Note, *Losing the Battle but Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After Austin v. United States*, 38 ST. LOUIS U. L.J. 739, 747 (1994).

<sup>34</sup> Pilon, *supra* note 6.

<sup>35</sup> HYDE, *supra* note 17, at 20 (quoting John Adams's argument in the defense of John Hancock's confiscation of the schooner *Liberty* by the Crown).

<sup>36</sup> MICHAEL KAMMEN, *LIBERTY, PROPERTY, & THE FOUNDATIONS OF THE AMERICAN CONSTITUTION* 7 (Ellen F. Paul & Howard Dickman eds., 1989).

“life” and “liberty.”<sup>37</sup> The Framers carried forward this Lockean triumvirate which is now embodied in the Fourteenth Amendment’s Due Process Clause—“nor shall any state deprive any person of life, liberty, or property, without due process of law.”<sup>38</sup>

Because civil asset forfeiture challenges an individual’s fundamental constitutional right to own property and remain secure in its possession, civil asset forfeiture should be highly scrutinized to ensure that it conforms with traditional concepts of fair play and justice. It is not enough simply to determine that the practice has ancient roots, particularly when those roots are authoritarianism and superstition. In the words of Justice Holmes:

[I]t is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>39</sup>

Holmes’s remark is particularly apropos. Authoritarian regimes were replaced by constitutionally based governments that secured guarantees of liberty, and the cloud of superstition was burned away by the beams of reason. Yet, despite the removal of the historical underpinnings of guilty property, the fiction continues today.

Today, civil forfeitures, which proceed *in rem*, are used to circumvent the protections of the Due Process Clause.<sup>40</sup> Casting aside superstition, courts still resort to the personification fiction, which has been described as “anachronistic,” “repugnant,” and a “perversion,” to proceed against property without considering the innocence of its owner.<sup>41</sup> Analogies continue to be drawn with admiralty, yet even in admiralty law itself, this fiction has fallen into disrepute.<sup>42</sup> Over the past decades, courts have justified the use of this fiction and avoided the requirements of due process by resorting to circular reasoning—proceeding against the property is not punishment of the owner; the owner of the property is not punished because the proceeding is against the property.<sup>43</sup> Perhaps courts should examine the harsh effects of civil

<sup>37</sup> POLITICAL WRITINGS OF JOHN LOCKE 264-65, 325 (David Wootton ed., 1993).

<sup>38</sup> U.S. CONST. amend. XIV, § 1. While, in general, the due process component of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment apply only to criminal proceedings, the principle of due process can and has been applied in proceedings similar in nature to criminal ones. Civil forfeiture is one of those proceedings where this principle should be applied.

<sup>39</sup> Piety, *supra* note 24, at 941 (quoting Oliver W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>40</sup> When the forfeiture occurs on the federal level, it circumvents the due process component of the Fifth Amendment. See U.S. CONST. amend. V.

<sup>41</sup> Piety, *supra* note 24, at 918.

<sup>42</sup> See *id.* at 941-42.

<sup>43</sup> See Pilon, *supra* note 6.

asset forfeiture—accounts seized, homes forfeited, business enterprises seized, airplanes, yachts, and cars confiscated—rather than spouting legal tautologies that ignore the reality of the impact of civil asset forfeiture upon individuals.

In *Burnham v. Superior Court*,<sup>44</sup> Justice Scalia quoted from *Shaffer v. Heitner*:<sup>45</sup> “[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.”<sup>46</sup> While in the context of *Burnham* the Court was discussing *quasi in rem* jurisdiction, the same principle applies to *in rem* jurisdiction in civil asset forfeiture actions. American civil asset forfeiture law is nothing other than an ancient form filtered through customs and admiralty law. The ancient theology of expiation of guilty property is no more than ancient superstition. Moreover, the fiction of personification has fallen into disrepute in admiralty law. Continuing to base jurisdiction on the legal fiction of personification, while perhaps convenient, is merely the perpetuation of an ancient form that ignores present reality—depriving individuals of cars, houses, and bank accounts is a significant punishment, more than can be inflicted in many criminal proceedings. Convenience, however, does not justify allowing law enforcement officials to circumvent fundamental constitutional due process rights.

Civil asset forfeiture necessarily implicates fundamental constitutional rights. For that reason, it should be highly scrutinized. An analysis of the historical and philosophical underpinnings of civil asset forfeiture reveals that the primary historical justifications no longer apply. Nevertheless, civil forfeitures continue to proceed upon the fiction of personification. An analysis of civil forfeitures reveals that its effect is often punitive, but the perpetuation of an ancient form prevents courts from properly applying the protection of due process. Both Holmes and Scalia expressed that the perpetuation of an ancient form without more is revolting. Thus, the fiction of personification should be discarded; under well-established principles of due process, courts should require some rational nexus between an owner’s actions and the property used to facilitate crime before effectuating forfeiture.

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<sup>44</sup> 495 U.S. 604 (1990).

<sup>45</sup> 433 U.S. 186 (1977).

<sup>46</sup> *Burnham*, 495 U.S. at 620 (quoting *Shaffer*, 433 U.S. at 212).

#### IV. CURRENT FORFEITURE PROCEDURE: THE BACKGROUND FOR ACCESSING DUE PROCESS

Before examining the due process implications of current forfeiture practice, it is necessary to explore briefly the current forfeiture procedures.<sup>47</sup> “[O]fficials today can seize a person’s property, real or chattel, without notice or hearing,<sup>48</sup> upon an *ex parte* showing of mere probable cause that the property has somehow been “involved” in a crime.<sup>49</sup> Once the property is seized, property owners have ten days to hire an attorney, post a cost bond amounting to the lesser of \$5,000 or ten percent of the item’s value, and file a claim contesting the forfeiture.<sup>50</sup> If an owner does not comply with these procedural hurdles, the action ends in a default for the government. Under the current procedure, eight out of every ten forfeitures are uncontested.<sup>51</sup>

In the twenty percent of forfeitures that are contested, the burden of proof shifts to the property owner.<sup>52</sup> Once the government establishes probable cause to seize the property, the burden shifts to the owner to prove a negative, the property’s noninvolvement in a crime, by a preponderance of the evidence.<sup>53</sup>

The difficulty of this allocation of proof is multiplied by its *in rem* styling. Because civil forfeitures proceed *in rem*, the guilt or innocence of the owner is irrelevant.<sup>54</sup> It is the property itself that is viewed as being guilty.<sup>55</sup> In fact, criminal charges may never be pressed against any party, or the owner may be acquitted in a separate criminal proceeding, and the property still be subject to seizure.<sup>56</sup> Some statutes, however, do provide an innocent-owner defense.<sup>57</sup> In the absence of legislation

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<sup>47</sup> Forfeiture procedures vary slightly with the particular statute that authorizes forfeiture.

<sup>48</sup> Pilon, *supra* note 6. Until 1993, property, real or chattel, could be seized without notice. See *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). In 1993, the United States Supreme Court ruled that, absent exigent circumstances, notice was required before real property could be seized. See *id.* at 53.

<sup>49</sup> See Pilon, *supra* note 6.

<sup>50</sup> See 145 CONG. REC. H4851-02, H48554 (daily ed. June 24, 1999) (Remarks of U.S. Representative Henry Hyde during proceedings for the consideration of the Civil Asset Forfeiture Reform Act, H.R. 1658, 106th Cong. (1999)).

<sup>51</sup> See Pilon, *supra* note 6.

<sup>52</sup> See *id.*

<sup>53</sup> See H.R. REP. NO. 106-192 (1999), available in 1999 WL 406892.

<sup>54</sup> See Pilon, *supra* note 6.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See Rolland, *supra* note 14, at 1375.

authorizing the defense, the Supreme Court held in *Bennis v. Michigan*<sup>58</sup> that an innocent owner has no constitutional right to an innocent-owner defense under the Fifth or Fourteenth Amendments.<sup>59</sup>

Finally, when owners are successful in asserting a claim, the Federal Tort Claim Act<sup>60</sup> does not guarantee that the property will be returned undamaged or that the government will offer any compensation for damage, whether willfully or negligently inflicted.<sup>61</sup> Thus, the DEA could inflict \$100,000 worth of damage upon Billy Munnerlyn's aircraft, destroying an innocent American's lawful business enterprise without threat of liability.<sup>62</sup>

#### V. DUE PROCESS: A GUIDE FOR EVALUATING CONTEMPORARY CIVIL FORFEITURES

The Fifth and Fourteenth Amendments impose definite and substantial constraints upon government action. The government may not deprive individuals of life, liberty, or property without providing due process of law.<sup>63</sup> Fundamental to due process is the opportunity to be heard in a meaningful way and at a meaningful time.<sup>64</sup> Present civil forfeiture procedure often operates to deprive individuals of both of these key elements of due process.

Due process is not a rigid measure but a flexible standard that affords "such procedural protections as the particular situation demands."<sup>65</sup> Beyond ensuring abstract principles of fair play, due process protects the "use and possession of property from arbitrary encroachment . . . [and minimizes] substantially unfair or mistaken deprivations of property."<sup>66</sup> The Court historically has applied a tri-part balancing test to determine whether due process has been afforded: it will (1) weigh the interest affected; (2) weigh the risk of erroneous deprivation through the procedure used, and examine the value of additional or substitute safeguards; and (3) weigh the government's interest.<sup>67</sup>

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<sup>58</sup> 516 U.S. 442 (1995).

<sup>59</sup> See *id.* at 451.

<sup>60</sup> 28 U.S.C. §§ 1346(b), 2671-2680 (1994).

<sup>61</sup> See *id.*

<sup>62</sup> See text accompanying notes 2-10.

<sup>63</sup> See U.S. CONST. amend. V; XIV, § 1.

<sup>64</sup> See *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>65</sup> *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>66</sup> *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1974)).

<sup>67</sup> See *Gilbert*, 520 U.S. at 931-32; see also *James Daniel Good Real Property*, 510 U.S. at 53; *Matthews*, 424 U.S. at 335.

In light of the civil forfeiture procedure detailed above, it is instructive to apply this tri-part test in the abstract to determine whether the procedural process itself suggests a deficiency in the process afforded. First, what is the interest affected? In civil forfeitures this interest will often be great—permanent deprivation of large amounts of property such as cash, homes, businesses, or yachts.

Second, what is the risk of an erroneous deprivation through the procedure used and could that risk be reduced by the adoption of additional or substitute procedures? Several factors combine to create a high risk of erroneous deprivation. Property is seized, often without notice, on the basis of probable cause.<sup>68</sup> This is, by itself, disturbing but arguably within the bounds of procedural due process because deprivation on the basis of probable cause alone is potentially a temporary inconvenience that can be remedied by post-seizure proceedings.<sup>69</sup> The problem of seizure without notice on the basis of probable cause is compounded, however, by the fact that the very same officials who seize the property often stand to directly benefit from its seizure, creating an irresolvable conflict of interest.<sup>70</sup> Moreover, procedural hurdles to filing and proving a claim combine to greatly multiply the possibility that an innocent owner will permanently be deprived of the property. Property owners must hire an attorney, post a cost bond, and file a claim within ten days or be subject to a default judgment.<sup>71</sup> Ten days is simply not enough time to hire an attorney and post a cost bond. This places a nearly insurmountable hurdle in front of poor claimants or those whose accounts or assets the government has seized. These individuals must default without the ability of receiving a meaningful hearing. Further, the cost of hiring an attorney and contesting the forfeiture may often outweigh the value of the property. Thus, time and cost present substantial barriers that operate to permanently deprive innocent owners of their property on a mere showing of probable cause.

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<sup>68</sup> See Pilon, *supra* note 6.

<sup>69</sup> See *Gilbert*, 520 U.S. at 930. Seizure without notice on a showing of probable cause is acceptable because moveable property often presents a unique challenge to the enforcement of the law. In addition, the Court has recognized reasonable safeguards to prevent severe abuse. See *James Daniel Good Real Property*, 510 U.S. at 53 (holding that, absent exigent circumstances, notice was required before real property could be seized).

<sup>70</sup> The word “irresolvable” is used here in the context of the procedures in place for civil forfeiture actions: unless the civil forfeiture procedure (or “machinery”) itself is changed, a conflict of interest will always exist. See *infra* Section VI for a more thorough discussion concerning the machinery causing this “irresolvable” conflict of interest.

<sup>71</sup> See 145 CONG. REC. H4851-02, H48554 (daily ed. June 24, 1999) (statement of Rep. Hyde), available in 1999 WL 419754.

Once a claim is asserted, property owners are confronted with more procedural hurdles that make challenging the forfeiture unduly difficult. While the government's "probable cause showing may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party, with interests adverse to the property owner,"<sup>73</sup> an owner must demonstrate the property's innocence by a preponderance of the evidence.<sup>73</sup> That standard is "all but impossible to meet because 'the thing is primarily considered the offender.' Imbued with personality, the thing is said to be 'tainted' by its unlawful use."<sup>74</sup> Because civil forfeitures proceed *in rem* under the myth of guilty property, the property owner's innocence "has almost uniformly been rejected as a defense [unless an innocent-owner defense is present in the statute]."<sup>75</sup> Rejecting innocence as a defense has given rise to perhaps the most deserved due process criticism of civil forfeiture. "[O]ften the forfeited property's true owner is innocent of any . . . wrongdoing. For example, commercial mortgage lenders, lessors of boats and airplanes, and parents or others who have loaned children their cars [are often unaware of any wrongdoing]."<sup>76</sup>

Taken as a whole, prehearing and hearing procedures present a great risk of rendering an erroneous result. Property may be seized on a mere showing of probable cause by parties who stand to benefit directly from the seizure.<sup>77</sup> Time and money present significant prehearing barriers that may prevent a significant number of individuals from even challenging forfeitures, depriving innocent owners of the constitutional right to a meaningful hearing. Eighty percent of forfeitures are uncontested. Thus, eighty percent of the time property is forfeited on the basis of a mere showing of probable cause by the government. When a hearing does occur, the property is presumed guilty. An owner may rebut the presumption but only by proving a negative by a preponderance of the evidence. Finally, the court maintains that the guilt or innocence of the owner has no legal significance because the proceeding is *in rem*.

Further, substantive and procedural hurdles that owners face are compounded by practical hurdles.<sup>78</sup> "Deprived of property, . . . owners are at a distinct legal and practical disadvantage if they want to wage a costly legal battle against the government to recover the property."<sup>79</sup>

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<sup>73</sup> Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 313 (1994).

<sup>73</sup> See H.R. REP. NO. 106-192 (1999), available in 1999 WL 406892.

<sup>74</sup> Pilon, *supra* note 72, at 313.

<sup>75</sup> Nelson, *supra* note 27, at 183.

<sup>76</sup> *Id.* (citations omitted).

<sup>77</sup> See *infra* Section VI.B. for a discussion of the parties that directly benefit from asset seizure.

<sup>78</sup> See HYDE, *supra* note 17, at ix.

<sup>79</sup> *Id.*

In addition, there are several simple procedural remedies available that would afford much greater protection to innocent owners without placing a great burden upon the government. Increasing the time to file a claim and decreasing or removing the cost bond would allow more individuals to challenge forfeiture actions. Placing the burden of proof upon the government would avoid requiring of owners the arduous task of proving a negative. Finally, rejecting the myth of guilty property would restore the full protection of the Due Process Clauses by requiring the government to demonstrate guilt as well as involvement in a crime.

Third, what government interests are involved? The government's interest varies with the situation. When the owner has committed criminal acts in which the property was involved, the government has a pronounced interest in punishment and general and specific deterrence. These same interests, however, could be better served by proceeding *in personam* with a criminal forfeiture action.<sup>80</sup> The government interest, however, is less significant when the owner is innocent of any wrongdoing. Punishment cannot be a legitimate governmental objective because the owner has done no wrong. Specific and general deterrence of crime is frustrated because innocent parties rather than guilty parties bear the cost of crime. Criminals are not deterred because their interests are not at stake. Moreover, claims of the government's remedial interest in asserting control over property that has allegedly facilitated a crime are invalidated by the government's practice of returning property to the private sector through government auctions. Finally, when the seized property is contraband, the government has a significant interest, and civil forfeiture is an appropriate remedy.

Factors one<sup>81</sup> and two<sup>82</sup> weigh heavily in favor of finding that increased process is due. An individual's right of ownership is a fundamental right that warrants significant procedural protection. Likewise, the current procedural framework presents a real and significant risk of an erroneous result. Time and cost operate together as a nearly insurmountable barrier that precludes an opportunity for a meaningful hearing in eighty percent of the forfeiture actions. Even

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<sup>80</sup> An action *in personam* is one that seeks to determine the rights and interests of the parties involved, whereas an action *in rem* proceeds against the property itself to determine whether the property has "committed" an act of which it is guilty. See BLACK'S LAW DICTIONARY 795, 797 (7th ed. 1999). The author considers *in personam* the superior procedure for several reasons: (1) *in personam* fosters personal accountability by examining the actions of persons rather than engaging in the fiction of guilty property; (2) *in personam* ties punishment to an individual's conduct, whereas *in rem* divorces a particular individual's conduct from punishment; and (3) because punishment is divorced from conduct, *in rem* leads to miscarriages of justice when innocent owners are deprived of their property.

<sup>81</sup> See *supra* note 66 and accompanying text.

<sup>82</sup> See *id.*

when a claim is filed, a shifting burden of proof that presumes the property guilty ensures that successfully asserting a claim will be extraordinarily difficult. Further, when statutes fail to provide an innocent-owner defense, the guilt or innocence of the owner is irrelevant. A slight tweaking of the forfeiture machine quickly eradicates these procedural difficulties.

The weight of factor three<sup>83</sup> varies with the circumstance. In two instances, the government has a strong interest. When the seized property is contraband, the government has a great interest. Likewise, the government's interest is significant when the owner of property is guilty of some crime. The weight of this interest, however, is counterbalanced by the government's ability to bring an action for criminal forfeiture. Finally, the government has relatively little interest when the property owner is innocent of wrong-doing. Thus, a balancing of the three factors suggests that the present procedural safeguards are inadequate in all cases except when the property is contraband.<sup>84</sup>

#### VI. ECONOMICS— THE ENGINE OF FORFEITURE: MACHINERY REplete WITH IRRESOLVABLE CONFLICTS

Bereft of external control, civil forfeiture has become an unchecked economic engine that breeds poor policy and injustice. In many cases, the proceeds from forfeiture are retained by the same officials seeking forfeiture, not subject to external oversight. Current forfeiture funding procedures create self-interested parties who are tempted to forsake justice to augment department revenues.

##### *A. Forfeiture Funding: A Built-in Conflict of Interest*

When the Comprehensive Crime Control Act of 1984<sup>85</sup> restructured forfeiture funding, it gave birth to an irresolvable conflict of interest and set in motion the gears of an uncontrolled economic engine. Prior to 1984, forfeiture-related revenue was deposited directly into the U.S. Treasury's general fund.<sup>86</sup> Now, funds are deposited in the Justice Department's Asset Forfeiture Fund and Treasury Department's Forfeiture Fund.<sup>87</sup> In theory, Congress requires no spending authorization for disbursement of funds so long as its use falls under the

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<sup>83</sup> *See id.*

<sup>84</sup> When the property is contraband, the presence or absence of procedural protection is a moot point because ownership of the property is itself illegal.

<sup>85</sup> Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 5, 18 & 19 U.S.C.).

<sup>86</sup> *See HYDE, supra* note 17, at 29-30.

<sup>87</sup> *See id.*

large, ill-defined penumbra of law enforcement activities.<sup>88</sup> In practice, the Comprehensive Crime Control Act creates a virtually bottomless slush fund subject to no external control or supervision.

Current law creates a further conflict of interest. Law enforcement officials keep up to ninety percent of seizures,<sup>89</sup> an economic force that drives forfeiture and distorts the perspective of those whose duty requires an objective viewpoint. Agencies have an incentive to urge forfeiture actions because forfeiture funds can significantly augment an agency's budget,<sup>90</sup> creating an invitation for abuse.<sup>91</sup> Forfeiture funds offer a tempting financial incentive to law enforcement agencies, "some of which have resorted to questionable methods in order to reap the benefits of civil forfeiture."<sup>92</sup>

Providing the inviting possibility of virtually unlimited economic gain in an age of budgetary constraints has created a pressure on agencies, prosecutors, and enforcement officials that has subtly worked a perversion of justice. For example, in 1993, Michael Zeldin, director of the Justice Department's Asset Forfeiture Office under President Bush stated, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing . . . the desire to effect fair enforcement of the laws."<sup>93</sup>

### B. The Actors

The full influence of forfeiture over substantive justice is best illustrated by a brief survey of three principle actors who share a stake in forfeiture claims: paid informants, law enforcement officials, and prosecutors.

#### 1. Paid Informants

Often the government relies on paid informants to provide evidence establishing probable cause. "One of the central pillars on which rests the dubious financial success of the federal forfeiture program is an army of well-paid secret informers."<sup>94</sup> These informers are paid on a contingency fee basis; the value of property seized determines the amount of money the informer receives.<sup>95</sup> Most informants are ex-cons

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<sup>88</sup> *See id.*

<sup>89</sup> *See Piety, supra note 24, at 975.*

<sup>90</sup> *See id.*

<sup>91</sup> *See Pilon, supra note 72, at 318.*

<sup>92</sup> *Chatman, supra note 33, at 745.*

<sup>93</sup> *HYDE, supra note 17, at 29.*

<sup>94</sup> *Id. at 45.*

<sup>95</sup> *See id.*

and convicts who have been involved in serious criminal activity, who have a personal stake in the outcome of the forfeiture, and who have a strong incentive to lie.<sup>96</sup> Property owners have no right to confront the informer; instead police officers simply repeat what informers told them.<sup>97</sup> The U.S. House Committee on Government Operations revealed in 1992 that the Justice Department paid sixty-five informants more than \$100,000 each, while in 1990 the highest paid federal informant received \$780,018.39<sup>98</sup> — “more than the President and Vice President of the United States combined.”<sup>99</sup>

## 2. Enforcement Officials

The contemporary formulation of power creates a self-interested body of enforcement officials, subject to little external control or accountability and who use a network of paid informants to wield the sword of probable cause. Hyde asserts that the profit motive causes some police and prosecutorial authorities to engage in questionable conduct because the forfeited property and cash goes to government agencies.<sup>100</sup> Under current law, forfeited property may be transferred to “any State or local law enforcement agency that participated directly or indirectly in the seizure or forfeiture of the property.”<sup>101</sup> Many state forfeiture laws contain similar provisions allowing “departments to retain all the money and proceeds from such forfeitures.”<sup>102</sup> The greater the amount of property and cash seized is, the greater is the amount of property available for “official use.”<sup>103</sup>

Some have suggested the stake that agencies have in the outcome of forfeiture proceedings “may explain the dramatic increase in the number of forfeiture actions brought and the amounts collected.”<sup>104</sup> Forfeiture actions present law enforcement officials with tempting incentives: forfeited luxury cars, airplanes, and boats available for undercover operations and sometimes for personal use.<sup>105</sup> In fact, Hyde asserts that forfeiture of valuable real estate has become so attractive to police “that most departments have quietly adopted a policy of ‘structured arrests,’ making certain that undercover agents purchase drugs or make deals on

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<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.* at 46.

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 8-9.

<sup>101</sup> 19 U.S.C. § 1616a(c)(1)(ii).

<sup>102</sup> Chatman, *supra* note 33, at 739 n.6.

<sup>103</sup> HYDE, *supra* note 17, at 9.

<sup>104</sup> Piety, *supra* note 24, at 975.

<sup>105</sup> *See id.*

a high-priced tract of land—which then can be confiscated immediately be the police.<sup>106</sup>

One further example suffices to illustrate the danger of creating self-interested law enforcement officials. In Volusia County, Florida, a select group of officers operating out of the Sheriff's office engaged in what has deservingly been dubbed "highway robbery."<sup>107</sup> Thousands of motorists, mostly Hispanic or African American, were stopped traveling south on I-95, the major route to southern Florida.<sup>108</sup> Under the Sheriff's guidance, moneys in excess of \$100 were assumed drug money and routinely confiscated.<sup>109</sup> The "[p]olice conduct was guided by no written rules and reviewed . . . [only] by Sheriff Vogel."<sup>110</sup> Interestingly enough, Sheriff Vogel maintained control over all funds seized.<sup>111</sup> Most telling of all, "it was regular police practice to bargain with motorists on the spot—stopped on the side of I-95, taking part of their cash in exchange for an agreement not to . . . take legal action against the Sheriff's department or the police."<sup>112</sup>

### 3. Prosecutors

Abuse of the current forfeiture funding scheme extends beyond paid informants and law enforcement officials. In Long Island, New York District Attorney James Catterson drove a BMW seized from a drug dealer, used thousands of forfeiture dollars for body work on "his" car, and purchased thousands of dollars worth of office furniture.<sup>113</sup> When questioned by a reporter, Catterson smugly responded, "By my view, I really don't have to ask anyone else's permission to spend moneys that come to me."<sup>114</sup> The point—law enforcement officials directly benefit from forfeiture proceeds and are not accountable to anyone. That is a guaranteed formula for abuse of power and corrupt practices. Enforcement officials cannot be expected to administer the laws objectively when they drive the same cars for which they sought forfeiture.

The threat of abuse of power by self-interested officials is greatly magnified by the low threshold of proof required by most forfeiture laws. A majority of civil forfeiture laws require only an initial showing of

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<sup>106</sup> HYDE, *supra* note 17, at 29-30.

<sup>107</sup> *Id.* at 38.

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* at 39.

<sup>113</sup> *See id.* at 36.

<sup>114</sup> *Id.*

probable cause before the burden shifts to the property owner to prove the property's innocence.<sup>115</sup> Enforcement officials often use a network of informants of questionable character who themselves receive a percentage of forfeited property.<sup>116</sup> Based on questionable tips from unnamed accusers, police officers often wield the sword of probable cause to deprive owners of their property rights without notice and often without due process; the cost of defending the action, the bond required to file suit, the difficulty of proving the property's non-involvement, and the short ten-day time period to file a claim operate together to deprive rightful owners any meaningful opportunity to be heard. Thus, probable cause becomes a dull sword that tears at the sacred right of private ownership of property.

#### VII. THE CIVIL ASSET FORFEITURE REFORM ACT OFFERS PROMISING REMEDIES

In June 1999, the House of Representatives passed H.R. 1658, the Civil Asset Forfeiture Reform Act,<sup>117</sup> which addresses several of the ills of current civil asset forfeiture practice.<sup>118</sup> The Act eliminates the proof burden-shifting involved with contemporary practice.<sup>119</sup> Recognizing that civil forfeitures punish property owners for alleged criminal activity, H.R. 1658 requires that the government show the property's guilt by clear and convincing evidence.<sup>120</sup> In support of this change in the allocation of the burden of proof, the House noted that allowing the deprivation of property on a mere showing of probable cause did not "reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable."<sup>121</sup>

In addition, H.R. 1658 authorizes the appointment of counsel for indigents and those made indigent by forfeiture.<sup>122</sup> Without this provision, those who could not afford counsel would have to navigate through the maze of forfeiture procedures, including its ten day filing period, cost bonds, and shifting burden of proof, without assistance. The

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<sup>115</sup> See Pilon, *supra* note 6.

<sup>116</sup> See HYDE, *supra* note 17, at 45.

<sup>117</sup> H.R. 1658, 106th Cong. (1999).

<sup>118</sup> See H.R. REP. NO. 106-192 (1999), available in 1999 WL 406892. Prior to the publishing of this comment, President Clinton signed into law the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. § 983). The language of this public law, which remains substantially similar to that in H.R. 1658, supports the reasoning of this comment.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

alternative is simply to receive a default judgment without an opportunity to be heard.

The Act provides a uniform and reasonable innocent-owner defense to civil forfeitures, creating a safe harbor for innocent owners.<sup>123</sup> It also eliminates the cost bond.<sup>124</sup> Previously, an individual who wished to challenge the forfeiture had to post a cost bond of the lesser of \$5,000 or ten percent of the property's value.<sup>125</sup> The House noted that requiring a bond is unconstitutional for indigents because it deprives them of a meaningful opportunity to be heard simply because they cannot pay for it.<sup>126</sup>

Moreover, H.R. 1658 enlarges the time frame within which a claimant may challenge judicial forfeiture from ten to thirty days<sup>127</sup> and allows for the return of property on a showing of hardship pending the outcome of the procedure.<sup>128</sup> Although current law allows the release of property pending final outcome, release is conditioned upon payment of the full bond. Often property owners lack sufficient funds to pay the bond, leaving them to endure undue hardship.<sup>129</sup>

Finally, H.R. 1658 extends liability under the Federal Tort Claims Act<sup>130</sup> to cover property damage while detained by law enforcement officials.<sup>131</sup> Under current law, the federal government has no duty to compensate for damage to seized property, producing a hollow victory for those who expend vast resources and energy to recover property only to find that it is significantly damaged or essentially destroyed.<sup>132</sup>

#### VIII. DOES THE CIVIL ASSET FORFEITURE REFORM ACT GO FAR ENOUGH?

The Civil Asset Forfeiture Reform Act leaves untouched two important aspects of contemporary civil asset forfeiture practice. First, the Act leaves intact the economic machinery that creates a self-interested and unaccountable enforcement arm.<sup>133</sup> Under the Act, federal and state officials still stand to gain directly from their own involvement in forfeiture actions.<sup>134</sup> The creation of self-interested parties breeds an

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<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> 28 U.S.C. §§ 1346(b), 2671-2680 (1994).

<sup>131</sup> See H.R. REP. NO. 106-192.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

irresolvable conflict between justice and economic gain. While stricter procedural safeguards in the Resolution offer some protection against abuses by officials, a better solution is to return to the practice of depositing all forfeiture proceeds in the general treasury and allowing Congress to exercise its regular spending and regulatory powers. Second, while the Act does provide an innocent-owner defense in federal suits, Congress does not have the power to require that states provide an innocent-owner defense in their forfeiture statutes. This is the Supreme Court's province. The time has arrived for the Supreme Court to revisit the issue of innocent-owner defenses and reverse its holding in *Bennis v. Michigan*.<sup>135</sup> The fiction of personification should be rejected as superstitious, anachronistic, and contrary to due process. Instead, the Court should follow the lead of Representative Deborah Pryce of Ohio in recognizing that "civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be both offended and concerned by the abuse . . . which happens sometimes under these laws."<sup>136</sup> Thus, the Court should apply the full protection afforded individuals under the Due Process Clause.

#### IX. CONCLUSION

Current civil forfeiture practice is unjustified. The legal fiction of guilty property is an ancient form without modern justification. Perpetuating this fiction is to ignore the reality of forfeiture's impact upon the average America: an owner is punished when deprived of property. Property ownership is a fundamental right, and Americans deserve the full protection of the Fifth and Fourteenth Amendment Due Process Clauses before the government may take away homes, cars, and businesses. Requiring a personal showing of the owner's guilt fosters legitimate governmental interests in punishment and deterrence by creating a nexus between behavior and punishment. Depriving innocent property owners, however, does nothing to punish criminals. The Civil Asset Forfeiture Reform Act addresses some of civil forfeiture's most irresolvable problems, including the standard of proof, the appointment of counsel for indigents, the provision of a uniform innocent-owner defense under federal statutes, the elimination of cost bonds, the short claim filing period, the return of property upon showing of hardship, and the amendment of the Federal Torts Claim Act to provide compensation for damage to the property caused by the government. Yet, the Civil

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<sup>135</sup> 516 U.S. 442 (1995). For an in-depth attack on the decision along these lines, see Michele M. Jochner, *The Supreme Court Turns Back the Clock on Civil Forfeiture in Bennis*, 85 ILL. B.J. 314 (1997).

<sup>136</sup> 145 CONG. REC. H4851-01, H4852 (daily ed. June 24, 1999), available in 1999 WL 419754.

Asset Forfeiture Reform Act fails to address the inherent conflicts of interest created by giving enforcement officials a direct stake in the property that they seize. Likewise, Congress lacks the power to require all states to include an innocent-owner defense in state forfeiture laws. Such a remedy lies with the Supreme Court or the state legislatures. Although current civil forfeiture practice offends traditional notions of due process, the wide support for the Civil Asset Forfeiture Reform Act proves that there is hope of reform in the not too distant future.

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I wish to thank Roger Pilon, Ph.D., J.D., Vice President for Legal Affairs, B. Kenneth Simon Chair in Constitutional Studies, and Director of the Center for Constitutional Studies, Cato Institute, for his help and support in researching this comment. Without his help, his commitment to this issue and his pioneering efforts, this comment would not have been possible. I am forever indebted.