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CIVIL FORFEITURE OF PROPERTY FOR DRUG  
OFFENDERS UNDER ILLINOIS AND  
FEDERAL STATUTE: ZERO  
TOLERANCE, ZERO  
EXCEPTIONS

INTRODUCTION

Throughout the last decade, as drug use exploded into an epidemic,<sup>1</sup> law enforcement agencies confronted with a sea of dealers, traffickers and users, began casting an increasingly wider net to catch anyone who might elude ordinary criminal sanctions.<sup>2</sup> Policy makers and law enforcement officials, realizing the impossibility of prosecuting hordes of drug users without completely overwhelming the already overburdened criminal justice system,<sup>3</sup> are making widespread use of a powerful economic dragnet: forfeiture.<sup>4</sup> Forfeiture permits the government to seize property such as cars, air-

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1. The United States Sentencing Commission projects that the federal prison population, already beyond normal operating capacity, will grow substantially in the next few years as a result of new harsh mandatory prison sentences under the Anti-Drug Abuse Act of 1986 and the Sentencing Commission's new sentencing guidelines. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, ch. 7 (1987). The Sentencing Commission estimates that the federal prison population will increase from its 1987 level of 42,000 inmates to between 85,000 and 108,000 inmates by the middle of this decade, mostly on account of the Anti-Drug Abuse Act's mandatory minimum sentences. *Id.*

In Section 5251 of the Anti-Drug Abuse Act of 1988, Congress noted that despite the fact that seizures of cocaine are up from 1.7 tons in 1981 to 70 tons in 1987, and Drug Enforcement Agency ("DEA") drug convictions have doubled between 1982 and 1986, the supply of illegal drugs has increased during the same period. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5251, 102 Stat. 4487 (codified as amended in scattered titles and sections of U.S.C.).

Experts project that the impact of the war on drugs will overwhelm the Nation's correctional system over the next five years. See Thomas F. Liotti, *War on Drugs: At What Cost to Our Liberty*, 203 N.Y.L. J., Feb. 28, 1990, at 2, col. 3 (recent National Council on Crime and Delinquency projects 460,000 more inmates by 1994, with costs to exceed \$30 billion to build and operate prisons to meet demand).

2. When prosecution is not possible, the government can still prosecute drug offenders through civil forfeiture statutes. S. REP. NO. 225, 98th Cong., 2d Sess. 216-58 (1984), reprinted in 1984 U.S.C.C.A.N. 3374, 3393 [hereinafter ADMIN. NEWS]. Since it is impossible to prosecute every drug user within the criminal judicial system, Congress imposed civil forfeiture as an economic sanction. DAVID SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.02 (1990).

3. SMITH, *supra* note 2, ¶ 1.02.

4. A forfeiture is the taking by the government of property that is illegally used or acquired, without compensating the owner. *United States v. Eight Rhodesian Stones*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

planes, bank accounts, profits or investments connected to drug violations,<sup>5</sup> either after a defendant is criminally convicted for the offense<sup>6</sup> or in a civil forfeiture, which does not require a conviction.<sup>7</sup> As a result, the Justice Department's asset-seizure fund, which receives the proceeds from the sale of the property and any assets seized, has expanded at an incredible rate over the last five years.<sup>8</sup> Since the cost of the "war" continues to escalate,<sup>9</sup> officials increasingly use forfeiture proceeds to help finance law enforcement operations.<sup>10</sup> In reaction to public sentiment,<sup>11</sup> law enforcement officials are drastically increasing their dragnet by enforcing forfeiture laws against even those they arrest for possession of extremely

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5. While the government uses forfeiture most significantly in drug law enforcement, it is available to enforce several federal statutes, criminal and civil. See generally 15 U.S.C. § 11 (1988) (forfeiture of property acquired in violation of anti-trust laws); 15 U.S.C. § 1177 (1988) (forfeiture of property used in connection with illegal gambling); 16 U.S.C. §§ 65, 117(d), 128, 171, 256c (1988) (forfeiture of guns and other equipment used unlawfully in national parks); 18 U.S.C. § 3668(d) (1988) (forfeiture of vehicles and aircraft seized for a violation of liquor laws).

6. Criminal forfeiture is part of a criminal procedure the government initiates against a defendant. The jury renders the verdict of forfeiture only after it reaches a guilty verdict on the criminal charge. See SMITH, *supra* note 2, ¶ 2.03 (only property the criminal defendant owned at the time he committed the crime is subject to forfeiture). See also 18 U.S.C. § 1961 (1988) (criminal forfeiture for Racketeer Influenced and Corrupt Organizations Act ("RICO") violations); 21 U.S.C. § 848 (1988) (forfeiture for those convicted for Continuing Criminal Enterprise ("CCE") violations); 21 U.S.C. § 853 (1988) (expansion of criminal forfeiture to cover all felony drug prosecutions under Title 21).

7. Courts consider civil forfeiture an *in rem* procedure which permits the government to acquire property without the need for a criminal conviction, and even if the court acquits the defendant, it will not bar a later forfeiture provision. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66 (1984). The theory in a civil forfeiture action is that the property itself committed the wrong. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). See 21 U.S.C. § 881 (1988) (general federal civil forfeiture statute).

8. See Stephanie Saul, *A House Could Be the Cost of a Joint Under Federal Asset-Seizure Law*, L.A. TIMES, May 6, 1990, at A2, col. 1. The Justice Department's asset-seizure fund increased from \$27.2 million in 1985 to \$580.7 million in 1989. *Id.*

9. President Bush is seeking \$11.7 billion for anti-drug programs for the 1992 fiscal year. See *Bush Seeks More Funds in Drug War*, CHI. TRIB., Feb. 1, 1990, § 1, at 13, col. 1 (Bush seeks 11% increase in federal spending for the battle against drugs).

10. See Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. TIMES, Jan. 7, 1990, § 1, at 18, col. 1 (officials use forfeiture to increase their financial position in fighting drugs).

11. As public opinion becomes more intolerant of drug dealers the public is willing to accept harsh measures in the "war," including mandatory drug testing at work and random searches of cars and luggage. See, e.g., Richard Morin & Jodie Allen, *Are We Shooting Ourselves in the Foot in the War on Drugs*, WASH. POST, June 26, 1988, at C1, col. 3. A recent national poll revealed that half of those surveyed favored allowing police to stop cars at random to search for drugs and that another third would allow police to search their homes without a court order. *Id.* Additionally, half said they favored mandatory one-year jail sentences for first time cocaine offenders. *Id.*

small amounts of drugs.<sup>12</sup> The impetus behind this expanding effort began in 1988 with the Reagan Administration's "Zero Tolerance Program."<sup>13</sup> While the Department of Justice has not adopted a "zero tolerance" policy,<sup>14</sup> at least facially, the premise is substantively alive and well and living within the federal civil forfeiture statute.<sup>15</sup>

The federal government has enacted and amended forfeiture statutes to put teeth into its drug enforcement activities<sup>16</sup> and to

12. See, e.g., Ruth Marcus & Laura Parker, *Vehicle Seizures Stepped Up in Drug War; Truck, Several Mercedes Confiscated Under "Zero Tolerance" Policy*, WASH. POST, May 10, 1988, at A9, col. 1 (property seized included \$2.5 million yacht after one-tenth of an ounce of marijuana found on board).

13. See, e.g., Fred Strasser & Marcia Coyle, *Defendants Have Zero Tolerance for Forfeitures*, 10 NAT'L L.J., May 23, 1988, at 5, col. 1 (government strategy to prosecute all violations of drug laws regardless of quantities involved). The Customs Service and the Coast Guard adopted a "zero tolerance" program under which they seized boats and cars whenever they found any detectable amount of controlled substances within. SMITH, *supra* note 2, ¶ 4.02. The government's seizure of vessels worth millions of dollars for minute amounts of marijuana created negative publicity, and Congress later enacted an innocent owner exception to help protect owners from the "zero tolerance" program. See 21 U.S.C. § 881 (a)(4)(C) (1988) (protection from forfeiture if owner proves he is without actual knowledge of the illegal activity).

14. SMITH, *supra* note 2, ¶ 4.02.

15. 21 U.S.C. § 881 (1988). Section 881 provides for an action *in rem* against any conveyances or real property used to facilitate any drug activity. This section provides in relevant part:

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

(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 [illegal drugs]. . .

(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 . . . 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 title. . .

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title. . . .

*Id.*

16. See ADMIN. NEWS, *supra* note 2, at 3374, 3374-76. In the course of amending the Comprehensive Drug Abuse Prevention and Control Act Congress made clear its intention regarding the forfeiture provisions:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable drug trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

*Id.* at 3374.

help defray the escalating governmental costs in pursuing forfeitures.<sup>17</sup> Illinois has not ignored this trend. In 1971, Illinois, in response to what it also saw as an increasing drug problem,<sup>18</sup> enacted its own version of the federal drug statute, the Controlled Substances Act.<sup>19</sup> Included in the Illinois Act is a civil forfeiture provision, section 505.<sup>20</sup> The Illinois General Assembly recently amended section 505 but, as amended, reviewing courts have yet to fully interpret the statute.<sup>21</sup> The amended version of section 505 permits forfeiture of any property, real or personal, which facilitates a violation of the Controlled Substances Act.<sup>22</sup>

Forfeiture statutes are effective in combatting drug traffickers. Unfortunately, when the government enforces these statutes against unwitting property owners, the effect is devastating. The purpose of civil forfeiture is to attack drug crimes,<sup>23</sup> but forfeiture

17. *Id.* at 3376 (Congress amended forfeiture statutes to eliminate ambiguities and increase the statutes' scope).

18. See ILL. REV. STAT. ch. 56 1/2, para. 1100 (1989). The intent of the legislature, recognizing the rising incidence of drug abuse, is to limit access to drugs, deter drug use, and to penalize most heavily traffickers and profiteers of controlled substances. *Id.*

19. ILL. REV. STAT. ch. 56 1/2, para. 1100-1603. (1989).

20. See ILL. REV. STAT. ch. 56 1/2, para. 1505 (1989). This section reads in relevant part:

(a) The following are subject to forfeiture:

(1) all substances which have been manufactured, distributed, dispensed, or possessed in violation of this Act;

(2) all raw materials, products, or equipment of any kind which are used, or intended for use in manufacturing, distributing, dispensing, administering or possessing any substance in violation of this Act;

(3) all conveyances . . . used or intended for use . . . in any manner . . . to facilitate a violation of this Act;

(4) all money, things of value, books, records, and research products and materials including formulas, microfilm, tapes, and data which are used, or intended to be used in violation of this Act;

(5) . . . all proceeds traceable to a violation of this Act . . .

*Id.*

21. The Illinois General Assembly amended Section 505 of the Controlled Substances Act by enacting the Drug Asset Forfeiture Procedure Act ("DAFPA"), P.A. 86-1382, 1990 Ill. Legis. Serv. 2061-64 (West) (codified as amended at ILL. REV. STAT. ch. 56 1/2, para. 1505 (1989 and Supp. 1991)).

22. ILL. REV. STAT. ch. 56 1/2, paras. 1100-1603 (1989 and Supp. 1991). See The Cannabis Control Act, P.A. 86-1382, 1990 Ill. Legis. Serv. 2059-61 (West) (codified as amended at ILL. REV. STAT. ch. 56 1/2, paras. 701-719 (1989 and Supp. 1991)). This Act is essentially the marijuana version of the Controlled Substances Act. The DAFPA currently governs the procedure for both of these drug related forfeiture statutes. DAFPA, P.A. 86-1382, 1990 Ill. Legis. Serv. 2053-64 (West) (codified at ILL. REV. STAT. ch. 56 1/2, paras. 701-719, 1100-1603 (1989 and Supp. 1991)). This comment will refer to both acts without differentiating forfeiture under the provisions of the acts, but the differences, where important, will be noted.

23. See ADMIN. NEWS, *supra* note 2, at 3374 (forfeiture is the mechanism through which an attack on the economic aspects of drug crimes is made).

also indirectly attacks constitutional rights.<sup>24</sup> The Constitution provides defendants procedural safeguards in all criminal prosecutions. However, despite the fact that civil forfeiture is often more severe than many criminal prosecutions, the government can avoid constitutional barriers in civil forfeitures because of the "civil" moniker of the proceedings.<sup>25</sup> The stripping away of a constitutional shield because of a legal classification is an injustice.

This comment will explore the various issues raised by both section 881 of the federal statute and section 505 of the Illinois statute by examining the history and application of these statutes. Part I of this comment briefly traces the historical development of civil forfeiture law. Part II analyzes the content, scope, and application of federal and Illinois civil forfeiture statutes. In addition, Part II considers the new amendments to Illinois' forfeiture provisions and their possible effects on current procedure. Part III analyzes the impact of denying constitutional protection in civil forfeiture proceedings,<sup>26</sup> and concludes that the use of civil forfeiture<sup>27</sup> for drug offenses represents grim prospects for due process guarantees.<sup>28</sup> Part IV examines the possibility of narrowing the scope of these statutes to alleviate the drastic application of civil forfeiture. Finally, Part V argues that the severe nature of civil forfeiture is punitive in effect and, therefore, excessive punishment under the Eighth Amendment. Part V concludes that the government must

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24. See Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390 (1988) (civil forfeiture burdens due process protections).

25. See *infra* notes 130-49 and accompanying text analyzing the constitutional impact of differentiating between civil and criminal proceedings.

26. See generally Henry C. Darmstadter & Leslie J. Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27 (1987) (in-depth discussion concerning constitutional and procedural questions of civil forfeiture).

27. Courts consider forfeitures under 21 U.S.C. § 881 as civil in nature and they are carried out in an *in rem* proceeding (*i.e.*, against the property). *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989). Courts consider forfeitures under 21 U.S.C. § 853 (1988) (criminal forfeiture of property involved in drug activity), 21 U.S.C. § 848 (1988) (continuing criminal enterprise) and 18 U.S.C. § 1963 (1988) (RICO) as criminal in nature and technically *in personam* procedures. *United States v. Sandini*, 816 F.2d 869, 874 (3d Cir. 1987). While this comment will occasionally mention the criminal forfeiture statutes, it will primarily focus on civil forfeiture in light of section 881's potential for government abuse and the fact that greater procedural protections are available in criminal forfeitures.

28. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 898 (1987). Professor Wisotsky characterized the government's efforts in the war on drugs as an assault on justice: "[I]n its zeal to shore up the sagging system, Congress did not hesitate to attack the 'enemy.' If the Bill of Rights, tradition, or statutory protections stood in the way of the war effort, then they had to go." *Id.* The Comprehensive Crime Control Act of 1984 marked an historical rollback of the rights of those accused of crime. *Id.*

either alleviate the unjust consequences of civil forfeiture by permitting more exceptions<sup>29</sup> or, in the alternative, courts must require the government to prove their case beyond a reasonable doubt.

## I. HISTORY OF CIVIL FORFEITURE

The historical background of civil or *in rem* forfeiture (i.e., an action against the property itself)<sup>30</sup> is an extensive one,<sup>31</sup> including

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29. Several claimants challenging forfeiture under Section 881 have argued what is known as the "innocent owner" exception to civil forfeiture. *See, e.g.*, *United States v. 6109 Grubb Road*, 886 F.2d 618 (3d Cir. 1989) (under section 881 innocent owner is one who neither knew or consented to the illegal act). Normally after the government has established probable cause (*see infra* note 149, for an explanation of the probable cause requirement) to believe the property is subject to forfeiture under 21 U.S.C. § 881(a)(7), the claimant, in order to avoid forfeiture, must establish his innocent ownership. The relevant part of 21 U.S.C. § 881(a)(7) provides: "[N]o 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 person to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(7) (1988). Thus, to avoid forfeiture the owner must prove the property was not used illegally, or that the use was without the claimant's knowledge or consent. *United States v. \$55,518.05 In U.S. Currency*, 728 F.2d 192, 195-96 (3d Cir. 1984). However, some courts have placed a greater burden on an owner attempting to establish this defense. *See United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895* (11th Cir. 1985) (claimant has burden of proof in establishing absence of actual knowledge of the illegal act), *cert. denied*, 474 U.S. 1056 (1986); *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 417 (10th Cir. 1982) ("innocence, in and of itself, is an insufficient defense to forfeiture"); *United States v. One Single Family Residence Located at 2901 S.W. 118th Court*, 683 F. Supp. 783, 788 (S.D. Fla. 1988) (innocent owner exception found in Section 881 should be interpreted to require claimant to demonstrate lack of actual knowledge and that claimant did everything reasonably possible to prevent illegal use of their property).

30. There are two types of forfeiture, criminal and civil. *In personam*, or criminal forfeiture, is based on a determination of a defendant's personal guilt. As a result, the government has a right to certain property possessed by the offender. Irving A. Pianin, Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227, 229 (1982). Criminal forfeiture has been described as "post-conviction divestiture of the defendant's property that has an association with his criminal activity." *Id.* at 229-32. Under the criminal forfeiture statutes, 21 U.S.C. § 853 (Section 853 is part of the Comprehensive Forfeiture Act of 1984, which amended the CCE, 21 U.S.C. § 848) or 18 U.S.C. § 1963 (RICO), a person may face forfeiture of any property used in drug crimes. Although RICO was enacted to combat organized crime, the statute is generally considered analogous to Section 853. *See ADMIN. NEWS, supra* note 2, at 3392 (CCE is nearly identical to the RICO criminal forfeiture statute as amended). *See also United States v. Amend*, 791 F.2d 1120, 1127 n.6 (4th Cir. 1986) (RICO and CCE are similar), *cert. denied*, 479 U.S. 930 (1986); *United States v. 3301 Burgundy Rd., Alexandria, Va.*, 728 F.2d 655, 657 n.3 (4th Cir. 1984) (the court could have relied on either CCE or RICO, since both have similar requirements). Regardless of which criminal forfeiture provision the courts use, it is apparent that Congress intended law enforcement officials to have broad authority to strip offenders of all their economic power, because both of the acts are used to combat the profitability of the sales of illegal drugs and the activities of organized crime. *See*

some indirect references in the Bible.<sup>32</sup> *In rem* forfeiture has more recent origins in English common law.<sup>33</sup> The theory behind *in rem*

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United States v. Turkette, 452 U.S. 576, 588-89 (1981) (interpreting RICO). See generally Sean D. Smith, *The Scope of Real Property Forfeiture For Drug-Related Crimes Under The Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303 (1988) (discussion of the application and similarities of criminal and civil forfeiture statutes).

These criminal forfeiture provisions were designed to both penalize and deter criminal activity. See United States v. McKeithen, 822 F.2d 310, 313 (2d Cir. 1987) (Congress enacted forfeiture statutes in an attempt to deter individuals from pursuing criminal gain and to eradicate organized criminal and drug-related activity). Section 853(a) of CCE provides for asset forfeiture by anyone convicted of specific federal drug felonies. 21 U.S.C. § 853(a) (1988). Forfeitable assets include property constituting the proceeds from the felony violation, property used in the commission of the violation, and in the case of those convicted of a continuing criminal enterprise (21 U.S.C. § 848 (1988)), property associated with that criminal enterprise. 21 U.S.C. § 853 (1988). See 21 U.S.C. § 853(b)(2) (1988) (property subject to forfeiture includes tangible and intangible personal property). For a historical examination of *in personam* and *in rem* actions, see William J. Hughes & Edward H. O'Connell Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613 (1984). See generally Brian H. Redmond, J.D., Annotation, *Validity, Construction, and Application of Criminal Forfeiture Provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853)*, 88 A.L.R. FED. 189 (1988) (thorough exploration of criminal forfeiture application).

On the other hand, an *in rem* civil forfeiture requires no criminal conviction before forfeiture may be ordered, and even the defendant's acquittal will not bar a later forfeiture claim. *One Assortment of 89 Firearms*, 465 U.S. at 362-66. The guilt or innocence of the property owner is irrelevant in a civil action because the theory is the property itself has committed the wrong. *Calero-Toledo*, 416 U.S. at 680-81. Additionally, forfeiture requires a quick and efficient determination of rights to the seized property. *United States v. One 1970 Ford Pickup*, 564 F.2d 864 (9th Cir. 1977). Criminal and civil forfeiture actions are not mutually exclusive and civil forfeiture can be used in a case where criminal proceedings are unsuccessful. See *United States v. Dunn*, 802 F.2d 646, 649 (2d Cir. 1986) (criminal forfeiture proceedings not barred by civil forfeiture provisions previously initiated by the government), *cert. denied*, 480 U.S. 931 (1987). See generally Lewis J. Heisman, J.D., Annotation, *Forfeiture of Personal Property Used in Illegal Manufacture, Processing, or Sale of Controlled Substances Under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.S. § 881)*, 59 A.L.R. FED. 765 (1982) (in-depth discussion of civil forfeitures under federal statute).

31. See *Calero-Toledo*, 416 U.S. at 680-86 (American forfeiture laws have their origins in English common law). See generally *United States v. Schmalfeldt*, 657 F. Supp. 385, 387-89 (W.D. Mich. 1987) (explanation of civil forfeiture and its origins in common law); Hughes & O'Connell, *supra* note 30, at 617-20 (common law history and comparison of *in rem* and *in personam* forfeiture).

32. See *Exodus* 21:28 ("[i]f an ox gore a man or woman, and they die, he shall be stoned: and its flesh may not be eaten").

33. Civil statutes which allow the government to proceed against inanimate objects have their origins in the concept of the deodand (L. Latin *Deo dandum* thing to be given to God). BLACK'S LAW DICTIONARY 392 (5th ed. 1979). In English law, any personal property which was instrumental in a person's death was forfeited to the crown to be used for some pious purpose. *Id.* See O.W. HOLMES, THE COMMON LAW 24-25, 34 (1881). When a man was slain, the coroner would value the object and then it would be forfeited as deodand to the church through the king. *Id.* The deodand (the object itself) was considered an



forfeiture is that the criminal act tarnishes the property when the owner involves the property in that act.<sup>34</sup> Generally, the source of *in rem* forfeiture has its roots in the concept of the "deodand."<sup>35</sup> The deodand was the instrument<sup>36</sup> of a man's death, and as such it was forfeited to the Crown as an "accused thing."<sup>37</sup> Thus, if one of the King's subjects accidentally killed another, even if morally blameless, since the King had lost a subject, the Crown considered him "objectively guilty."<sup>38</sup> Even where the Crown granted the subject a pardon, the subject still forfeited his goods to the Crown.<sup>39</sup> While courts determine *in personam*, or criminal forfeiture, by a defendant's personal guilt, an *in rem* action is against the property and does not require the owner to be at fault.<sup>40</sup> For example, Holmes<sup>41</sup> noted that if a man fell off a ship and drowned, because it was the cause of his death, the Crown forfeited the ship as deodand.<sup>42</sup> Originally, the Church received the forfeited deodand and distributed it as charity for the poor. However, the Crown soon abandoned this practice so that the deodand became, even at an early date, simply a means of revenue for whomever the Crown designated as the public beneficiary.<sup>43</sup>

In colonial America, the courts did not strictly follow the concept of the deodand. The Crown however, did demand adherence to

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"accused thing," and vengeance of the offending thing was the original objective of the deodand. *Id.*

"The concept of the deodand has been transformed by the historical process." *Schmalfeldt*, 657 F. Supp. at 388. In our society the government has supplanted the church and the crown. *Id.* Now forfeited property is no longer "applied to pious uses," but rather sold, destroyed, or retained for official uses. *Id.* See also William Reed & Gerald Gill, *Rico Forfeitures, Forfeitable "Interests," and Procedural Due Process*, 62 N.C.L. REV. 57 (1983) (historical developments of English law to present day procedure). See generally Lawrence Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973) (complete historical analysis of forfeiture law).

34. SMITH, *supra* note 2, ¶ 2.02. See HOLMES, *supra* note 33, at 11 (forfeiture of inanimate objects results from the "hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger").

35. HOLMES, *supra* note 33, at 23-24.

36. *Id.* at 24-25, 34. "An instrument could be any personal property, be it a sword or an ox, which was involved in a man's death." *Id.*

37. *Id.* at 23-24.

38. Finkelstein, *supra* note 33, at 187.

39. *Id.*

40. Hughes & O'Connell, *supra* note 30, at 617. See James R. Maxeiner, *Bane of American Forfeiture Law-Banished at Last?*, 62 CORNELL L. REV. 769, 772 (1977) (suggestion that deodand was only one example of forfeiture where the fault of the owner was irrelevant).

41. See HOLMES, *supra* note 33, at 23-25 (Holmes analyzes, among other things, the development of forfeiture law).

42. *Id.*

43. Finkelstein, *supra* note 33, at 182.

the Navigation Acts,<sup>44</sup> which were applicable to the colonies.<sup>45</sup> Under British law, any vessel, including cargo, which the Exchequer<sup>46</sup> found in violation of the Acts, were subject to forfeiture. Not surprisingly, the colonies enforced these provisions along with their own local forfeiture laws.<sup>47</sup> Thus, even in pre-Constitutional America, common law courts exercised *in rem* jurisdiction through the enforcement of forfeiture laws concerned with commodities and vessels used in violation of customs laws.<sup>48</sup> Following the adoption of the Constitution, Congress enacted a statute making ships and cargoes involved in customs offenses subject to forfeiture.<sup>49</sup> Most federal *in rem* forfeiture provisions originate from these early "customs law" forfeiture provisions.<sup>50</sup>

While *in rem* civil forfeiture is by no means a new concept, criminal forfeiture provisions are more novel.<sup>51</sup> In fact, before 1984 only two federal criminal forfeiture statutes existed: the Racketeer Influenced and Corrupt Organization Act, ("RICO"),<sup>52</sup> and the Continuing Criminal Enterprise Act ("CCE").<sup>53</sup> Congress enacted both of these statutes in the Drug Abuse Prevention and Control Act of 1970 ("Controlled Substances Act" or "CSA").<sup>54</sup> Congress established the CSA to combat what it saw as a growing problem of drug abuse in this country.<sup>55</sup> The civil forfeiture provision of the CSA, section 881,<sup>56</sup> permits the federal government to confiscate any property a court finds connected with drugs without a finding

44. The Navigation Acts were a major component of English policy to promote national seapower. Maxeiner, *supra* note 40, at 774-75.

45. *Id.*

46. The Exchequer was the court of the King's revenue. *Id.*

47. *Id.*

48. *Calero-Toledo*, 416 U.S. at 681-82 n.19.

49. See SMITH, *supra* note 2, ¶ 2.03; see also *Calero-Toledo*, 416 U.S. at 683 (citing Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47 and Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176).

50. See SMITH, *supra* note 2, ¶ 2.03 (some customs law provisions governing forfeiture proceedings date from the time of the Constitution).

51. When Congress passed the RICO and CCE statutes in 1970 it thought that there had been no criminal forfeitures in the United States since 1790. SMITH, *supra* note 2, ¶ 2.03. Actually, criminal forfeiture fell into disrepute and was gradually replaced by civil forfeiture. Maxeiner, *supra* note 40, at 779-80. Still, there are almost no reported federal cases of criminal forfeiture for a hundred years prior to 1970. SMITH, *supra* note 2, ¶ 2.03.

52. 18 U.S.C. §§ 1961-68 (1988).

53. 21 U.S.C. § 848 (1988).

54. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 101-1016, 84 Stat. 1236-1291 (1970) (current version codified at 21 U.S.C. §§ 801-971 (1988)) (also known as the Drug Control Act and the Controlled Substances Act)).

55. H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1-3 (1970) *reprinted in* 1970 U.S.C.C.A.N. 4566, 4566-68 (law enacted in response to the "growing menace of drug abuse in the United States").

56. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1276 (codified at 21 U.S.C. § 881).

of guilt.<sup>57</sup> Congress amended the CSA's forfeiture provisions<sup>58</sup> by enacting the Comprehensive Crime Control Act of 1984.<sup>59</sup> Congress added subsection (a)(7) to section 881 to cover *real* property,<sup>60</sup> in addition to personal property, acquired through, or associated with the actual commission of such acts.<sup>61</sup> This provision has an extremely broad scope, and permits a court to order forfeiture of an entire parcel of property if the owner used any part of the property to grow marijuana, for example.<sup>62</sup> The broad sweep of civil forfeiture casts a wide net, snaring not only multi-billion dollar traffickers, but also property owners who have the unfortunate luck to be caught with drugs.<sup>63</sup> Herein lies the troubling aspect of civil

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57. 21 U.S.C. § 881 (1988). Section 881 provides for an action *in rem* against any conveyance or real property used to *facilitate* any drug activity. 21 U.S.C. § 881(a)(4),(7) (1988) (emphasis added). *See supra* note 15, for the relevant portions of section 881.

58. *See* ADMIN. NEWS, *supra* note 2, at 3374-75. Congress amended the Comprehensive Drug Abuse Prevention and Control Act to eliminate the statutory limitations and ambiguities that have hampered federal law enforcement agencies from using forfeiture statutes as the powerful law enforcement weapon Congress intended. *Id.*

59. Pub. L. No. 98-473, §§ 501-525, 98 Stat. 2068-2070 (1984).

60. *Forfeiture in Drug Cases, 1982: Hearings on H.R. 5371 Before the Subcomm. on Crime of the House Committee on the Judiciary, 97th Cong., 2d Sess. 175-76* (1982) (statement of Jeffrey Harris, Deputy Assoc. Att'y Gen., U.S. Dep't of Justice) (emphasis added). Prior to the 1984 amendments to section 881, the government could not seek forfeiture of real property. *Id.* This was a continuing source of irritation to law enforcement officials who were aware that real property was being used to assist, not only in concealing drugs, but also in the commission of trafficking crimes. *Id.* When section 881 was finally amended, it contained a provision subjecting to forfeiture real property which is used or intended to be used in violation of the Drug Abuse Prevention and Control Act. *See* 21 U.S.C. § 881(a)(7)(1988) (All real property including any right, title or interest in, subject to forfeiture).

61. *See* ADMIN. NEWS, *supra* note 2, at 3374-92. Congress considered the forfeiture statutes of 1970 as failures because of their numerous limitations and ambiguities, and intended to remedy these problems by improving the procedures used to initiate forfeiture provisions, by increasing their reach, and by limiting a defendant's pretrial disposition of his assets. *Id.* *See supra* note 15 for the relevant portions of section 881 (civil forfeiture provision). Title III of the Comprehensive Crime Control Act of 1984 extended the boundaries of forfeiture actions to include both "civil" (section 881) and "criminal" (section 853), permitting the seizure of profits derived from criminal acts as well as the seizure of property associated with the actual commission of the acts. Comprehensive Crime Control Act, 21 U.S.C. §§ 881, 853 (1988); ADMIN. NEWS, *supra* note 2, at 3375-90.

62. Section 881(a)(7) subjects to forfeiture:

[A]ll real property. . . 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. . . .

21 U.S.C. § 881(a)(7)(1988).

63. *Compare* United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895 (11th Cir. 1985) (civil forfeiture of funds acquired by corporation with suspected ties to giant Columbian drug cartel) *with* United States v. 6109 Grubb Road, 886 F.2d 618 (3d Cir. 1989) (homeowner's husband convicted for selling drugs, house later forfeited under Section 881).

forfeiture.

## II. CURRENT APPLICATION OF CIVIL FORFEITURE LAW

### A. Forfeiture in the Federal Courts

On the federal level, civil forfeiture has become a powerful tool in effecting drug policy.<sup>64</sup> Two types of property are subject to forfeiture under section 881.<sup>65</sup> One consists of all controlled substances themselves and all materials and equipment used to make them (*per se* contraband).<sup>66</sup> Another type of property subject to forfeiture consists of any "conveyances," that is, cars, trucks, boats, planes, etc., which an owner uses or intends to use to transport or conceal drugs.<sup>67</sup> Courts consider this group *derivative* contraband, and it includes any real property which the owner used, or intended to use, to facilitate the transportation, sale, or purchase of controlled substances.<sup>68</sup> Additionally, derivative contraband includes money, securities or anything else of value, acquired through the sale of drugs or which an owner intends to use to buy drugs.<sup>69</sup> Forfeiture of illegal substances themselves does not raise any legal argument.<sup>70</sup> However, judicial forfeiture of derivative contraband under section 881 raises several important issues regarding not only its scope, but also its constitutional shortcomings.<sup>71</sup>

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64. See *supra* note 8 for the estimated value of Justice Department seizures.

65. 21 U.S.C. § 881(a)(1),(2) (1988) covers all controlled substances themselves, and all raw materials used to make them. 21 U.S.C. § 881(a)(4),(6),(7) (1988) covers all conveyances (vehicles) used in connection with drug violations, real property connected with drug violations, and proceeds, in any form, derived from drug violations.

66. *Id.* § 881(a)(1)(2) (raw materials used make drugs, subject to forfeiture).

67. *Id.* § 881(a)(4) (all conveyances used in any way to facilitate a violation of the act, subject to forfeiture).

68. *Id.* § 881(a)(4),(6).

69. *Id.*

70. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) (*per se* contraband can be considered *malum in se* since its possession, without more, constitutes a crime).

71. Questions regarding the constitutionality of forfeiture of attorney's fees under RICO, 18 U.S.C. § 1961-1968, and CCE, 21 U.S.C. §§ 848, 853, have received significant attention lately. See *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2656-57 (1989) (forfeiture of attorney's fees found not violative of Sixth Amendment right to counsel of choice); see also *United States v. Monsanto*, 109 S. Ct. 2657, 2666 (1989) (statutory intent was to include attorney's fees and as such was not a Sixth Amendment violation); see generally Norman Geis, Note, *Caplin & Drysdale, Chartered v. United States: Supreme Court Approves Attorney Fee Forfeiture*, 23 J. MARSHALL L. REV. 471 (1990) (analysis of Supreme Court's decision regarding attorney fee forfeiture and the Sixth Amendment); Kevin B. Zeese, *Supreme Court Upholds Forfeiture of Legal Fees*, 2 DRUG L. REP. NO. 10, at 109 (1989) (discussion of constitutional impact of *Caplin & Drysdale* and *Monsanto*).

While Sixth Amendment questions regarding criminal forfeiture provisions are important, this comment will not consider the constitutional implications of

## B. Scope of Civil Forfeiture

The broad sweep of section 881 permits the federal government to combine the different provisions of the section to seize all of the defendant's property associated with the drugs involved.<sup>72</sup> Depending on the standard used to interpret the scope of the statute, prosecutors can usually attain forfeiture of any property involved in the alleged wrongful activity despite any tangible connection to drugs.<sup>73</sup>

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attorney fee forfeiture. However, this comment will examine other constitutional questions involving the burden of proof, probable cause, double jeopardy, the privilege against self incrimination, and notice and warrant requirements. See Darmstadter & Mackoff, *supra* note 26, at 34-44 (constitutional analysis of forfeiture); see generally Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?* 41 Sw. L.J. 1111 (1988) (analysis of due process and civil forfeiture).

72. See 21 U.S.C. § 881 (1988). By combining the various provisions in section 881, the government can reach almost any of the person's property. Under Section 881(a)(4) any "conveyances" including aircraft or cars used, or intended to be used in any manner to facilitate the transportation or receipt, possession or concealment can be subject to forfeiture. Under Section 881(a)(6), any "moneys," including bank accounts, negotiable instruments, securities, proceeds or anything of value, either traceable to the illegal act involved, used in the act, intended to be used in the act, or to "facilitate" the act, are subject to forfeiture. Under Section 881(a)(7), all real property (including any interest in the property), leasehold or otherwise, whole tracts or any part thereof, including any improvements or appurtenances, used or intended to be used in any manner to commit or to facilitate a violation of the act are subject to forfeiture. *Id.*

Some courts have determined that only the portion of the property actually used for drug activity should be forfeited. *United States v. McKeithen*, 822 F.2d 310, 313-14 (2d Cir. 1987); *United States v. Anderson*, 637 F. Supp. 632, 635-37 (N.D. Cal. 1986). Some courts impose a complete forfeiture of an entire parcel of land, despite the fact that only a part of it was used for drug related activity. See, e.g., *United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987).

73. See *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3d Cir.), (question concerning forfeiture is whether the car made drug violation "less difficult"), *cert. denied*, 454 U.S. 818 (1981); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 427 (2d Cir. 1977) (what constitutes facilitation is a question of degree, which is a question of fact not readily susceptible to generalization). Most civil forfeiture cases are brought against cars, trucks, boats or aircraft involved in some manner in the commission of a drug violation. SMITH, *supra* note 2, ¶ 3.03. The reason is that conveyances are constantly being used to commit acts that subject them to forfeiture, the conveyances' connection to the offense is easy to prove, and conveyances can't be easily hidden. *Id.* However, the problem here comes in determining the degree of involvement with the prohibited activity that must be shown to incur the forfeiture penalty. *Id.* Congress left the courts to decide, on a case-by-case basis, what type of nexus to the prohibited activity is sufficient to trigger a conveyance's forfeiture. *Id.*

The language of Section 881 concerning what property involved in the wrongful activity can be forfeited has given rise to differing interpretations. Some courts have found the term "facilitate" to mean "in any manner or part to commit or facilitate commission of a drug-related offense." See *United States v. Real Estate Known as 916 Douglas Ave.*, 903 F.2d 490, 494 (7th Cir. 1990) (connection between the drug transaction and property need only be more than incidental or fortuitous in order to be subject to forfeiture). Other courts have found that the term "facilitate" means that a sufficient "nexus" between the property and the drug transaction needs to exist in order to support the forfei-

Under section 881, the government can attain forfeiture of any property, real or personal, used or intended to be used "in any manner to facilitate" a violation.<sup>74</sup> Courts<sup>75</sup> have interpreted this language to require some kind of "nexus" to the underlying activity, but rarely draw any substantial lines between which connections trigger forfeiture and which do not.<sup>76</sup> One fact is inescapable; this language causes harsh and unjust results.<sup>77</sup>

Such a result occurred in *One Blue 1977 AMC Jeep CJ-5 v. United States*,<sup>78</sup> where the Eighth Circuit Court of Appeals found that under section 881, property is subject to forfeiture when a property owner uses the property "in any manner" to facilitate the sale, receipt, possession, or transportation of a controlled substance.<sup>79</sup> In *One Blue Jeep*, the court forfeited a mother's car after determining her son used the vehicle to drive to a location where he discussed a drug deal with two other men.<sup>80</sup> Despite the fact that the police found no drugs in the vehicle, the court held that since

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ture. See *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1427 (11th Cir. 1983) (fact that car transported neither contraband or money but was used to transport a "pivotal figure" to a transaction was enough for sufficient "nexus" between property and illegal activity).

Still other courts have determined that the term "facilitate" requires that there be a "substantial connection" between the property to be seized and the illegal drug transaction involved. See *United States v. 3639-2d Street, N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (substantial connection between sale of drugs and defendant's house existed to support forfeiture). But see *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980) (no finding of a substantial connection between car and drug transaction).

74. 21 U.S.C. § 881(a)(4), (a)(7) (1988).

75. For the differing circuit court applications of the "nexus" requirement, see *supra* note 73.

76. A car used to carry a participant to the scene where a preliminary meeting that may lead to, or is expected to lead to, a drug deal is sufficient to forfeit the vehicle under 21 U.S.C. § 881(a)(4). *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421, 426-27 (2d Cir. 1977). In *Cadillac*, two men used the car to travel to negotiate a drug deal. *Id.* at 421-22. The parties disagreed, however, and no deal was agreed upon. *Id.* Three days later the same parties made the drug transaction, but the car the court ordered forfeited was only used at the first aborted transaction. *Id.* The court found this connection to the drug transaction enough to forfeit the vehicle under Section 881(a)(4). *Id.* at 423.

Furthermore, a conveyance which is used to assist the primary conveyance in an illegal activity (i.e., as lookout, replacement) is subject to forfeiture. SMITH, *supra* note 2, ¶ 3.03. A conveyance used as a place for negotiating or consummating an illegal transaction can also be forfeited because it provides "shelter and privacy." *United States v. One 1981 Datsun 280ZX*, 563 F. Supp. 470, 473 (E.D. Pa. 1983).

However, the use of a car to transport a drug conspirator to a meeting at which he was to be repaid his "front money" was not enough to forfeit the car. *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026, 1030 (1st Cir. 1980).

77. See *supra* note 73 and cases cited therein (cases evidencing harsh application of civil forfeiture statutes).

78. 783 F.2d 759 (8th Cir. 1986).

79. *Id.* at 761-62.

80. *Id.* at 761.

the claimant's son used the vehicle to transport himself to a site where he discussed drug deals, his use constituted a facilitation of the illegal act.<sup>81</sup> The court ordered the jeep forfeited even though the owner had no knowledge of her son's action.<sup>82</sup>

Unfortunately, the term "facilitate" in section 881 has resulted in broad interpretations<sup>83</sup> and permitted the forfeiture of property in situations involving small amounts of drugs or where the owner does not intentionally involve himself with drugs at all.<sup>84</sup> Courts, in addition to being unswayed by the amount of drugs involved,<sup>85</sup> are

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81. *Id.* In *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990), the court found that the owner's use of his home telephone to negotiate a two ounce cocaine sale was a sufficient nexus to subject the house to forfeiture. *Id.* at 493-94.

82. *One Blue 1977 AMC Jeep CJ-5*, 783 F.2d at 761.

83. *See United States v. One 1982 Buick Regal*, 670 F. Supp. 808 (N.D. Ill. 1987) (a vehicle may be used to facilitate an illegal transaction within the meaning of Section 881 even though there is no evidence that the contraband was actually transported in the vehicle). Courts have construed facilitation to mean any use of property which makes trafficking in contraband less difficult. *United States v. One 1980 Cadillac Eldorado*, 603 F. Supp. 853, 855 (E.D.N.Y. 1985). In *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), the Fifth Circuit found that property is forfeitable if it is "used in any manner" to facilitate the transportation of raw materials used in the manufacture of a controlled substance. *Id.* at 727-28. The court found that since the property was used to transport the defendant to and from meetings where drug deals were discussed and was used to transport materials, there was enough evidence to subject the property to forfeiture, despite the fact it did not transport the illegal drugs in question. *Id.* Courts have found that the term "facilitate" in the context of Section 881 encompasses any activity making the prohibited conduct "more or less free from obstruction or hindrance." *See United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 157 (3rd Cir.) (the presence of the automobile with its hood up provided a convenient cover, rendering the vehicle forfeitable), *cert. denied*, 454 U.S. 818 (1981).

84. Forfeiture laws often permit for the forfeiture of any vehicle used to facilitate a drug offense even if not used to transport drugs. *See United States v. One 1979 Porsche Coupe*, 709 F.2d 1424, 1427 (11th Cir. 1983) (automobile which transported neither drugs nor money but used to transport pivotal figure to attempted narcotics transaction is forfeitable); *United States v. One 1981 Datsun 280ZX*, 563 F. Supp. 470, 472 (E.D. Pa. 1983) (despite the fact that no sale ever took place or charges brought, car used to commute to meetings, and in which negotiations occurred, found forfeitable); *Duckham v. State*, 478 So. 2d 347 (Fla. 1985) (forfeiture upheld where owner used vehicle to drive to restaurant where drug deal was made even though no drugs were found in vehicle); *Commonwealth v. One 1979 Lincoln Four Door Sedan*, 496 A.2d 397, 398-99 (Pa. Super. 1985) (forfeiture of auto used to bring coffee and sandwiches to workers in illegal laboratory upheld); *see also United States v. One 1982 28' Int'l Vessel*, 741 F.2d 1319, 1323 (11th Cir. 1984) (forfeiture of twenty-eight foot boat after two leaves and a twig of marijuana found on board upheld); *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 814-15 (9th Cir. 1979) (forfeiture of car after .226 grams of marijuana found in trunk upheld).

85. Courts have found that property can be subject to forfeiture despite the amount of contraband found. *See United States v. One 1985 Mercedes*, 917 F.2d 415, 417 (9th Cir. 1990) (\$35,000 automobile seized after owner arrested in possession of \$75 worth of cocaine); *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989) (small amount of cocaine found in owner's pocket enough to trigger forfeiture of \$45,000 car); *One 1982 28' Int'l Vessel*, 741 F.2d at

equally unconcerned with whether the owner intends to sell the drugs or keep them for personal use.<sup>86</sup> Furthermore, despite the fact that the owner of the property is innocent of any wrongdoing,<sup>87</sup> the government can, and will seize the property and subject it to forfeiture.<sup>88</sup> Thus, the government applies civil forfeiture to traffickers and users in the same manner without regard to the amount of drugs involved, their intended use, or the harsh effects on the property owner.<sup>89</sup> Thus, where a property owner becomes involved with drugs in a remote sense, despite his ignorance, his property is

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1321-23 (yacht forfeited after a twig and leaf of marijuana found on board). *But see* United States v. One Gates Learjet, 861 F.2d 868, 873 (5th Cir. 1988) (court found jet not forfeitable after government vacuum search turned up 10-14/100,000 of one ounce of cocaine).

86. Courts interpreting Section 881 usually make no distinction between controlled substances possessed for personal use and those possessed for sale, on the basis that Congress intended both situations to result in forfeiture. In *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977), the court interpreted Section 881 to apply to any vessel used to "transport" controlled substances, regardless of the purpose of the transportation. *Id.* at 10. In *United States v. 3639-2nd St., N.E. Minneapolis, Minn.*, 869 F.2d 1093 (8th Cir. 1989), the court stated that the proportionality between the value of the forfeitable property and the severity of the injury sustained by the forfeiture is irrelevant. *Id.* at 1096.

87. *See* 21 U.S.C. § 881 (1988). Section 881 contains an "innocent owner" defense; however, proving one's innocence is still a substantial hurdle to overcome in a civil forfeiture proceeding. *See* 21 U.S.C. § 881(a)(4),(6),(7) (1988). To succeed on the innocent owner defense, a claimant must show he/she did not know of the illegal use of the property and that he/she did not consent to it. *See, e.g., United States v. One Single Family Residence*, 894 F.2d 1511, 1519 ((11th Cir. 1990) (innocent owner must demonstrate that she had no knowledge of and gave no consent to the wrongdoer's actions); *United States v. 124 East North Ave.*, 651 F. Supp. 1350, 1357 (N.D. Ill. 1987) (claimant must show that she had no knowledge and gave no consent to her husband's unlawful activity). However, some courts require a claimant to prove more in order to succeed on this defense. Thus, a wife whose husband uses their home for drug trafficking activity must show more than lack of consent, she must show she took affirmative action to stop her husband's illegal activity. *United States v. Sixty Acres, More or Less*, 727 F. Supp. 1414, 1417 (N.D. Ala. 1990).

Sometimes the owner's complete ignorance and lack of involvement in illegal activity on his property will not be enough to defeat forfeiture. In *United States v. 2400-3410 West 16th St., Chicago, Ill.*, 636 F. Supp. 142 (N.D. Ill. 1986), the seizure of the building in which thirteen different drug deals had taken place over a period of more than a year was upheld without requiring a showing that the owner was connected with any of the transactions. *Id.* at 143-44.

88. Section 881 exempts property from forfeiture if the owner establishes by a preponderance of the evidence that he had no knowledge of and did not consent to the illegal use. 21 U.S.C. § 881(a)(4),(6),(7) (1988).

89. *See United States v. One 107.9 Acre Parcel of Land in Warren Tp.*, 898 F.2d 396, 400 (3d Cir. 1990) (plain language of statute requires forfeiture of all of a unitary tract of land, although only part is used in violation); *United States v. A Parcel of Land*, 884 F.2d 41, 43 (1st Cir. 1989) (statute authorizes forfeiture of entire tract of land regardless of the magnitude of the violation); *United States v. 3639 2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (statute contains no requirement of continuing drug business; single sale of relatively small amount of cocaine requires forfeiture of house).



subject to forfeiture.<sup>90</sup> On the state level, the undercurrents of "zero tolerance" are also sweeping more citizens into the "dragnet."

### C. Civil Forfeiture in Illinois

When the federal government enacted the Comprehensive Drug Abuse Prevention and Control Act in 1970,<sup>91</sup> the Illinois General Assembly was creating their own version, the Controlled Substances Act ("Act").<sup>92</sup> While the Act states that it is not the intent of the General Assembly to treat users or petty distributors with the same severity as large-scale traffickers and dealers,<sup>93</sup> Illinois law enforcement officials and prosecutors have nevertheless proceeded against all those connected with drugs with the same vigor.<sup>94</sup> Recently, the Illinois General Assembly amended the Act.<sup>95</sup> Although reviewing courts have yet to fully construe the statute in the amended form,<sup>96</sup> the amendments, combined with the old provisions, could conceivably have as severe an impact on small quantity users and innocent property owners as the statute's harsh federal counterpart.

The relevant pre-amendment forfeiture portion of the Act, section 505, contains language similar to section 881 of the federal provision.<sup>97</sup> Section 505(a)(1)-(5) subjects to forfeiture of any substances manufactured, dispensed, or possessed in violation of the

90. See 2400-3410 West 16th St., Chicago, Ill., 653 F. Supp. at 143 (N.D. Ill. 1986) (forfeiture of a building where drug deals took place without knowledge or consent of owner).

91. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 101-1016, 84 Stat. 1236-91 (current version codified at 21 U.S.C. §§ 801-971 (1988)).

92. ILL. REV. STAT. ch. 56 1/2, para. 1100-1603 (1989) (effective Aug. 16, 1971).

93. See ILL. REV. STAT. ch. 56 1/2, para. 1100 (1989) (intent of legislature to penalize most heavily the illicit traffickers or profiteers of controlled substances).

94. See *People ex rel. Vandersnick v. One 1987 Dodge Charger*, 550 N.E.2d 271, 273 (Ill. App. Ct. 1990) (forfeiture of automobile following owner's guilty plea upon theory of "constructive possession" of small amount of cocaine); *People ex rel. Daley v. 1986 Honda*, 537 N.E.2d 1077, 1079 (Ill. App. Ct. 1989) (small quantity of drug will not save vehicle from forfeiture); *People ex rel. Mihm v. Miller*, 411 N.E.2d 592, 595-96 (Ill. App. Ct. 1980) (forfeiture of car for driver's possession of .08 grams of cocaine).

95. See DAFPA amending both the Controlled Substances Act, ILL. REV. STAT. ch. 56 1/2, para. 1505 (1989 and Supp. 1991), and the Cannabis Control Act, ILL. REV. STAT. ch. 56 1/2, para. 712 (1989 and Supp. 1991).

96. As of the time of writing this comment, published opinions regarding the new provisions of the Illinois Controlled Substances Act have not yet been released. Recently in *People ex rel. Broch v. Hogg*, 571 N.E.2d 888 (Ill. App. Ct. 1991), the court used the Act to obtain forfeiture of an automobile and cash. However, the court did not apply any of the amended sections.

97. Section 881 and the Illinois Controlled Substances Act contain similar language. Both statutes subject property to forfeiture when "used or intended to be used" to violate the respective act, or "in any manner to facilitate" a viola-

Act,<sup>98</sup> conveyances (cars, boats, planes, etc.), or any traceable proceeds (money, securities, negotiable instruments), used or intended to be used in any manner to facilitate any violation of the Act.<sup>99</sup> Additionally, when officials find any money near any forfeitable substance they will rebuttably presume that the money is forfeitable.<sup>100</sup>

The Illinois Supreme Court, in *People v. 1946 Buick*,<sup>101</sup> applied section 505 prior to the 1990 amendment. In *1946 Buick* the prosecution sought forfeiture of a car when police, after stopping the driver for running a stop sign, discovered 0.33 grams of cocaine on the floor of the vehicle.<sup>102</sup> The trial court denied the state's claim, and the appellate court affirmed.<sup>103</sup> The Illinois Supreme Court reversed and ordered forfeiture of the vehicle.<sup>104</sup> The court held that the statutory term "facilitate" means that where an owner of a vehicle uses it in any manner to make possession of the substance easier the vehicle is subject to forfeiture.<sup>105</sup> The court was unaffected by the fact that the claimant possessed a personal use quantity, and that the claimant was not using the vehicle to "facilitate" the sale or distribution of controlled substances.<sup>106</sup> The court either chose to ignore or did not consider the legislative intent stated in Article I of the Act itself, not to treat unlawful users with the same severity as large-scale dealers.<sup>107</sup>

Similarly, in *People ex rel. Daley v. 1986 Honda*,<sup>108</sup> an Illinois Appellate Court ordered the forfeiture of a car following the owner's guilty plea to possession of cocaine in the underlying criminal action.<sup>109</sup> Subsequently, in the civil forfeiture proceeding the trial court found that the car did not facilitate the concealment or possession of the drug.<sup>110</sup> However, on appeal for the civil action,

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tion of the act. 21 U.S.C. § 881(a)(4),(6),(7) (1988); ILL. REV. STAT. ch. 56 1/2, paras. 1505(a)(3),(5),(6) (1989).

98. ILL. REV. STAT. ch. 56 1/2, paras. 1505(a)(1),(2) (1989).

99. *Id.*

100. *Id.*

101. 537 N.E.2d 748 (Ill. 1989).

102. *Id.* at 749.

103. *Id.* at 749-50.

104. *Id.* at 751.

105. *See id.* at 750 (the court was referring to section 505(a)(3), which covers "conveyances").

106. *Id.* at 750-51. The court found Section 505(a)(3) to be clear and unambiguous; if the vehicle makes violation of the Act easier or less difficult, forfeiture is appropriate. *Id.*

107. *See* ILL. REV. STAT. ch. 56 1/2, para. 1100 (1989) (intent of legislature to punish traffickers more severely than users).

108. 537 N.E.2d 1077 (Ill. App. Ct. 1989).

109. *Id.* at 1078. The claimant was actually arrested with less than one gram of cocaine. *Id.*

110. *Id.*

the appellate court stated that courts must "strictly enforce" the forfeiture provision, and that under the plain language of the statute, the owner who had the cocaine concealed in her purse, used the car to "facilitate" possession of the drug.<sup>111</sup> The court stated that when a vehicle in any manner facilitates "*any violation of the Act*" it is sufficient to trigger forfeiture.<sup>112</sup> Evidently, the court did not consider the violator's intent or the quantity involved, only that a violation occurred and the car made "possession easier."<sup>113</sup>

The new amendment to the Illinois Controlled Substances Act, the Drug Asset Forfeiture Procedure Act ("DAFPA"), went into effect September 10, 1990.<sup>114</sup> Reviewing courts have yet to fully construe the new law, but the amendment contains significant alterations to section 505.<sup>115</sup> The most important is that law enforcement can now subject *real* property to forfeiture.<sup>116</sup> This is significant in two respects. First, because courts have interpreted section 505 to permit forfeiture of vehicles used in "any manner" to facilitate "*any violation*" of the Act,<sup>117</sup> there is a possibility that they will apply the statute in the same manner to forfeitures of real property, including family homes. While this seems unlikely, the Illinois Supreme Court has already stated that section 505 is "clear and unambiguous,"<sup>118</sup> and the new amendment contains no real

111. *Id.* at 1079.

112. *Id.* at 1078.

113. Compare *People ex rel. Mihm v. Miller*, 411 N.E.2d 592, 595 (Ill. App. Ct. 1980) (forfeiture of a car ordered because .08 grams of cocaine fell out of the driver's pocket as he stepped out of the car after being pulled over for running a stop sign) with *People ex rel. Barra v. Lee*, 470 N.E.2d 46 (Ill. App. Ct. 1984) (no forfeiture even though controlled substance found in driver's purse, because car not used to "facilitate" the drug offense).

114. P.A. 86-1382, 1990 Ill. Legis. Serv. 2061-64 (West) (codified at scattered paragraphs of ILL. REV. STAT. ch. 56 1/2, paras. 701-719 (Cannabis Control Act), and paras. 1100-1603 (Controlled Substances Act)).

115. First, the amendment permits warrantless seizures in more situations. DAFPA § 16 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1505(b)(4)). Second, it permits the seizing agency to keep 65 % of the funds and proceeds of forfeiture actions, and split the rest with other officials involved. DAFPA § 16 (codified at ILL. REV. STAT. ch. 56 1/2, paras. 1505(g)(1),(2),(2)(ii)). Finally, the amendment requires the losing claimant in the civil forfeiture proceeding to pay the court costs involved. DAFPA § 6(c)(2) (codified at ILL. REV. STAT. ch. 56 1/2, para. 1676).

116. See DAFPA § 16 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1505(6)) (emphasis added). Previously, real property could only be forfeited under the Narcotics Profit Forfeiture Act, ILL. REV. STAT. ch. 56 1/2, para. 1655 (1989).

117. See *People ex rel. Daley v. 1986 Honda*, 537 N.E.2d 1077, 1078 (Ill. App. Ct. 1989) (emphasis added) (forfeiture statute subjects to forfeiture all vehicles "which are used or intended to be used" in any manner to facilitate any violation of the statute).

118. See *People v. 1946 Buick*, 537 N.E.2d 748, 750 (Ill. 1989) (statute is clear and unambiguous; property used in any manner to facilitate any violation of the Act is subject to forfeiture); *People ex rel. Broch v. Hogg*, 571 N.E.2d 888, 892-93 (Ill. App. Ct. 1991) (following the holding in *1946 Buick*).

mitigating language for a family home situation.<sup>119</sup> Even if courts apply the new provisions leniently, considering past application of section 505, harsh results are almost inevitable.<sup>120</sup>

The second significant aspect of DAFPA concerns the division of the proceeds of forfeitures.<sup>121</sup> Under DAFPA, the seizing officials are the beneficiaries of the bulk of the assets and proceeds that are the fruits of the forfeiture.<sup>122</sup> Distributing the assets from the

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119. Like its federal counterpart, Illinois Section 505 does contain an innocent owner exception. ILL. REV. STAT. ch. 56 1/2, para. 1505(a)(3)(ii) (1989). This exception is important because it denies forfeiture of conveyances where the owner has neither consented to, nor has knowledge of the consented act or omission. *Id.* The amended real property section (§ 505(a)(6)) contains no such language. Courts most likely will allow the innocent owner defense to real property forfeiture actions. However, the claimant still bears the considerable burden of proving his or her lack of knowledge and consent. See ILL. REV. STAT. ch. 56 1/2, para. 1505(a)(3)(ii) (1989) (owner must prove that the violation was committed without their knowledge or consent). It is very difficult, if not impossible, to prove a negative. See Peter Petrov, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Prosecutions Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822 (because of the allocation of burden of proof, the claimant must deny knowledge of the act, and hope the trier of fact will believe him, which is not likely).

120. See, e.g., *People ex rel Mihm v. Miller*, 411 N.E.2d 592, 594 (Ill. App. Ct. 1989) (car forfeited after .08 grams of cocaine fell out of driver's pocket as he exited the vehicle, because the car added a dimension of privacy).

121. The new amendment provides that the law enforcement agency making the forfeiture (local, county or state) is to receive 65% of the proceeds; the office of the state's attorney who prosecutes the forfeiture and the appellate prosecutor each get 12.5%; and the final 10% of the proceeds goes to the state police. DAFPA at § 16 (codified at ILL. REV. STAT. ch. 56 1/2, paras. 1505(g)(1)-(3) (1989 and Supp. 1991)).

122. See *id.* The agencies that conduct or participate in the investigation receive 65% of the proceeds from any resulting forfeiture. ILL. REV. STAT. ch. 56 1/2, para. 1505(g)(1)-(3).

This particular provision suggests that those familiar with forfeiture laws will be selective about whom, when, and where they make their seizures, focusing not on the degree of criminal involvement, but rather on what property will bring in the most "dollar for the collar." The Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), premised that only disinterested public officials would initiate civil forfeitures, not "self-interested private parties." *Id.* at 679. However, just as the 1984 amendments to the federal civil forfeiture statute, 21 U.S.C. 881, created an incentive for bringing forfeiture actions by allowing law enforcement personnel to keep some of the property and proceeds of the forfeiture, see ADMIN. NEWS, *supra* note 2, at 3399-40, the Illinois civil forfeiture statute may do the same. At least on the federal level, the economic incentive has resulted in some DEA agents driving seized Mercedes, Cadillacs, and other luxury cars. *Hearings Before the Committee on the Judiciary, Subcommittee on Crime*, March 9, 1987, Miami, Fla. (Testimony of William Snider, Forfeiture Counsel, DEA).

This potential abuse becomes even more troubling in light of the new amendment to the Illinois civil forfeiture statute, which permits any peace officer to make a warrantless seizure if there is probable cause to believe that the property is subject to forfeiture if the property is seized under circumstances in which warrantless seizure would be reasonable. DAFPA at § 16 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1505, § 505(6)(b)(4) (1989 and Supp. 1991)). The old statute did provide for warrantless seizures but not under such discretion-

sale of forfeited property in this manner represents a momentous change to section 505. Prior to the amendment, courts could use the proceeds from a forfeiture to cover court costs.<sup>123</sup> Under the new amendment, the claimant who fights to protect his property must pay all the costs associated with the proceedings if he loses his claim.<sup>124</sup> This is important because a claimant's assets may be significantly depleted as a result of the forfeiture.<sup>125</sup> Cash or no cash, when a property owner fails to challenge the forfeiture, the state's attorney may declare the property forfeited.<sup>126</sup> With his property on the line, the burden of proof on his back, and court costs the prize for a losing claim, a property owner is caught in a serious dilemma. If a claimant fights the forfeiture and loses, the government forfeits his property and the court assesses costs to him. If he does not challenge, the state's attorney summarily forfeits the property.

The Illinois General Assembly made these critical amendments to the Substance Control Act because forfeiture will have a significant effect on deterring drug trafficking, which is beneficial to the public.<sup>127</sup> While this may be true, the new provisions also widen the drug "dragnet" and impose substantial burdens on anyone caught in the net.

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ary standards. Previously, the statute allowed for a peace officer to make a seizure without process:

- (1) If the seizure is incident to inspection under an administrative inspection warrant;
- (2) If the property has been the subject of a prior judgment in favor of the state in a criminal procedure, or an injunction or forfeiture proceeding based on this Act;
- (3) If there is probable cause to believe that the property is directly or indirectly dangerous to health or safety;
- (4) In accordance with the Code of Criminal procedure of 1963, as amended.

ILL. REV. STAT. ch. 56 1/2, para. 1505, § 505(b)(1)-(4) (1989).

123. See ILL. REV. STAT. ch. 56 1/2, paras. 1505(f)(1),(2) (1989) (forfeited property can be kept for official use or sold to cover expenses, including court costs).

124. DAFPA at § 6(c)(2) (codified at ILL. REV. STAT. ch. 56 1/2, para. 1676 (1989 and Supp. 1991)).

125. Under ILL. REV. STAT. ch. 56 1/2, para. 1505(a)(5) the government can seize any proceeds, negotiable instruments, bank accounts, securities, or anything else of value used or intended to be used to facilitate any violation of the Act. *Id.* If a claimant's bank account is seized he may not have the funds to mount a legitimate legal battle to regain his property. *Id.*

126. See DAFPA at § 6 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1676 (1989 and Supp. 1991)) (if defendant fails to file a claim within 45 days, the state's attorney may declare property forfeited unless the property is valued at more than \$ 20,000, or the property is real estate).

127. DAFPA at § 2 (codified at ILL. REV. STAT. ch. 56 1/2, para. 1672 (1989 and Supp. 1991)).

### III. CURRENT APPLICATION IN THE CIRCUIT COURTS CONCERNING THE CONSTITUTIONALITY OF CIVIL FORFEITURE

Although civil forfeiture is an extremely powerful tool for law enforcement in pursuit of a drug-free society,<sup>128</sup> in the fervor to catch the "big ones," officials make few exceptions for the "small fish" caught in the ever-widening net. While innocent owners, small time dealers and users may be acceptable casualties in the "war on drugs," law enforcement and the courts have turned a blind eye to the fact that the war on drugs has pushed constitutional rights into the cross-fire.

The Constitution provides criminal defendants with significant safeguards to protect their life and liberty.<sup>129</sup> Unfortunately, civil defendants lack these safeguards.<sup>130</sup> First, courts have determined that the owner whose property is seized under section 881 is not constitutionally entitled to a pre-seizure hearing or notice.<sup>131</sup> Second, courts have held that a civil forfeiture proceeding against a property owner, subsequent to a criminal prosecution, is not viola-

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128. See Lisa Balkin, *The Booty of Drugs Enriches Agencies*, N.Y. TIMES, Jan. 7, 1990, at A13 (the Department of Justice seized cash and property valued at \$94 million in 1986, \$207 million in 1988, and \$580 million in 1989).

129. Generally, when the government prosecutes someone for a criminal violation, they are protected by several constitutional provisions to which civil defendants are not privileged. See Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390 (1988) (examination of civil forfeitures and constitutional rights).

130. U.S. CONST. amend. V provides in pertinent part, "[n]o person . . . shall be deprived of life liberty or property without due process of law." One due process protection absent in civil forfeiture is a pre-seizure hearing to determine the propriety of the proposed seizure. See *United States v. One 1971 BMW Four-Door Sedan*, 652 F.2d 817, 820-21 (9th Cir. 1981) (risk of erroneous deprivation of property by improper seizure outweighed by public interest in combatting drugs). Another due process protection applied in criminal procedures but absent in civil forfeiture is the critical notion that in criminal cases the government is required to prove its case beyond a reasonable doubt. *E.g.*, *In re Winship*, 397 U.S. 358 (1970) (due process clause requires that the government prove the elements of the crime beyond a reasonable doubt). In civil forfeiture the government need only show probable cause for the forfeiture, and then it becomes the claimant's burden to prove otherwise. *United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990).

131. In civil forfeiture actions, warrantless seizures have been found not violative of due process. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-72 (1974) (state's interest in securing property outweighs owner's right to a pre-seizure hearing); *United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986) (pre-seizure hearing not constitutionally required); *United States v. One 1971 BMW Four-Door Sedan*, 652 F.2d 817, 820 (9th Cir. 1981) (failure to provide pre-seizure hearing is not a denial of due-process under the Fifth Amendment). *But see United States v. \$38,394 in U.S. Currency*, 498 F. Supp. 1325, 1326-28 (N.D. Ill. 1980) (illegal seizure bars forfeiture). See generally *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (Supreme Court's expansion of procedural due process under Fifth Amendment to cover any significant deprivation of property).

tive of Fifth Amendment double jeopardy principles.<sup>132</sup> Third, in most situations courts do not require that the seizing official obtain a warrant prior to seizing the property.<sup>133</sup> Finally, notwithstanding the notion that in criminal procedures courts requires the government to prove its case,<sup>134</sup> section 881 places the burden squarely on the shoulders of the property owner to prove that the illegal activity is not in any way connected to his property.<sup>135</sup>

Oddly, section 881 does not require the government to grant pre-seizure notice or a hearing to determine whether the seizure is appropriate.<sup>136</sup> Section 881(b)(4) provides that the government can

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132. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 358-62 (1984) (defendant's acquittal will not preclude a later forfeiture claim based on the same conduct); see also *In re* \$53,263, 512 N.E.2d 740 (Ill. App. Ct. 1987) (statutory forfeiture actions do not depend on prior criminal conviction, guilt or innocence is not at issue).

133. See *United States v. One 1978 Mercedes Benz*, 711 F.2d 1297, 1300 (5th Cir. 1983) (warrant not required to seize property pursuant to forfeiture statutes). But see *United States v. 124 E. North Ave., Lake Forest, Ill.*, 651 F. Supp. 1350 (N.D. Ill. 1987) (seizure without prior judicial authorization violates Fifth Amendment).

134. See *Winship*, 397 U.S. at 366 (criminal actions generally require more stringent procedures because of the serious consequences of conviction). In *Winship*, the Supreme Court required proof beyond a reasonable doubt for criminal convictions because of the gravity of the injury of loss of liberty, and not because the actions are labelled as "criminal." *Id.* at 663-66. See generally *Petrov*, *supra* note 119, at 822 (analysis of constitutional ramifications of shifting the burden of proof to the claimant in civil forfeiture proceedings).

135. See *United States v. Parcel of Land and Residence Located Thereon at 5 Bell Rock Road, Freetown Mass.*, 896 F.2d 605, 608, (1st Cir. 1990) (once government shows probable cause that property is subject to forfeiture, burden shifts to claimant to show that the property was not used in violation of the statute); *United States v. Santoro*, 866 F.2d 1538, 1540-43 (4th Cir. 1989) (once burden shifts claimant must show by a preponderance of the evidence that the property was not forfeitable).

136. U.S. CONST. amend. V. provides, in pertinent part, that, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall any property be taken for public use without just compensation." In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Supreme Court extended procedural due process under the Fifth Amendment to apply to any significant deprivation of property. *Id.* at 86. The Court stated that any significant taking of property by the state is within the purview of the Due Process Clause. *Id.* at 86. Under *Fuentes* the government can seize property prior to a hearing if the government meets a test consisting of three factors: the seizure is necessary to secure an important governmental or public interest, there is a special need for prompt action, and the government retains strict control over its use of force. *Id.* at 91. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-79 (1974), involved the pre-judgment seizure of a yacht after officials found two marijuana cigarettes on board. After applying the *Fuentes* test, the Supreme Court upheld the seizure. The Court stated that because the property in *Calero-Toledo* could be moved to another jurisdiction, or concealed or destroyed if any warning of an impending seizure hearing was given, requiring a pre-seizure hearing or notice would frustrate the purpose of [forfeiture] statutes. *Id.* at 679.

More recently, courts have denied pre-seizure and notice only in situations where the property itself was capable of being moved. *United States v. Certain Real Estate Property*, 612 F. Supp. 1492 (S.D. Fla. 1985). In *Certain Real Estate Property*, the court found that where the property is large and immovable there

seize any property and subject it to civil forfeiture without process when "the Attorney General has probable cause to believe the property is subject to forfeiture."<sup>137</sup> These types of seizures wreak havoc on property owners when the government seizes their home or their only means of transportation with little or no warning. Without time to challenge the impending seizure, property owners may lose their jobs<sup>138</sup> and their families may suffer hardships.<sup>139</sup>

Despite civil forfeiture's egregious effects, the courts have long recognized an exception to the warrant requirement for forfeiture seizures<sup>140</sup> and almost all of the circuit courts continue to do so.<sup>141</sup>

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is no overriding need for immediate action which would sacrifice the property owner's right to procedural due process. *Id.* at 1496. Therefore, if the government can show a "special need for prompt action" exists, *Fuentes*, 407 U.S. at 91, and the property is capable of being moved or concealed, *i.e.*, anything which is not real property, no pre-seizure hearing is necessary. See *124 East North Ave., Lake Forest, Ill.*, 651 F. Supp. at 1356 (because government failed to show exceptional circumstances required by *Fuentes*, seizure without pre-seizure hearing under section 881(b)(4) violated the Fifth Amendment).

Courts apparently are more willing to give constitutional protection to a house than to an automobile. Still, some courts only require that police show probable cause in automobile forfeiture cases, and exigent circumstances need not be shown. *United States v. Kemp*, 690 F.2d 397, 401-02 (4th Cir. 1982); *United States v. Bush*, 647 F.2d 357, 368-69 (3d Cir. 1981). However, some courts require both probable cause and exigent circumstances. *United States v. \$ 39,000 in Canadian Currency*, 801 F.2d 1210, 1219, 20-21 (10th Cir. 1986); *United States v. Spetz*, 721 F.2d 1457, 1469-70 (9th Cir. 1983). For a critical discussion concerning the distinction between search and seizure and forfeiture seizure, see Richard Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 37 U. FLA. L. REV. 841 (1985). See generally Winn, *supra* note 71, at 1113-118 (discussion of due process under *Fuentes*, and pre-judgment seizure).

137. 21 U.S.C. § 881(b)(4) (1988).

138. Since no warrant is required to seize an automobile, a claimant could lose his car, and if unable to procure a ride to work on such short notice, he could possibly lose his job.

139. In *Sniadich v. Family Finance Corp.*, 395 U.S. 337 (1968), the Supreme Court addressed a due process issue concerning the pre-judgment garnishment of an employee's wages. *Id.* at 338-39. The Court stated that such pre-judgment garnishment would impose tremendous hardship on wage earners with a family to support. *Id.* at 340. The Court found that when such a taking of one's property has such drastic consequences, a denial of pre-seizure notice and a prior hearing violates the fundamental principles of due process. *Id.* at 342. While the Supreme Court in *Sniadich* dealt with pre-judgment seizure of wages, the pre-judgment seizure of one's property may have just as drastic an effect. If one's car is seized, the opportunity to earn a wage could be compromised or extinguished if a job is lost as a result of the forfeiture.

While federal code Section 881 does provide an innocent owner exception, the government does not need to show direct evidence of a spouse's knowledge to prove the wife's acquiescence to the illegal act leading to the forfeiture. *United States v. Lots 12, 13, 14 and 15, Keeton Heights*, 869 F.2d 942, 947 (6th Cir. 1989) (nature and circumstances of the marital relationship may well give rise to an inference of spouse's knowledge to the illegal activity, to permit forfeiture). Thus, a spouse initially may be shocked to discover her husband sold drugs from their home, then because she is presumed to have known of it, and finally because the government has taken their home.

140. See, *e.g.*, *United States v. Francolino*, 367 F.2d 1013 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967). The court in *Francolino* upheld both a warrantless



It is now generally accepted that when an officer is in a place where he has a right to be, he may seize property without a warrant so long as he has probable cause to believe the property is subject to forfeiture.<sup>142</sup>

The probable cause requirement generates the next constitutional dilemma. Courts, apparently because they label civil forfeiture as "civil," reject the accepted notion in criminal cases that the due process clause requires the government to prove beyond a reasonable doubt that the defendant has, in fact, committed the crime he is charged with.<sup>143</sup> When the government seeks to obtain a civil forfeiture in court, the government must simply show probable cause exists to warrant the forfeiture.<sup>144</sup> Moreover, although the penalty inflicted by forfeiture of one's house, car, or personal property may be much more severe in effect than that of a criminal prosecution,<sup>145</sup> section 881 does not require the government to show any connection between the forfeited property and the illegal activity.<sup>146</sup> Under section 881, it is not necessary that the government trace the property to any particular transaction.<sup>147</sup> Rather, the government must show reasonable *belief* that a connection to the illegal activity exists.<sup>148</sup>

The government's belief must be supported by less than "prima facie proof but more than mere suspicion."<sup>149</sup> Once the government

seizure and the subsequent warrantless search of an automobile, noting that there was an independent exception to the warrant requirement for vehicles subject to forfeiture. *Id.* at 1014-15.

141. *E.g.*, United States v. \$29,000-U.S. Currency, 745 F.2d 853 (4th Cir. 1984); United States v. Spetz, 721 F.2d 1457 (9th Cir. 1983); United States v. One 1978 Mercedes Four Door Sedan, 711 F.2d 1297 (5th Cir. 1983); United States v. Modica, 663 F.2d 1173 (2d Cir. 1981); United States v. Bush, 647 F.2d 357 (3d Cir. 1981); United States v. One Pontiac Lemans, 621 F.2d 444 (1st Cir. 1980); United States v. White, 488 F.2d 563 (6th Cir. 1973); United States v. Young, 456 F.2d 872 (8th Cir. 1972); United States v. Edge, 444 F.2d 1372 (7th Cir. 1971).

142. SMITH, *supra* note 2, ¶ 10.05. See Texas v. Brown, 460 U.S. 730, 738-42 (1983); Payton v. New York, 445 U.S. 573, 587 (1980).

143. See United States v. \$2500 in U.S. Currency, 689 F.2d 10, 12 (2d Cir. 1982) (shifting of burden in civil forfeiture of drug proceeds upheld, *in rem* forfeiture not criminal), *cert. denied*, 465 U.S. 1099 (1984); Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974) (no constitutional due process violation in shifting the burden of proof to a property owner), *cert. denied*, 419 U.S. 1069 (1974).

144. United States v. 1985 BMW 318I, 696 F. Supp. 336 (N.D. Ill. 1988).

145. See United States v. One Red Ferrari, 875 F.2d 186, 189 (8th Cir. 1989) (owner found guilty of cocaine possession fined \$1000, subsequent civil action resulted in forfeiture of car valued at more than 40 times the criminal fine).

146. See *supra* note 73 which explains the "nexus" requirement between seized property and the illegal activity.

147. United States v. \$4,255,625.39, 762 F.2d 895, 903 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

148. *Id.* at 904 (emphasis added).

149. See United States v. One 1987 Mercedes 560 SEL, 919 F.2d 327, 331 (5th Cir. 1990) (probable cause supported by less than prima facie proof but more than mere suspicion as a reasonable ground for belief of guilt). Probable cause

meets this test, the burden of proof shifts to the claimant to show by a preponderance of the evidence that the property is "innocent" or otherwise not subject to forfeiture.<sup>150</sup> If the claimant does not offer a rebuttal, the court will enter a default judgment of forfeiture.<sup>151</sup>

Thus, the shifting of the burden demands that the claimant prove a negative, that is, that the facts alleged are *untrue*.<sup>152</sup> In addition, the government may show probable cause through rank hearsay,<sup>153</sup> while section 881 limits the claimant to using only admissible evidence in meeting his burden.<sup>154</sup> In *United States v. \$ 4,255,625.39*,<sup>155</sup> the Eleventh Circuit Court of Appeals upheld the forfeiture of alleged drug proceeds on the basis of the "sheer amount of money involved," the fact the events took place in Miami and that a corporation with Columbian affiliations maintained the bank account in question.<sup>156</sup> The court dismissed the claimant's allegations that the evidence was all circumstantial and that the gov-

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in a forfeiture proceeding may be established through demonstrating by some credible evidence the probability that the property or money involved was, in fact, drug related. One 1986 Nissan Maxima GL, 895 F.2d 1063, 1064-65 (5th Cir. 1990). Probable cause in a forfeiture proceeding is basically the same standard applied to test the reasonableness of searches and seizures generally. *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 199 (6th Cir. 1978).

150. *See United States v. One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990) (government need only show probable cause, then burden is on claimant to prove otherwise); *United States v. 3639-2nd St., N.E.*, 869 F.2d 1093 (8th Cir. 1989) (after initial showing of probable cause, burden shifts to claimant to show by a preponderance of the evidence that property is not subject to forfeiture or that a defense to forfeiture is applicable).

151. *3639-2d St.*, 869 F.2d at 1095. *See One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986) (if no rebuttal made, showing of probable cause will support forfeiture).

152. Petrov, *supra* note 119, at 839. For purposes of forfeiture the property owner is presumed guilty unless he can prove that he is innocent. *Id.* The government need only show probable cause then the owner can only protect his property by disproving the elements of the forfeiture action. *Id.* at 838. Allocating the burden of proof in this way creates a greater risk of erroneous deprivation of property than if the government was required to produce affirmative proof. *Id.* at 839. The claimant would have to deny knowledge of the act in question, and it is very likely the trier of fact will disregard as untrustworthy an owner's denial of implicating knowledge. *Id.* If the trier of fact does disregard such testimony, the government will not usually be required to make any independent showing of implicating knowledge of the crime. *Id.* In a typical forfeiture case involving an innocent owner, the owner will likely be forced to rely primarily on his own testimony, and if the trier of fact does not like his demeanor the trier may disbelieve his testimony and the property owner will lose his property based solely on the government's showing of probable cause. *Id.* at 840.

153. *United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063, 1065 (5th Cir. 1990).

154. SMITH, *supra* note 2, ¶ 11.03.

155. 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

156. *Id.* at 903.

ernment did not prove the existence of a nexus to drugs.<sup>157</sup> The court stated that hearsay can be used to establish probable cause, and furthermore, the government need not prove any connection to a particular narcotics transaction.<sup>158</sup> The court held that the claimant bears the responsibility to prove the property is not subject to forfeiture.<sup>159</sup> The court then found that the claimant did not meet his burden and upheld the forfeiture.<sup>160</sup>

By placing the burden of proof on the claimant, not the government, the trier of fact can presume that the property is "guilty" and the claimant must prove that it is "innocent."<sup>161</sup> This is why civil forfeiture is a popular law enforcement device.<sup>162</sup> Civil forfeiture places on a claimant both the legal burden of proving in court that there is no connection between the property and drugs, and the economic burden of paying for a complicated legal battle to overcome the presumption.<sup>163</sup> Since civil forfeiture inflicts such a harsh penalty, that section 881 does not require the government to prove the property forfeitable by at least a reasonable doubt, or by clear and convincing evidence, is untenable. Ultimately, the result of civil forfeiture is penal in effect and the "property" should be considered innocent until proven guilty.<sup>164</sup> According to the Fourth Circuit however, shifting the burden to the claimant simply does not violate due process since Congress can alter the burden of proof in civil proceedings as "they see fit."<sup>165</sup>

In light of the proof requirement, civil forfeiture requires a claimant to take the stand in defense of his property, in spite of his

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157. *Id.* (The court stated that these claims were irrelevant, because Section 881(a)(6) permits the government to establish probable cause through circumstantial evidence, and that nothing in the statute requires the government to produce evidence of any particular drug transaction).

158. *Id.* at 904.

159. *Id.* at 906-07 (The court found that the claimant's evidence on this issue was unpersuasive).

160. *Id.*

161. See *United States v. One 1974 Porsche 911-S*, 682 F.2d 283, 285 (1st Cir. 1982) (once the government shows probable cause to believe the property is subject to forfeiture, the claimant must prove by a preponderance of the evidence that the property is "innocent"). This essentially means that the property is presumed guilty until proven innocent. SMITH, *supra* note 2, ¶ 11.03.

162. SMITH, *supra* note 2, ¶ 11.03.

163. *United States v. Parcel of Land & Residence at 28 Emery St.*, 914 F.2d 1, 2-4 (1st Cir. 1990). Once the government shows probable cause, the burden is on the claimant to prove by a preponderance of the evidence that the property was not used in violation of the Act. *Id.* at 3. The claimant does not meet this burden by a simple denial. *Id.* If a claimant only enters a general denial to the facts, summary judgement is entered in the government's favor. *Id.* Therefore, a claimant has a difficult legal task which will not be completed easily or quickly.

164. In criminal prosecutions the presumption of the defendant's innocence is an elementary principle of justice. *In re Winship*, 397 U.S. 358, 363 (1970).

165. *United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989).

Fifth Amendment right against self-incrimination.<sup>166</sup> While the government cannot require a claimant to testify at a forfeiture proceeding,<sup>167</sup> the civil forfeiture statute might, in effect, force him to do so. When the claimant has the affirmative duty to disprove the property's assumed "guilt," and with the possibility of losing valuable property, there is no real choice.

Moreover, regardless of the outcome of the civil action, the threat of future criminal prosecution still exists.<sup>168</sup> This anomaly is true, since the government can seek criminal prosecution before, during, or after a civil forfeiture proceeding, and courts refuse to find that a violation of the Fifth Amendment prohibition on double jeopardy<sup>169</sup> exists.<sup>170</sup> After a trial concerning the underlying criminal offense where the defendant either pleads, or the court acquits him or finds him guilty, the government can essentially "try" him

166. U.S. CONST. amend. V states, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

167. *United States v. United States Coin and Currency*, 401 U.S. 715, 721 (1971).

168. A forfeiture claimant who decides to remain silent in a forfeiture proceeding will, because of the burden of proof, have virtually no chance of succeeding in the forfeiture case. Rosenberg, *supra* note 24, at 396. The claimant must choose between protecting his property and waiving his right against self-incrimination. *Id.* at 397. A claimant can protect his Fifth Amendment right by not coming forward and alleging an interest in the property, but this would result in automatic forfeiture of the property. *Id.*

169. U.S. CONST. amend. V, states, in pertinent part, that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

170. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (forfeiture actions following a criminal acquittal does not constitute double jeopardy). In *United States v. Schmalfeldt*, 657 F. Supp. 385, 394-95 (W.D. Mich. 1987), the court, in dealing with the double jeopardy issue, found that Section 881 is not a criminal proceeding and that the Double Jeopardy Clause does not apply. The Court stated that while "[t]he government ought not to be allowed to proceed with 'simultaneous, concurrent, or consecutive'" proceedings where those proceedings are identical in every respect, criminal and civil forfeiture provisions are *not* the same, although they involve the same property. *Id.* Logically, if the government achieves forfeiture in a criminal proceeding it would not seek a subsequent civil forfeiture proceeding. And conversely, if the civil action failed, the following criminal action would not deal with the same issue, *i.e.*, the individual's guilt as opposed to the property's guilt. *Id.*

The court in *Schmalfeldt* cited *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938), where the Supreme Court stated that "Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense." *Schmalfeldt*, 657 F. Supp. at 395. Apparently, regardless of how the civil forfeiture is characterized it could never be considered a second punishment for a prior or subsequent criminal action.

However, recently in *United States v. Halper*, 490 U.S. 435 (1989), the Supreme Court found that a civil penalty of \$130,000, following a criminal conviction constituted a second punishment within the meaning of the Double Jeopardy Clause. *Id.* at 1904. While *Halper* was not a forfeiture case, it could have powerful implications if courts subsequently apply its holding to forfeiture proceedings.

again concerning that offense.<sup>171</sup> Facially, the property owner's guilt is not an issue in a civil forfeiture procedure.<sup>172</sup> The government, however, is seeking forfeiture of the property because the owner violated drug laws.<sup>173</sup> Conceivably, after a court fines or imprisons him for a violation, a defendant can lose his property as well, *for the same offense*. Inconceivably, most courts have not found this violative of double jeopardy.<sup>174</sup>

Regardless of civil forfeiture's constitutional infirmities, under the guise of battling the "drug menace,"<sup>175</sup> the government fully enforces section 881. While noble in motive, civil forfeiture has become somewhat harsh in effect. Innocence is sometimes no excuse, and when a court does consider it a defense, the claimant must shoulder the burden of proving by a preponderance of the evidence, his property is not "guilty."<sup>176</sup> Quantity and intended use have little relevancy under section 881.<sup>177</sup> The government has the comparatively easy task of establishing probable cause that the property is subject to forfeiture and, unfortunately, the Constitution pro-

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171. *One Assortment of 89 Firearms*, 465 U.S. at 362 (holding that a civil forfeiture proceeding directed at property after disposition of a criminal case was not barred by the doctrine of double jeopardy).

172. See *supra* note 30 and cases cited therein (civil forfeiture is an action against the property involved and the guilt of the property owner is not at issue).

173. 21 U.S.C. §§ 881(a)(2),(4),(6) (1988). Section 881 in fact states that any property used in any manner to facilitate any violation of this Act is subject to forfeiture. *Id.* (emphasis added).

174. See, e.g., *One Assortment of 89 Firearms*, 465 U.S. at 361-62 (relative burdens of proof in criminal and civil actions preclude the application of collateral estoppel); *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 234 (1972) (acquittal involves issue of whether physical act was done with requisite intent, civil forfeiture proceeding does not require proof of intent; and so issue involved was not previously litigated). Recently, however, some courts have applied the Double Jeopardy Clause to other civil actions. See, e.g., *Halper*, 490 U.S. at 442 (civil sanction constituting punishment may not be imposed following a criminal prosecution based on same conduct without violating Double Jeopardy Clause); *United States v. Mayers*, 897 F.2d 1126, 1131 (11th Cir. 1990) (application of *Halper* rationale to criminal prosecution following civil sanction for same conduct); *United States v. United States Fishing Vessel Maylin*, 725 F. Supp. 1222, 1225 (S.D. Fla. 1989) (application of *Halper*); *State v. Crenshaw*, 548 So. 2d 223, 226 (Fla. 1989) (dissent argument for *Halper* application to civil forfeiture).

175. H.R. REP. NO. 1444, 91st Cong., 2d Sess. 2-3 (1970) reprinted in 1970 U.S.C.A.N. 4566, 4567-68.

176. See *supra* note 165 (once government shows probable cause for forfeiture, burden shifts to claimant to prove by preponderance of the evidence that property is "innocent").

177. See, e.g., *United States v. One 1986 Mercedes Benz*, 846 F.2d 2, 3-4 (2d Cir. 1988) (forfeiture based on discovery of remains of a single marijuana cigarette in ashtray upheld; fact that possession of less than 25 grams of marijuana decriminalized in state of New York held irrelevant); see SMITH, *supra* note 2, ¶ 12.09 (defense of forfeiture on the grounds that the quantity of the drugs was minimal has been rejected in numerous federal cases and accepted in none).

vides little protection for the property owner caught up in this drag-net of drug law enforcement.

#### IV. MITIGATING THE HARSH RESULTS OF CIVIL FORFEITURE BY NARROWING THE STATUTORY SCOPE OF SECTION 881: THE "SUBSTANTIAL CONNECTION" TEST

Throughout the last decade, law enforcement has successfully forfeited hundreds of millions of dollars in assets and property.<sup>178</sup> Current policy permits officials to use the property forfeited and divide the cash among local, state, and federal agencies,<sup>179</sup> so this trend will certainly continue. Such a strong incentive to bring forfeiture actions foster the continuing and unyielding enforcement of civil forfeiture laws without regard to the amount or type of drugs involved, the intent of the possessor or the relative innocence of the owner.<sup>180</sup> Debatably, the purpose of section 881, as with other forfeiture provisions, is to attack the profits and instrumentalities of drug trafficking.<sup>181</sup> However, the broad language of the statute has permitted the government to bring the full effect of the statute to bear on any property remotely connected to an alleged drug violation.<sup>182</sup> One solution to the harsh application of section 881 is for

178. See *Meanwhile, Back at the Ranch, Federal Agents Knock Narcotics Dealers Off Their High Horses*, WALL ST. J., May 3, 1989, at A20 (DEA seizures predicted to value 1 billion dollars in 1989).

179. See Attorney General's Guidelines on Seized and Forfeited Property § III(D), at 1(a) (1987), reprinted in SMITH, *supra* note 2, app. at 7b (Attorney General authorized to transfer forfeited property to federal agency or to any state or local law enforcement agency that participated in the forfeiture); see also 21 U.S.C. § 881(e) (1988) (disposition of forfeited property).

180. See, e.g., *One Blue AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986) (innocent owner forced to forfeit vehicle).

181. When Congress amended Section 881 in 1984, it was not to catch more individual users but to make civil forfeiture applicable to more types of property, including the property of drug traffickers. See ADMIN. NEWS, *supra* note 2, at 3392-93. Additionally, Congress was aware that civil forfeiture has certain advantages over criminal forfeiture, not because it allows law enforcement officials to go after the little guy, but because the standard of proof is lower, and when the prosecution of the defendant is not possible, as where the defendant is a fugitive, forfeiture can still be achieved. *Id.* Congress also noted the drawbacks to civil forfeiture could be avoided if prosecutors had the option of seeking criminal forfeiture in "all major drug cases." *Id.* Thus, it is likely that civil forfeiture was originally intended as a back-up or alternative method to recover drug dealers's profits. Furthermore, the language used by Congress when considering amendments to these statutes is indicative of their underlying intent: "Clearly, if law enforcement efforts to combat racketeering and drug trafficking is to be successful, they must include an attack on the economic aspects of these crimes." *Id.* (emphasis added). Therefore, the intent of civil forfeiture statutes is to take the profit out of organized crime, drug trafficking, and dealing. Obviously, these statutes could not have been intended to take the profit out of drug possession, because there is no profit in possession alone.

182. See *United States v. One 1980 Bertram 58' Motor Yacht*, 876 F.2d 884, 887-88 (11th Cir. 1989) (determining factor is state of mind of owner with the respect to the property to be forfeited, not whether the property was actually

courts to require a more tangible connection between the property to be forfeited and the underlying offense.<sup>183</sup> Three circuits apply a "substantial connection" test which denies forfeiture where the connection between the property and the drug offense fails to reach a certain level.<sup>184</sup>

The First Circuit, in *United States v. Parcel of Land & Residence at 28 Emery St.*,<sup>185</sup> reversed a summary judgment in favor of forfeiture since the government did not show the requisite substantial connection between the property seized and the underlying drug offense.<sup>186</sup> Following the property owner's guilty plea to drug charges stemming from a drug sale out of his truck, the government sought civil forfeiture of his house, based on the charge that the claimant used his house to facilitate cocaine trafficking.<sup>187</sup> The lower court granted summary judgment for the government although the government's only evidence consisted of information from an unproven informant, a telephone call that "sounded like a drug deal," and some drug paraphernalia found in the house.<sup>188</sup> The First Circuit Court of Appeals held that the government did not show a substantial connection between the house and the illegal transaction, and denied forfeiture.<sup>189</sup>

The substantial connection requisite for forfeiture under section 881 provides for the protection of property that has no connection to the offense involved.<sup>190</sup> This test permits prudent and efficient law enforcement officials to achieve forfeiture of property where drug dealing and trafficking occurs or where the property

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used to execute the criminal intention); *United States v. One 1980 Cadillac Eldorado*, 705 F.2d 862, 863 (6th Cir. 1983) (intent is controlling factor, not actual presence of controlled substances); *United States v. 124 East North Ave., Lake Forest, Ill.*, 651 F. Supp. 1350, 1353 (N.D. Ill. 1987) (house forfeitable as the intended site of a narcotics transaction).

183. For a discussion concerning the requisite connection between the activity and the property to be forfeited, see *supra* notes 72-76 and accompanying text.

184. See *United States v. 3639-2d St.-N.E.*, 869 F.2d 1093, 1097 (8th Cir. 1989) (substantial connection test); *United States v. Santoro*, 866 F.2d 1538, 1541-42 (4th Cir. 1989) (substantial connection test appropriate under Section 881); *United States v. Various Parcels of Real Property*, 650 F. Supp. 62, 65 (N.D. Ind. 1986) (government must show specific facts to show substantial connection).

185. 914 F.2d 1 (1st Cir. 1990).

186. *Id.* at 6.

187. *Id.* at 2-3 (the police obtained a warrant to search the claimant's truck, discovered cocaine and marijuana, and the claimant later pled guilty to drug charges).

188. *Id.* at 5 (the informant involved had stated that at some unspecified time, more than a year before, he had seen cocaine in the claimant's house).

189. *Id.* at 2 (the court stated that the government had nothing but suspicion on which to base the connection between drug trafficking and the house).

190. See, e.g., *id.* at 6 (court denied forfeiture where house not "substantially connected" to drug deal made from owner's truck).

owner purchased the property with drug profits.<sup>191</sup> One commentator even suggests that the "substantial connection" test comports more precisely with the text of section 881.<sup>192</sup> The legislative history of section 881 in fact mentions that courts should apply the substantial connection test, because this test is more suited to achieve the purpose of section 881.<sup>193</sup> In 1978, while amending the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress stated, "it is the intent of these provisions that the property would be forfeited only if there is a substantial connection between the property and the criminal activity."<sup>194</sup>

However, while the substantial connection test may, in some cases, protect those arrested with small amounts of drugs, it is no guarantee.<sup>195</sup> Some courts reject this test altogether,<sup>196</sup> while others see no legislative intent for its application.<sup>197</sup> Even when courts apply this test it has almost always resulted in forfeiture.<sup>198</sup>

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191. See *United States v. 1966 Beechcraft Aircraft Model King Air*, 777 F.2d 947, 953 (4th Cir. 1985). In *Beechcraft*, the court applied the substantial connection test in a forfeiture proceeding. *Id.* The owner of the plane involved was forced to forfeit it, because he loaned the plane to a business associate who then used the plane to transport 10 kilograms of illegal drugs. *Id.* at 950. The court found that a substantial connection existed between illegal drug trafficking and the airplane, and upheld the plane's forfeiture. *Id.* at 952-53. Thus, the substantial connection test still allows prosecutors to get the property of traffickers and dealers where the property is used in major drug trafficking. *Id.*

192. James B. Speta, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 173 (1990). Congress intended the most severe measures to apply to large scale drug traffickers who make a profit from the drug trade. *Id.* at 174. Thus, applying the substantial connection test would usually reach these persons because the property involved is usually entirely paid for or intended to transport or conceal drugs or drug activity. But those individuals minimally involved with drugs or with legitimately acquired property rights would have no substantial connection with drug trafficking as called for by the test, because the property involved is not paid for with drug money or used for trafficking.

193. H.R. REP. NO. 1193, 95th Cong, 2d Sess. 1, 22 (1978), reprinted in 1978 U.S.C.C.A.N. 9496, 9518, 9522.

194. *Id.*

195. See, e.g., *United States v. 916 Douglas Ave.*, 903 F.2d 490, 494 (7th Cir. 1990) (difference between "substantial connection" test and affirming forfeiture where property in any manner or part facilitates the commission of an offense is a matter of semantics).

196. See *916 Douglas Ave.*, 903 F.2d at 492-94 (statute demands forfeiture where property used in any manner or part to commit or facilitate commission of a drug related offense); *United States v. Premises Known as 3639-2d St., N.E.*, 869 F.2d 1093, 1097 (8th Cir. 1989) (rejecting property owner's claim that government must show substantial connection between house and prohibited activity).

197. See *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 727 (5th Cir. 1982) (per curiam) (legislative history of section 881 "devoid" of any mention of substantial connection test), cert. denied, 461 U.S. 914 (1983).

198. Compare *United States v. 1966 Beechcraft Aircraft Model King Air*, 777 F.2d 947 (4th Cir. 1985) (transportation of individuals to site of drug transaction enough for substantial connection to criminal activity) with *United States v. Parcel of Land & Residence at 28 Emery St.*, 914 F.2d 1 (1st Cir. 1989) (house of



Additionally, the substantial connection test is vague and merely permits the courts to decide on a case-by-case basis if the facts of the case meet the test in that particular situation.<sup>199</sup> Furthermore, the differences between the substantial connection test and the approach requiring forfeiture when the owner used the property "in any manner or part to commit or facilitate an offense," is largely semantic rather than practical.<sup>200</sup> The substantial connection test provides no real distinction from the "in any manner" approach, since with either approach there is no need for the property to be integral, essential or indispensable to the violation in order to subject it to forfeiture.<sup>201</sup>

#### V. A PROPOSAL TO TEMPER THE SEVERE EFFECTS OF CIVIL FORFEITURE

There is no doubt that a serious drug problem exists in this country. However, current approaches have not been successful in conquering this social ill.<sup>202</sup> Civil forfeiture under the "zero tolerance" program has not stopped or checked drug use, but the program has encouraged law enforcement officials to step up seizures to finance the "war" and to boost their own economic status.<sup>203</sup> The reason for this is that current policy permits law enforcement officials to divide the proceeds among agencies,<sup>204</sup> thus encouraging selectivity in seizing property for forfeiture.<sup>205</sup> The solution to the

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arrested drug dealer found not to be substantially connected to drug transaction).

199. See SMITH, *supra* note 2, ¶ 4.03 (substantial connection test, even where applied, has had little, if any, effect on the outcome of forfeiture cases).

200. United States v. 916 Douglas Ave., 903 F.2d 490 (7th Cir. 1990).

201. United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990); see also United States v. Approx. 50 Acres of Real Property, 920 F.2d 900 (11th Cir. 1991) (substantial connection test or more lenient standard still renders property forfeitable).

202. See *supra* note 1 explaining that despite increased drug seizures, strict mandatory sentencing guidelines, and more drug convictions, the supply of drugs is still increasing.

203. See Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. TIMES, Jan. 7, 1990, § 1, at 18 (forfeiture is viewed by law enforcement as a way to increase their own arsenals). One particular sheriff in Florida set up a special team of deputies to patrol a stretch of Interstate 95 specifically for the purpose of seizing drug money. *Id.* The deputies would stop motorists for routine traffic violations and ask to search the car; almost everyone the deputies stopped consented. *Id.* Even if there were no drugs in the car the deputies would seize cash if there was "probable cause" to believe it was drug money, usually without filing any criminal charges. *Id.* This program seized more than \$3 million in one year. *Id.* The Justice Department funneled \$76 million to state and local agencies in 1988. W. John Moore, *Crime is Paying Local Dividends*, 21 NAT'L J., Feb. 25, 1989, at 474.

204. See *supra* note 179 for Attorney General's guidelines on asset distribution.

205. See Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. TIMES, Jan. 7, 1990, at 18. Lisa Griffin, who manages seized and forfeited property for the

drug problem is not in incessantly forfeiting the property of drug users.<sup>206</sup> While civil forfeiture may appear as a panacea to law enforcement officials, to a citizen whose property was not paid for with drug profits, it is not a cure. Although civil forfeiture can still be a part of the solution to the drug problem, to stay within constitutional boundaries, law enforcement officials should temper its harsh effects through an application of the Eighth Amendment<sup>207</sup> prohibition against excessive fines<sup>208</sup> and cruel and unusual punishment.<sup>209</sup> Alternatively, courts should require the government to prove beyond a reasonable doubt that the property is subject to forfeiture.

Courts do not normally apply constitutional safeguards in civil actions.<sup>210</sup> However, civil forfeiture is often more severe than any applicable criminal penalty.<sup>211</sup> In fact, the Supreme Court has con-

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United States Marshall's Service in Texas, states that "[t]he aim used to be to hurt the bad guy, now we want to hurt the bad guy and maximize profits for the Government." *Id.* Griffis also stated that if a property is too battered to use or sell or if a clandestine title search finds the property is owned more by the bank than by the defendant, "we say, 'hey guys, it's not worth it.'" *Id.*

206. See W. John Moore, *Dissenter in the Drug War*, NAT'L L. J., Nov. 4, 1989, at 2692. The solution is not in packing prisons either. *Id.* During the 1980's, the federal prison population more than doubled, and in the first six months of 1989 it climbed 15%. *Id.* The increased prison rate does not equate with a reduction in crime; in Washington D.C. 40,000 people have been sent to jail since 1985, but its murder rate is among the nation's highest. *Id.*

207. The Eighth Amendment states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

208. Courts have not applied the excessive fines clause to civil forfeiture, but some courts have mentioned the clause's applicability to civil forfeiture. See *United States v. 3639 2nd St., N.E.*, 869 F.2d 1093, 1098 (8th Cir. 1989) (Arnold, J., concurring) ("We are not today foreclosing the possibility that a given use of the forfeiture statutes may violate the Excessive Fines Clause of the Eighth Amendment."); *United States v. \$173,081.04 In U.S. Currency*, 835 F.2d 1141, 1143 n.6 (5th Cir. 1988) (court suggests that disproportionately severe civil forfeiture could be constitutionally infirm); *United States v. Bonnano Organized Crime Family*, 683 F. Supp. 1411, 1460 (E.D.N.Y. 1988) (court has discretion in declining civil forfeiture of real property where only portion used for offense or forfeiture would effect a disproportionate penalty). See also SMITH, *supra* note 2, ¶ 13.05 (suggesting that Eighth Amendment might be applicable to civil forfeiture).

209. See Speta, *supra* note 192, at 191 (Eighth Amendment cases demonstrate concern for proportional punishment).

210. See, e.g., *In re Winship*, 397 U.S. 358, 371-73 (1970) (Harlan, J., concurring) (explanation of why constitutional protections not required in civil actions).

211. See *United States v. One 1985 Mercedes*, 917 F.2d 415 (9th Cir. 1990) (owner arrested for possession of \$75 of cocaine, and charges later dismissed, still forced to forfeit car valued at over \$40,000 in civil forfeiture action); *United States v. Lot 4 Block of Eaton Acres*, 904 F.2d 487 (9th Cir. 1990) (defendant's home subject to forfeiture, despite criminal sentence for distributing cocaine was only three years and of \$10,000 fine); *United States v. One Red Ferrari*, 875 F.2d 186 (8th Cir. 1989) (criminal fine of \$1000 but resulting civil forfeiture of

sidered civil forfeiture to be somewhat quasi-criminal in nature.<sup>212</sup> Regardless of the label attached to the proceeding, the government is still acting in a manner that the framers of the Constitution intended to protect against.<sup>213</sup> Recently, the Supreme Court, in *United States v. Halper*,<sup>214</sup> stated that when ascertaining the actual character of sanctions "it is the purpose served by the sanction in question," not the underlying nature of the proceeding giving rise to the sanction, which is determinative.<sup>215</sup> Therefore, since the purpose of civil forfeiture is not solely remedial, but to punish,<sup>216</sup> it is essentially a criminal sanction requiring proportionate punishment.<sup>217</sup> The Supreme Court made this proposition clear when it stated that "[t]he principle that the punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."<sup>218</sup> Therefore, the courts should not allow the government to inflict a penalty whereby possession of small amounts of drugs, or other minor offenses<sup>219</sup> which carry only

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car worth \$45,000); *United States v. One 1976 Porsche 911S*, 670 F.2d 810 (9th Cir. 1979) (forfeiture of car after .226 grams of marijuana found).

212. See *Boyd v. United States*, 116 U.S. 616 (1886) (holding that a forfeiture action, though technically a civil proceeding, is in substance and effect a criminal one and therefore quasi-criminal in nature); see also *United States v. United States Coin & Currency*, 401 U.S. 715 (1971) (following the *Boyd* holding).

213. See *In re Gault*, 387 U.S. 1 (1967) (civil labels and good intentions do not themselves obviate the need for criminal due process safeguards).

214. 109 S. Ct. 1892 (1990).

215. *Id.* at 1901.

216. SMITH, *supra* note 2, ¶ 1.02. While some people may be deterred by the threat of forfeiture from lending assistance to criminals, civil forfeiture is essentially a "user sanction." *Id.* Civil forfeitures are the only sanction available to penalize persons who make their property available to others but are not sufficiently involved in the criminal scheme to be prosecuted. *Id.*

217. See Speta, *supra* note 192, at 191-93 (forfeiture of property gives rise to Eighth Amendment proportional punishment concerns because civil forfeiture acts as punishment for and deterrence to engaging in criminal activity).

218. *Solem v. Helm*, 463 U.S. 277, 284 (1983). In *Solem*, defendant Helm had previously been convicted for six nonviolent felonies when he was convicted for bouncing a check for \$100 and was punished under North Dakota's recidivist statute to life in prison. *Id.* The Supreme Court struck down the sentence on Eighth Amendment grounds. *Id.* at 290. The Court stated in *Helm* that the Eighth Amendment imposes limitations on bail, fines, and other punishments. *Id.* at 289 (citing *Ingraham v. Wright*, 430 U.S. 651, 657 (1977)) (emphasis added). Civil forfeiture is not unlike a fine, since it takes away a certain asset from an individual because of a narcotics violation. Therefore, the "fine" should not be "excessive" in relation to the underlying illegal act.

219. Some criminal offenses, however minor, carry with them other constitutional implications. In *Robinson v. California*, 370 U.S. 660, 667 (1962), the Supreme Court held that punishing a person under a state criminal statute that imposed imprisonment for being a narcotics addict, was cruel and unusual punishment. Under civil forfeiture a claimant who may be an addict might have his property forfeited. The statute in question in *Robinson* punished simply for a defendant's status, not for a drug violation. *Id.* Civil forfeiture similarly permits forfeiture without the need to show a tangible connection with drugs exists. See *United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895, 904* (11th Cir. 1985) (civil forfeiture does not require the government

a minimal prison term or a fine,<sup>220</sup> trigger forfeiture of valuable property.<sup>221</sup> Despite the fact that Congress has characterized civil forfeiture as *in rem*, civil forfeiture is in substance a penalty<sup>222</sup> for drug involvement.

On the other hand, if the judicial system is unwilling to apply Eighth Amendment protection to a civil litigant, the courts should require the government, in civil forfeiture proceedings, to show beyond a reasonable doubt that there is a connection between the

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to trace the forfeitable property to a particular drug transaction). Since the government does not need a drug violation to subject property to forfeiture, an addict may be forced to forfeit his property for being an addict and in some manner involved with illegal drugs. This would be a punishment for one's status, and would be a violation of the Eighth Amendment through the Fourteenth Amendment according to *Robinson*. See *Robinson*, 370 U.S. at 666.

220. *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). The Supreme Court in *Helm* stated that determining whether a sentence is proportional to the crime under the Eighth Amendment requires looking at objective factors. *Id.* The Court found that the first of these factors was the gravity of the offense and the harshness of the penalty. *Id.* Certainly under an Eighth Amendment review, subjecting a house to forfeiture is a harsh penalty for an offense such as possession of cocaine, which arguably is not a grave offense.

Besides the Eighth Amendment issue in civil forfeiture, commentators have questioned the lack of other constitutional safeguards in light of the harsh penalties involved in civil forfeiture. See Speta, *supra* note 192, at 182-85 (examination of Eighth Amendment and penal nature of civil forfeiture); see also Darmstadter & Mackoff, *supra* note 26, at 39-49 (discussion of limited constitutional procedures including notice, double jeopardy, and self-incrimination principles in section 881 procedures); Rosenberg, *supra* note 24, at 394-402 (analysis of right against self-incrimination and right to counsel under civil forfeiture proceedings); see generally Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990) (advocating Eighth Amendment review of civil forfeitures).

221. See Wisotsky, *supra* note 28, at 897-907. During the last few years Congress has proposed extreme, sometimes ludicrous, measures to combat drugs. *Id.* at 897. Congress at one time proposed the Artic Penitentiary Act which would create remote prison camps for drug offenders. H.R. 7112, 9th Cong., 2d Sess. (1982). Recently, Congress was successful in enacting significant multi-year prison sentences for possession of small amounts of drugs. See 21 U.S.C. § 841(b)(1)(B) (1988) (possession of five grams of cocaine requires not less than five years in prison). However, this does not mean that Congress is free to impose whatever penalty it chooses on drug offenders. *Solem v. Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment prohibits sentences disproportionate to the crime committed).

222. See *Boyd v. United States*, 116 U.S. 616 (1886) (civil forfeiture is at least quasi-criminal in effect). A civil or criminal characterization should not determine whether a fine, which is what forfeiture essentially is, is violative of the Eighth Amendment. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2914 (1989) (Court's reluctance to hold the Excessive Fines Clause explicitly limited to criminal cases); see also *id.* at 2930 (O'Connor, J., concurring in part and dissenting in part) (the framer's debates over the Eighth Amendment point to its application in civil as well as criminal context); *United States v. Halper*, 109 S. Ct. 1892, 1901-02 (1989) (civil as well as criminal sanction constitutes punishment when the sanction in that particular case serves deterrence and retribution goals).

property involved and an illegal act.<sup>223</sup>

The Supreme Court in *In re Winship*<sup>224</sup> stated that due process requires that the prosecution prove beyond a reasonable doubt that an accused defendant committed the crime charged.<sup>225</sup> Although *Winship* was itself a juvenile delinquency hearing, the Court there rejected the contention that the procedure was civil rather than criminal and did not require the higher standard of proof.<sup>226</sup> The Court instead stressed that since the juvenile in question faced six years imprisonment, due process required that the prosecution meet the reasonable doubt standard.<sup>227</sup> The Court made it clear that due process adjudication cannot be controlled by labels placed on the proceeding in question.<sup>228</sup> The Court looked at the end effect of the government's action, and determined that the possible result (six years in prison) required the government to prove their case beyond a reasonable doubt, rather than by a preponderance of the evidence.<sup>229</sup> Civil forfeiture represents a similar situation. The government places a "civil" label on the proceeding, but the result of the procedure is essentially a form of criminal punishment or fine.<sup>230</sup> Masking the procedure in this way should not hide the fact that the punishment in civil forfeiture is harsh enough to require the same due process protection<sup>231</sup> called for in *Winship*.

Justice Harlan, concurring in *Winship*, looked at the reasons for differing burdens of proof for civil and criminal actions.<sup>232</sup> Justice Harlan stated that a lesser standard is acceptable in civil cases

223. The Supreme Court has held that in a criminal action the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). This holding underlines the fact that an accused is presumed innocent until proven guilty beyond a reasonable doubt. See 3 RONALD L. CARLSON, CRIMINAL LAW ADVOCACY, ¶ 10.01-02 (1982) (overview of presumption of proof in criminal prosecutions).

224. 397 U.S. 358 (1970).

225. *Id.* at 364.

226. *Id.* at 365-66.

227. 397 U.S. at 365-67. The juvenile in *Winship* was accused of stealing \$112 from the complainant's pocketbook. *Id.* at 360-61.

228. *Id.* at 366-67 (citing *In re Gault*, 387 U.S. 1 (1967)).

229. *Id.* at 366-68.

230. See ADMIN. NEWS, *supra* note 2, at 3374. Congress stated, when amending the criminal and civil forfeiture statutes in 1984, that since the traditional sanctions of fine and imprisonment were inadequate to deter and punish drug activity, more powerful and efficient forfeiture procedures were needed to provide an economic mechanism to do what the traditional sanctions could not. *Id.* Civil forfeitures really serve no other purpose than to enforce the criminal laws. SMITH, *supra* note 2, ¶ 1.02. In fact, although most civil forfeiture statutes are deemed to be civil in nature, for most purposes, they are generally conceded to be an element of the criminal justice system. *Id.*

231. See *Sniadich v. Family Finance Corp.*, 395 U.S. 337, 342-43 (1968) (Harlan, J., concurring) (when a deprivation of property cannot be considered *de minimis*, fundamental fairness requires the usual requisites of due process).

232. *Winship*, 397 U.S. at 371-72.

because it is no more serious for an erroneous decision in either parties' favor.<sup>233</sup> However, he stressed that proof beyond a reasonable doubt in a criminal prosecution is an idea grounded in fundamental fairness concerning the conviction of an innocent man.<sup>234</sup> In a civil forfeiture it is the government on the other side, not a litigant on equal footing. Accordingly, an erroneous finding for a claimant in a typical civil action is, as Justice Harlan concedes, not serious.

However, an erroneous finding in favor of the government in a civil forfeiture action can be disastrous to the property owner. Fundamental fairness<sup>235</sup> demands that the government prove a connection between the property and a drug offense beyond a reasonable doubt to overcome the consequences of such an erroneous finding. If a property owner must face such harsh punishment, it is only fair that the courts should not force him to bear the burden of proving the "innocence" of his property.

#### CONCLUSION

Civil forfeiture, when used properly, is an effective weapon in the war on drugs. Its expansive scope takes the backbone out of organized drug traffickers by taking away the financial gains gleaned from their illegal activity. However, the dragnet cast by civil forfeiture hauls in not just these drug profiteers, but innocent owners, families, and small time users unaware of the grave consequences of their activity. Civil forfeiture places almost unlimited discretion in the hands of law enforcement since ultimately, only those individuals manning the nets decide which fish to keep, and which to set free. If law enforcement officials permit their discretion to be swayed by their zeal to stamp out drugs, only the Constitution will stand between the citizen gone astray, and the loss of property which only a lifetime's earnings can replace.

*T.J. Hiles*

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233. *Id.*

234. *Id.* at 372.

235. The concept of fundamental fairness goes to the heart of the American justice system. See *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J., concurring) (due process involves "canons of decency and fairness" which express the accepted notions of justice of "English-speaking peoples"); see also *Duncan v. Louisiana*, 391 U.S. 145 (1968) (finding that fundamental fairness and ordered concept of liberty required states to provide criminal defendants with a jury trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding the right to counsel for those charged with a crime fundamental and essential to a fair trial).

